NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
June 6 – 10, 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 6 – 10, 2022, and Posted on the New York Appellate Digest Website on Monday, June 13, 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Summaries Which Link to Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Pager to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ARBITRATION, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE HIGH SCHOOL PRINCIPAL WAS CHARGED WITH GIVING STUDENTS UNAUTHORIZED CREDITS TO INCREASE GRADUATION RATES; THE CHARGES REQUIRED INTENTIONAL CONDUCT; THE HEARING OFFICER DETERMINED THE PRINCIPAL DID NOT ACT INTENTIONALLY BUT WAS GUILTY OF THE CHARGES; THE INCONSISTENCY RENDERED THE RULING ARBITRARY AND CAPRICIOUS (SECOND DEPT).

Matter of Simpson v Poughkeepsie City Sch. Dist., 2022 NY Slip Op 03730, Second Dept 6-8-22

Practice Point: The high school principal was charged with giving students unauthorized credits to increase graduation rates. All the charges alleged intentional conduct. The hearing officer (correctly) found the principal did not act intentionally, but sustained the charges and terminated her employment. The inconsistency rendered the hearing officer's ruling in the arbitration arbitrary and capricious.

Table of Contents

CIVIL PROCEDURE, AMENDMENT OF ANSWER, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW.

ALTHOUGH DEFENDANT'S MOTION TO AMEND ITS ANSWER (ADDING AFFIRMATIVE DEFENSES) WAS MADE AFTER A TWO-YEAR DELAY, THE DELAY ALONE DID NOT DEMONSTRATE THE PLAINTIFF WAS PREJUDICED; THE MOTION TO AMEND SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Board of Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC, 2022 NY Slip Op 03680, First Dept 6-7-22

Practice Point: Here defendant moved to amend its answer by adding affirmative defenses two years after the answer was served. Discovery was still ongoing. The delay alone was not enough to demonstrate the plaintiff was prejudiced. The motion to amend should have been granted.

CONVERSION, IDENTIFIABLE FUND, ATTORNEY IOLA ACCOUNT.

ALTHOUGH THE PLAINTIFFS' $96,000, CONSTITUTING TWO MONTHS' RENT AND A SECURITY DEPOSIT, WAS TRANSFERRED TO DEFENDANT FROM AN ATTORNEY'S IOLA ACCOUNT, THE $96,000 CONSTITUTED AN "IDENTIFIABLE FUND" WHICH DEFENDANT "CONVERTED" WHEN IT WAS NOT RETURNED (FIRST DEPT).

Family Health Mgt., LLC v Rohan Devs., LLC, 2022 NY Slip Op 03796, First Dept 6-9-22

Practice Point: Here the plaintiffs' security deposit and two-months rent amounting to $96,000 were transferred to defendant landlord from an attorney's IOLA account. However the lease was never signed and defendant did not return the money. Despite the fact that the money was deposited in the IOLA account, it remained an "identifiable fund" and was therefore a proper subject for this conversion action.

CRIMINAL LAW, ROBBERLY, LESSER INCLUDED OFFENSES.

ROBBERY THIRD AND ASSAULT SECOND CONVICTIONS REVERSED AS LESSER INCLUDED OFFENSES OF ROBBERY SECOND (FOURTH DEPT).

People v Coleman, 2022 NY Slip Op 03842, Fourth Dept 6-9-22

Practice Point: Here the robbery third and assault second convictions were reversed as lesser included offense of robbery second.

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REVERSED (FOURTH DEPT).

People v Bunton, 2022 NY Slip Op 03856, Fourth Dept 6-9-22

Practice Point: Here there was only a vague description of pain and no medical records were introduced. The assault conviction was not supported by legally sufficient evidence the police officer suffered "physical injury."

CRIMINAL LAW, COURT CLERK'S QUESTIONING PROSPECTIVE JURORS, MODE OF PROCEEDINGS ERROR.

AN INQUIRY MADE BY THE COURT CLERK OF PROSPECTIVE JURORS ABOUT WHETHER THEY COULD SERVE IN THIS SEXUAL-ASSAULT-OF-A-CHILD CASE DID NOT AMOUNT TO AN IMPROPER DELEGATION OF JUDICIAL AUTHORITY; THERE WAS NO MODE OF PROCEEDINGS ERROR (FIRST DEPT).

People v Ocampo, 2022 NY Slip Op 03803, First Dept 6-9-22

Practice Point: Here defense counsel consented to the court clerk's asking prospective jurors whether they could serve in this sexual-assault-of-a-child case. The inquiry was not an improper delegation of judicial authority. There was no mode of proceedings error (which would have required reversal on appeal even though the issue was not preserved).

CRIMINAL LAW, LARCENY, INTENT TO PERMANENTLY DEPRIVE OWNER OF PROPERTY.

DEFENDANT TOOK A KEY, GOT IN A U-HAUL VAN, SAT FOR TWO MINUTES AND GOT OUT OF THE VAN; THE PEOPLE DID NOT PROVE DEFENDANT INTENDED TO PERMANENTLY DEPRIVE THE OWNER OF ITS PROPERTY; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS REVERSED (SECOND DEPT).

People v Golding, 2022 NY Slip Op 03741, Second Dept 6-8-22

Practice Point: Grand Larceny includes the intent to permanently deprive the owner of the property. Here defendant took a key to a U-Haul van, got in the van, sat for two minutes, and got out of the van. There was, therefore, proof of an intent to permanently deprive the owner of its property. Because grand larceny was not proven, possession of stolen property was not proven as well.

CRIMINAL LAW, MISTRIAL, DOUBLE JEOPARDY.

AFTER THE TRIAL HAD BEGUN AND WITNESSES HAD TESTIFIED, THE JUDGE BECAME ILL AND SOUGHT A COVID TEST; AFTER THE NEGATIVE TEST-RESULT, THE JUDGE, SUA SPONTE, WITHOUT DEFENDANT'S CONSENT, DECLARED A MISTRIAL; THE JUDGE'S FAILURE TO CONSIDER A CONTINUANCE OR THE SUBSTITUTION OF ANOTHER JUDGE WAS AN ABUSE OF DISCRETION; THE DOUBLE-JEOPARDY PROHIBITION PRECLUDED RETRIAL (FOURTH DEPT).

Matter of McNair v McNamara, 2022 NY Slip Op 03825, Fourth Dept 6-9-22

Practice Point: Here the judge became ill after the trial had begun and declared a mistrial without defendant's consent and without considering a continuance or the substitution of another judge. There was no manifest necessity for the mistrial. The double-jeopardy prohibition therefore precluded retrial.

CRIMINAL LAW, MOLINEUX, MODUS OPERANDI.

THE SEXUAL ABUSE ALLEGATIONS FROM THE 1990'S WERE NOT SUFFICIENTLY SIMILAR TO THE CHARGED OFFENSES AND THEREFORE DID NOT MEET THE "MODUS OPERANDI" CRITERIA UNDER MOLINEUX TO PROVE IDENTITY; NEW TRIAL ORDERED (FOURTH DEPT).

People v Mountzouros, 2022 NY Slip Op 03840, Fourth Dept 6-9-22

Practice Point: If the identity of the perpetrator is an issue and the manner in which the charged crime was committed is unique, evidence of defendant commission of an uncharged crime involving the same unique "modus operandi" may be admissible under Molineux. Here sexual abuse allegations from the 1990's were not sufficiently similar to the charged offenses. The uncharged-crime evidence should not have been admitted. New trial ordered.

Table of Contents

CRIMINAL LAW, STREET STOPS, REASONABLE SUSPICION, FRISK.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS ARMED AND THEREFORE SHOULD NOT HAVE ATTEMPTED TO FRISK HIM; THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST DEFENDANT WHEN HE THREW HIS COAT AT AN OFFICER AND RAN BECAUSE THE POLICE WERE NOT AUTHORIZED TO ATTEMPT THE FRISK; INDICTMENT DISMISSED; AN APPELLATE COURT CANNOT CONSIDER A THEORY WHICH WOULD SUPPORT DENIAL OF SUPPRESSION BUT WHICH WAS NOT RAISED BY THE PEOPLE BELOW (FOURTH DEPT).

People v Hodge, 2022 NY Slip Op 03821, Fourth Dept 6-9-22

Practice Point: Here the police did not have a reasonable suspicion that the defendant was armed and therefore should not have attempted to frisk him. The fact that the defendant threw his coat at an officer and ran did not provide probable cause for arrest because the police conduct (attempting to frisk him) was not authorized. An appellate court cannot consider a theory which would support the denial of suppression but with was not raised below.

CRIMINAL LAW, STREET STOPS.

THE LEVEL THREE STREET STOP WAS NOT JUSTIFIED BY THE VAGUE DESCRIPTION OF A ROBBERY SUSPECT WHICH DEFENDANT DID NOT MATCH; THAT THE DEFENDANT HID HIS FACE AND WALKED QUICKLY WHEN THE POLICE FOLLOWED HIM DID NOT PROVIDE THE POLICE WITH THE REQUISITE REASONABLE SUSPICION (FIRST DEPT).

People v Thorne, 2022 NY Slip Op 03696, First Dept 6-7-22

Practice Point: Here the police conducted a level-three street stop based upon a vague description of a robbery suspect which the defendant did not match. The stop was not justified by defendant's hiding his face and walking quickly when the police followed him.

ELECTION LAW.

EVEN THOUGH THE STATE ASSEMBLY REDISTRICTING MAP WAS DECLARED INVALID BY THE COURT OF APPEALS IN APRIL 2022, THE MAP WILL BE USED UNTIL THE GENERAL ELECTION IN 2024 (FIRST DEPT).

Matter of Nichols v Hochul, 2022 NY Slip Op 03809, First Dept 6-10-22

Practice Point: The Court of Appeals, in April 2022, declared the state assembly redistricting map invalid. Here the First Department determined the map will continue to be used until the general election in 2024.

EMPLOYMENT LAW, LABOR LAW (PAYMENT OF WAGES), CORPORATION LAW.

CORPORATE SHAREHOLDERS AND OFFICERS MAY ONLY BE LIABLE FOR LABOR LAW (WAGE-PAYMENT-RELATED) VIOLATIONS IF THEY EXERCISE CONTROL OVER THE DAY-TO-DAY OPERATIONS OF THE CORPORATION, WHICH WAS ALLEGED HERE (SECOND DEPT).

Interstate Home Loan Ctr., Inc. v United Mtge. Corp., 2022 NY Slip Op 03715, Second Dept 6-8-22

Practice Point: Corporate shareholders and officers may be liable for Labor Law (wage-payment-related) violations only if they exercise control over the day-to-day operations of the corporation.

FAMILY LAW, ATTORNEYS, HOME VISITS.

NO REASON MOTHER'S ATTORNEY COULD NOT BE PRESENT, EITHER IN PERSON OR ELECTRONICALLY, DURING A HOME VISIT BY THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) (SECOND DEPT).

Matter of Lexis B. (Natalia B.), 2022 NY Slip Op 03721, Second Dept 6-8-22

Practice Point: The Administration for Children's Services (ASC) did not cite any authority for its attempt to preclude mother's attorney from being present, either in person or electronically, during ASC's home visits.

FAMILY LAW, CUSTODY, ADOPTION.

ALTHOUGH FATHER, WHO HAD BEEN IN THE MILITARY, HAD NOT PROCURED HOUSING FOR HIMSELF AND HIS UNDER-SIX-MONTH-OLD SON, HE DEMONSTRATED HE WAS WILLING AND ABLE TO CARE FOR THE CHILD; THEREFORE HIS CONSENT TO ADOPTION BY PETITIONERS-RESPONDENTS WAS REQUIRED AND CUSTODY WAS PROPERLY AWARDED TO HIM; THE DISSENT ARGUED FATHER'S FAILURE TO PROCURE HOUSING RENDERED HIM UNABLE TO CARE FOR THE CHILD (FOURTH DEPT).

Matter of William, 2022 NY Slip Op 03831, Fourth Dept 6-9-22

Practice Point: The Fourth Department noted that custody and housing are separate and distinct concepts. Although father, who had been in the military, had not procured housing for himself and the child, he demonstrated he was willing and able to care for the child. Therefore his consent to adoption by the petitioners-respondents was required and custody was properly awarded to him.

FAMILY LAW. PRENUPTIAL AGREEMENTS.

THE WIFE RAISED QUESTIONS OF FACT ABOUT (1) THE FAIRNESS OF THE NEGOTIATIONS FOR THE PRENUPTIAL AGREEMENT, (2) WHETHER HER ATTORNEY, CHOSEN FOR HER, ENGAGED IN MEANINGFUL NEGOTIATIONS, (3) WHETHER SHE RATIFIED THE AGREEMENT, AND (4) WHETHER SHE WAS ENTITLED TO TEMPORARY MAINTENANCE (THIRD DEPT).

Spiegel v Spiegel, 2022 NY Slip Op 03778, Third Dept 6-9-22

Practice Point: Here in this divorce action there were questions of fact whether the wife was meaningfully represented in the prenuptial-agreement negotiations and

whether she ratified the agreement. In addition, pursuant to the Domestic Relation Law, Supreme Court should have awarded temporary maintenance.

FORECLOSURE, FRAUD, REAL PROPERTY LAW, MARKETABLE TITLE.

AFTER THE FORECLOSURE SALE BUT BEFORE THE CLOSING, THE MORTGAGOR STARTED AN ACTION ALLEGING FRAUD IN THE FORECLOSURE PROCEEDINGS; THE FRAUD ACTION DID NOT RENDER THE TITLE UNMARKETABLE SUCH THAT THE PURCHASER COULD SET ASIDE THE FORECLOSURE SALE AND HAVE THE DOWN PAYMENT RETURNED (SECOND DEPT).

DiTech Fin., LLC v Steplight, 2022 NY Slip Op 03710, Second Dept 6-8-22

Practice Point: The title to the property sold at the foreclosure auction was not rendered unmarketable by a subsequent action brought by the mortgagor alleging fraud in the foreclosure proceedings. Therefore the purchaser's motion to set aside the foreclosure sale and return the down payment was properly denied.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304, PARTICULARLY THE MAILING REQUIREMENTS, WAS NOT SHOWN IN THIS FORECLOSURE ACTION (SECOND DEPT).

LNV Corp. v Allison, 2022 NY Slip Op 03716, Second Dept 6-8-22

Practice Point: Yet another example of the mortgagee's failure to demonstrate the RPAPL 1304 notice was properly mailed in its foreclosure motion papers.

Table of Contents

INSURANCE LAW, PROPERTY, "DETERIORATION" EXCLUSION.

THE PROPERTY-INSURANCE EXCLUSION FOR "DETERIORATION" APPLIED TO THE BULGING WALL CAUSED BY THE DETERIORATION OF BRICKS, PRECLUDING COVERAGE (FOURTH DEPT).

S & J Props. of Watertown, LLC v Main St. Am. Group, 2022 NY Slip Op 03837, Fourth Dept 6-9-22

Practice Point: Here the bulging wall was caused by the deterioration of bricks. The "deterioration" exclusion in the policy applied and precluded coverage.

INSURANCE LAW, REINSURANCE.

THE "FOLLOW THE SETTLEMENTS" DOCTRINE DOES NOT APPLY TO A REINSURER WHERE THE PAYMENTS MADE BY THE PRIMARY INSURER WERE CLEARLY BEYOND THE SCOPE OF THE ORIGINAL POLICY (FOURTH DEPT).

Utica Mut. Ins. Co. v Abeille Gen. Ins. Co., 2022 NY Slip Op 03815, Fourth Dept 6-9-22

Practice Point: Here the "follow the settlements" doctrine did not apply to a reinsurer who refused to cover payments made by the primary insurer because those payments were clearly beyond the scope of the original policy.

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION.

HOMEOWNER'S EXEMPTION PRECLUDED THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST THE DEFENDANT PROPERTY OWNER, A RELIGIOUS ORGANIZATION; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION ALLEGING THE HOMEOWNER'S LADDER WAS DEFECTIVE PROPERLY SURVIVED SUMMARY JUDGMENT (SECOND DEPT).

Reinoso v Han Ma Um Zen Ctr. of N.Y., Inc., 2022 NY Slip Op 03755, Second Dept 6-8-22

Practice Point: The homeowner's exemption precludes Labor Law 240(1) and 241(6) causes of action against a homeowner which/who does not direct plaintiff's work, even if the homeowner is a religious organization. The homeowner's exemption does not apply to Labor Law 200 or negligence causes of action, here based on allegations the homeowner's ladder was defective.

MUNICIPAL LAW, CONTRACT LAW, NOTICE OF CLAIM.

DEFENDANT DID NOT FILE A NOTICE OF CLAIM AGAINST PLAINTIFF VILLAGE IN THIS CONTRACT ACTION AS REQUIRED BY CPLR 9802; THEREFORE DEFENDANT'S ANTICIPATORY-REPUDIATION COUNTERCLAIM SHOULD HAVE BEEN DISMISSED; THE VILLAGE'S PARTICIPATION IN DISCOVERY WAS NOT DESIGNED TO MISLEAD THE DEFENDANT AND DID NOT TRIGGER THE ESTOPPEL DOCTRINE (SECOND DEPT).

Incorporated Vil. of Freeport v Freeport Plaza W., LLC, 2022 NY Slip Op 03713, Second Dept 6-8-22

Practice Point: In a contract action against a municipality, here an anticipatory-repudiation-of-contract counterclaim, a notice of claim must be filed (CPLR 9802).

No notice of claim was filed here and the counterclaim should have been dismissed. The fact that the municipality participated in discovery did not give rise to the estoppel doctrine because there was no intent to mislead the defendant with respect to the notice-of-claim requirement.

MUNICIPAL LAW, EMPLOYMENT LAW, FIREFIGHTERS, ARBITRATION, GENERAL MUNICIPAL LAW 207-A BENEFITS.

THE MANNER IN WHICH THE FIREFIGHTER'S GENERAL MUNICIPAL LAW 207-A INJURY CLAIM SHOULD BE PROCESSED IS ARBITRABLE BECAUSE THE ISSUE IS ADDRESSED IN THE COLLECTIVE BARGANING AGREEMENT (CBA); THE PETITION TO STAY ARBITRATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Matter of City of New Rochelle v Uniformed Fire Fighters Assn., Inc., 2022 NY Slip Op 03722, Second Dept 6-8-22

Practice Point: Here the issue (how a firefighter's General Municipal Law 207-a injury claim should be processed) was addressed in the collective bargaining agreement (CBA) was therefore arbitrable. The petition to stay arbitration should not have been granted.

Table of Contents

MUNICIPAL LAW, GENERAL MUNICIPAL LAW 207-A BENEFITS, FIREFIGHTERS.

A FIREFIGHTER INJURED ON THE JOB RETURNED TO THE JOB BUT COULD NOT WORK THE 10 TO 24 HOUR SHIFTS WHICH ARE THE "REGULAR DUTIES" OF A FIREFIGHTER; BECAUSE SHE WAS NOT OFFERED THE FULL-TIME EQUIVALENT OF THE SHORTER SHIFTS OR LIGHT-DUTY WORK, SHE WAS ENITLTED TO GENERAL MUNICIPAL LAW 207-A BENEFITS (FOURTH DEPT).

Matter of Newman v City of Tonawanda, 2022 NY Slip Op 03834, Fourth Dept 6-9-22

Practice Point: Here petitioner-firefighter was injured on the job. When she returned to the job she could not work the 10 to 24 hour shifts which are the "regular duties' of a firefighter. She was assigned shorter shifts which resulted in less pay. She was therefore entitled to General Municipal Law 207-a benefits.

NEGLIGENCE, ASSUMPTION OF RISK, SLIPPERY BASKETBALL COURT.

PLAINTIFF ASSUMED THE RISK OF SLIPPING ON THE BASKETBALL COURT WHICH WAS WET WITH CONDENSATION; PLAINTIFF WAS AWARE OF THE RECURRING CONDITION (SECOND DEPT).

Lungen v Harbors Haverstraw Homeowners Assn., Inc., 2022 NY Slip Op 03717, Second Dept 6-8-22

Practice Point: Plaintiff was aware that the basketball court routinely became wet with condensation. Therefore he assumed the risk of slipping on the condensation while playing basketball.

Table of Contents

NEGLIGENCE, SLIP AND FALL.

A FLATTENED CARDBOARD BOX ON THE FLOOR WAS NOT ACTIONABLE IN THIS SLIP AND FALL CASE (SECOND DEPT).

DiScalo v Mannix Family Mkt. @ Forest & Richmond Ave, LLC, 2022 NY Slip Op 03708, Second Dept 6-8-22

Practice Point: A flattened cardboard box on the floor was not actionable in this slip and fall case because it was "open and obvious."