NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Newsletter
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An Organized Compilation of the Summaries of Selected Decisions Addressing Civil Procedure, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in May 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Practice Points Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

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Practice Point: Criminal contempt seeks to vindicate the authority of the court. Therefore no showing of prejudice is required. Here plaintiff's counsel issued subpoenas in defiance of an order of the court. A $10,000 sanction for criminal contempt was imposed on the attorney by the appellate court.

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Practice Point: Here the party made a motion to change venue in the county to which the party wanted venue changed. That was deemed the "wrong county" and the motion was dismissed because the party did not first use the special procedure in CPLR 511 (a) an (b) which requires making a demand on the other party before bringing the motion.

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Practice Point: The Child Victims Act, which extends the statute of limitations for plaintiffs who were abused as children, does not apply to this Florida plaintiff who was allegedly abused in Florida. Plaintiff sued the Diocese of Brooklyn under the theory that the priest who abused him in Florida in 1983 and 1984 was transferred to Florida from Brooklyn, allegedly because of sexual misconduct with children. New York's borrowing statute applied rendering the action time-barred under Florida's four-year statute of limitations.

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Practice Point: The claimants adequately demonstrated defendants in this construction-accident case were not prejudiced by the minimal delay in filing the notice of claim and defendants were unable to demonstrate any prejudice as they had time to investigate the incident after timely receiving the accident report. Claimants' motion for leave to file and serve a late notice of claim should have been granted.

CRIMINAL LAW, CIVIL DISCOVERY NOT PRECLUDED BY PARALLEL CRIMINAL INVESTIGATION.

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Matter of People of the State of New York v Trump Org., Inc., 2022 NY Slip Op 03456, First Dept 5-26-22

Practice Point: This case stems from the Office of Attorney General's (OAG's) fraud investigation of the Trump Organization. Supreme Court properly refused to quash the OAG's subpoenas. The fact that there is a related criminal investigation does not preclude civil discovery. There was no showing the appellants' privilege

against self-incrimination was being undermined by the subpoenas seeking depositions and documents.

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Practice Point: Attorney's fees are properly demanded as damages in an action for breach of a forum selection clause.

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ting petition was "verified" within the meaning of Election Law § 16-116. Matter of Francois v Rockland County Bd. of Elections, 2022 NY Slip Op 03190, Second Dept 5-12-22

Practice Point: Under the Election Law a validating petition must be verified and the absence of verification is a jurisdictional defect. The failure raise the issue with due diligence, however, waives the objection pursuant to CPLR 3021. In addition, to constitute a valid verification, the exact language in CPLR 3021 need not be used. Here he language in the validating petition. although not exactly as prescribed in CPLR 3021, was deemed sufficient to verify it.

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Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

FAMILY LAW, DEFAULT, ATTORNEYS, APPEALS.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

FORECLOSURE, BANK'S STANDING.

TO CHALLENGE THE BANK'S STANDING TO FORECLOSE THE DEFENDANT MUST ASSERT THE LACK OF STANDING AS AN AFFIRMATIVE DEFENSE; MERELY DENYING THE RELEVANT ALLEGATIONS IN THE COMPLAINT IS NOT ENOUGH (SECOND DEPT).

Aurora Loan Servs., LLC v Jemal, 2022 NY Slip Op 02970, Second Dept 5-4-22

Practice Point: Lack of standing in a foreclosure action must be raised as an affirmative defense. It is not enough to deny the relevant allegations in the foreclosure complaint.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), STATUTE OF LIMITATIONS, ONLY AN EXPLICIT ACKNOWLEDGMENT OF THE MORTGAGE DEBT WILL REVIVE AN EXPIRED STATUTE OF LIMITATIONS.

ONLY AN EXPRESS ACKNOWLEDEMENT OF THE MORTGAGE DEBT PURSUANT TO GENERAL OBLIGATIONS LAW 17-105 COULD REVIVE OR TOLL THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION; THE REFERENCES TO THE MORTGAGE DEBT IN FINANCIAL STATEMENTS AND TAX RETURNS PROVIDED TO THE MORTGAGOR BY THE MORTGAGEE WERE NOT ENOUGH (CT APP).

Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc., 2022 NY Slip Op 03361, CtApp 5-24-22

Practice Point: Here references to the mortgage debt in financial statements and tax returns provided to the mortgagor by the mortgagee did not revive or toll the statute of limitations on the underlying foreclosure action. Pursuant to General Obligations Law 17-105, only an express acknowledgement of the mortgage would revive the action.

GOOD FAITH EFFORT TO FILE AND SERVE OPPOSITION PAPERS.

PETITIONER DEMONSTRATED A GOOD FAITH EFFORT TO TIMELY FILE AND SERVE HIS OPPOSITION PAPERS AND DEMONSTRATED A POTENTIALLY MERITORIOUS CAUSE OF ACTION; SUPREME COURT HAD REFUSED TO CONSIDER THE OPPOSITION PAPERS BEFORE ISSUING ITS ORDER DISMISSING THE PETITION; THE ORDER SHOULD HAVE BEEN VACATED (SECOND DEPT).

Matter of Brennan v County of Rockland, 2022 NY Slip Op 03240, Second Dept 5-16-22

Practice Point: Here petitioner's good faith effort to timely file and serve his opposition papers demonstrated he did not intend to abandon the action. Supreme Court should not have refused to consider his opposition papers before issuing its order dismissing the petition. The order should have been vacated.

JUDGES, SUA SPONTE DISMISSAL.

ABSENT "EXTRAORDINARY CIRCUMSTANCES," A JUDGE DOES NOT HAVE THE AUTHORITY TO, SUA SPONTE, DISMISS A COMPLAINT (SECOND DEPT).

Binder v Tolou Realty Assoc., Inc., 2022 NY Slip Op 03223, Second Dept 5-18-22

Practice Point: Absent so-called "extraordinary circumstances." a judge does not have the authority to, sua sponte, dismiss a complaint. Here plaintiff's evidence was not sufficient to support a default judgment, but that insufficiency did not justify dismissing the complaint.

LIMITED LIABILITY COMPANY LAW, REAL PROPERTY LAW, DEFAULT, LIS PENDENS.

THE LLC'S FAILURE TO CHANGE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE IS NOT A SUFFICIENT EXCUSE FOR A DEFAULT; PARTIES TO WHICH THE SUBJECT PROPERTY WAS TRANSFERRED AFTER THE LIS PENDENS WAS FILED ARE NOT NECESSARY PARTIES BECAUSE THEY ARE BOUND BY THE RESULT IN THIS ACTION (FIRST DEPT).

Majada Inc. v E&A RE Capital Corp., 2022 NY Slip Op 03476, First Dept 5-31-22

Practice Point: A limited liability corporation's (LLC's) failure to change the address on file with the Secretary of State is not an acceptable excuse for a default. Because a lis pendens was filed against the defendant's property here, the parties to which the property was subsequently transferred are bound by the result of this action and are not, therefore, necessary parties.

LONG-ARM JURISDICTION.

NEW YORK DID NOT HAVE LONG-ARM JURISDICTION OVER A BAVARIAN STEM DONOR REGISTRY INVOLVED IN DECEDENT'S PHYSICIANS' SEARCH FOR A BONE-MARROW MATCH TO TREAT LEUKEMIA (FIRST DEPT).

Aloisio v New York-Presbyt./Weill Cornell Med. Ctr., 2022 NY Slip Op 03205, First Dept 5-17-22

Practice Point: A Bavarian stem donor registry did not have sufficient contacts with New York to allow New York to exercise long-arm jurisdiction over the registry. The registry played a role in decedent's physicians' search for a bone-marrow match to treat decedent's leukemia. The registry had no presence in New York and did not purposely conduct activities in New York. Even if the long-arm

statute applied, the registry did not have the minimum contacts with New York required under a due-process analysis.

LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

MOTIONS TO RENEW, SUCCESSIVE SUMMARY JUDGMENT MOTIONS.

WHEN THE FAILURE TO PRESENT FACTS IN A PRIOR MOTION IS NOT JUSTIFIED, THE SECOND MOTION DOES NOT FIT THE CRITERIA FOR A MOTION TO RENEW OR AN ALLOWABLE SUCCESSIVE SUMMARY JUDGMENT MOTION (SECOND DEPT).

Wells Fargo Bank, N.A. v Osias, 2022 NY Slip Op 03275, Second Dept 5-18-22

Practice Point: Attempting to bring a second motion which includes "new" facts, without a reasonable justification for leaving them out of the first motion, does not

fit the criteria for a motion to renew or an allowable successive summary judgment motion.

PLEADING, CONTRACT LAW, FRAUD, DUPLICATIVE CAUSES OF ACTION.

THE FRAUD CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; CRITERIA EXPLAINED (FIRST DEPT).

IS Chrystie Mgt. LLC v ADP, LLC, 2022 NY Slip Op 02950, First Dept 5-3-22

Practice Point: Fraud causes of action are often dismissed as duplicative of breach-of-contract causes of action. Here the fraud cause of action should not have been dismissed because the misrepresentations concerned present facts, not a future intent to perform. In addition, the complaint sought damages for fraud that were not sought for breach of contract.

PUNITIVE DAMAMGES, CONTRACT LAW, INSURANCE LAW.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS BREACH OF AN INSURANCE CONTRACT ACTION SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

Schlusselberg v New York Cent. Mut. Fire Ins. Co., 2022 NY Slip Op 03539, Second Dept 6-1-22

Practice Point: The criteria for punitive damages for breach of contract are difficult to meet. The defendant's conduct must amount to an independent tort, be morally reprehensible, wantonly dishonest, and criminally indifferent to civil obligations. Here, those criteria were not met by the allegations of breach of an insurance contract.

REAL PROPERTY LAW, JOINT VENTURE, LIS PENDENS.

PLAINTIFF WAS SEEKING THE PROCEEDS OF A JOINT VENTURE, WHICH, UNDER PARTNERSHIP LAW, INVOLVES PERSONAL PROPERTY, NOT REAL PROPERTY; PLAINTIFF HAD NO INTEREST IN THE REAL PROPERTY WHICH WAS TO BE USED AS AN INN OPERATED AS A JOINT VENTURE; THERFORE THE LIS PENDENS FILED BY PLAINTIFF SHOULD HAVE BEEN CANCELLED (FOURTH DEPT).

Renfro v Herrald, 2022 NY Slip Op 03593, Fourth Dept 6-3-22

Practice Point: Partnership law applies to joint ventures. Here the joint venture was the operation of an inn. Plaintiff sought the assets of the joint venture, which involves only personal property, not real property. Plaintiff had no interest in the real property (the inn). Therefore the lis pendens filed by the plaintiff should have been cancelled.

RELATION-BACK DOCTRINE, STATUTE OF LIMITATIONS.

THE RELATION-BACK DOCTRINE DID NOT APPLY TO SAVE THE AMENDED PETITION CHALLENGING A USE VARIANCE; THE INTITIAL PETITION FAILED TO NAME A NECESSARY PARTY WHO WAS KNOWN TO THE PETITIONERS AND WAS DISMISSED ON THAT GROUND; THE AMENDED PEITITION, WHICH NAMED THE NECESSARY PARTY, WAS DISMISSED AS TIME-BARRED; BECAUSE THE PETITIONERS HAD NO DOUBT ABOUT WHO THE NECESSARY PARTY WAS AND HAD NAMED HER IN A PRIOR PETITION, THE RELATION-BACK DOCTRINE COULD NOT BE INVOKED (SECOND DEPT).

Matter of Nemeth v K-Tooling, 2022 NY Slip Op 03034, Second Dept 5-4-22

Practice Point: Here a necessary party was not named in the petition and the petition was dismissed for that reason. The amended petition, which named the

necessary party, was time-barred. The relation-back doctrine could not be invoked to save the amended petition because the identity of the necessary party was known to the petitioners who had named her in a related petition in 2013.

REPLIES, EVIDENCE FIRST PRESENTED IN REPLY, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION.

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE (FIRST DEPT).

Douglas v Tishman Constr. Corp., 2022 NY Slip Op 03344, First Dept 5-24-22

Practice Point: Evidence first presented in reply and which does not address anything raised by the other party's opposition papers should not be considered by the court. A ruling in a Workers' Compensation case, here rejecting the worker's traumatic brain injury and cognitive disorder claims, may preclude the same claims in a Labor Law action pursuant to the collateral estoppel doctrine.

RES JUDICATA.

HERE THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S FRAUDULENT CONVEYANCE ACTION; THE CAUSE OF ACTION COULD HAVE BEEN RAISED IN THE PRIOR ACTION WHICH WAS DISMISSED (FIRST DEPT).

Aboelnaga v National Bank of Can., 2022 NY Slip Op 03467, First Dept 5-31-22

Practice Point: The doctrine of res judicata precludes causes of action which could have been investigated and raised in a prior action.

SECURITIES, THE STRICT PLEADING REQUIREMENTS FOR FRAUD DO NOT APPLY TO VIOLATIONS OF SECURITIES ACT.

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Erie County Empls.' Retirement Sys. v NN, Inc., 2022 NY Slip Op 03473, First Dept 5-31-22

Practice Point: The heightened pleading requirements for fraud (CPLR 3016) do not apply to the causes of action here alleging violations of the Securities Act—allegedly misleading information in a secondary public offering (SPO).

SOVEREIGN IMMUNITY, NEGLIGENCE, TRAFFIC ACCIDENTS.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLANTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD (FIRST DEPT).

Colt v New Jersey Tr. Corp., 2022 NY Slip Op 03343, First Dept 5-24-22

Practice Point: A bus operated by the New Jersey Transit Corp (NJT) struck plaintiff in New York. NJT is an arm of the state of New Jersey to which the sovereign immunity doctrine applies. But, under New Jersey law, the suit cannot be brought in New Jersey. After analyzing the case using the forum non coveniens criteria, the First Department allowed the New York lawsuit to go forward.

UNTIMELY ANSWER AS NOTICE OF APPEARANCE.

DEFENDANT'S UNTIMELY ANSWER WAS REJECTED BY PLAINTIFF BUT PLAINTIFF DEEMED THE ANSWER TO BE A NOTICE OF APPEARANCE; DEFENDANT DID NOT OBJECT; AN APPEARANCE IS THE EQUIVALENT OF SERVICE OF A SUMMONS; THEREFORE DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Muzac, 2022 NY Slip Op 02978, Second Dept 5-4-22

Practice Point: Here defendant's late answer was rejected but plaintiff informed defendant it considered the answer to be a notice of appearance. Defendant did not object. An appearance is equivalent to service of a summons. Therefore defendant waived the lack-of-personal-jurisdiction defense.