NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Newsletter
June 2022

An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in June 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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.

Table of Contents

Contents

AMENDMENT OF ANSWER. 5

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). 5

AMENDMENT OF COMPLAINT AFTER APPELLATE DISMISSAL. 5

SUPREME COURT DID NOT HAVE THE DISCRETION TO GRANT PLAINTIFF LEAVE TO AMEND A COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED FOR LACK OF STANDING BY THE APPELLATE DIVISION (FIRST DEPT). 5

AMENDMENT OF COMPLAINT. 6

THE COMPLAINT WAS NEVER PROPERLY AMENDED TO ADD DEFENDANT AS A PARTY PURSUANT TO CPLR 1003 OR CPLR 3025 REQUIRING DISMISSAL (FIRST DEPT). 6

COMPEL INDEPENDENT MEDICAL EXAMINATION, MENTAL CONDITION IN CONTROVERSY. 6

DEFENDANT'S MOTION TO COMPEL PLANTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE (FIRST DEPT). 6

COVID-RELATED COURT PROCEDURES. 7

PLAINTIFF'S ATTORNEY WAS NOT AWARE OF COVID-RELATED PROCEDURAL CHANGES FOR CONDUCTING COMPLIANCE CONFERENCES; PLAINTIFF'S MOTION TO VACATE DISMISSAL OF THE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT). 7

DOMICILE, FOREIGN WILLS. 7

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT). 7

EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS. 8

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT). 8

Table of Contents

FAMILY LAW, IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS. 8

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT). 8

FORECLOSURE, LACK OF STANDING, ACCELERATION OF DEBT. 9

BECAUSE THE PRIOR FORECLOSURE ACTION WAS DISMISSED FOR LACK OF STANDING, THE PRIOR ACTION DID NOT ACCELERATE THE DEBT; THEREFORE DEFENDANT DID NOT DEMONSTRATE THE INSTANT ACTION WAS TIME-BARRED (SECOND DEPT). 9

FORECLOSURE, SEVEN-YEAR DELAY IN MOVING FOR JUDGMENT, INTEREST TOLLED. 9

PLAINTIFF OFFERED NO EXPLANATION FOR THE SEVEN-YEAR DELAY BETWEEN THE ORDER OF REFERENCE AND THE MOTION FOR A JUDGMENT OF FORECLOSURE AND SALE; THE ACCRUAL OF INTEREST DURING THE DELAY SHOULD HAVE BEEN TOLLED (SECOND DEPT). 9

GOVERNMENTAL VERSUS PROPRIETARY FUNCTION, IMMUNITY, HARNESS RACING ACCIDENT. 10

THE NYS GAMING COMMISSION'S DUTIES TO INSPECT HORSES AND EQUIPMENT BEFORE A HARNESS RACE ARE PROPRIETARY, NOT GOVERMENTAL, IN NATURE; THEREFORE ORDINARY NEGLIGENCE PRINCIPLES APPLY AND THE IMMUNITY DEFENSE IS NOT AVAILABLE; DURING THE RACE A HORSE FELL AND CLAIMANT'S HORSE COLLIDED WITH THE FALLEN HORSE; THERE ARE QUESTIONS OF FACT ABOUT THE SAFETY OF THE FALLEN HORSE'S EQUIPMENT AND WHETHER THE HORSE EXHIBITED INDICATIONS HE WAS LAME; THERE ARE QUESTIONS OF FACT ABOUT THE APPLICABILTY OF THE ASSUMPTION OF THE RISK DOCTRINE; REGULATIONS RE: THE INSPECTION OF HORSES AND EQUIPMENT ALLOWED CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION TO BE IMPUTED (THIRD DEPT). 10

JOINT TRIAL, TRAFFIC ACCIDENTS. 11

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT). 11

LATE ANSWER, MOTION TO COMPEL ACCEPTANCE. 11

PLAINTIFF SERVED THE COMPLAINT ON NOVEMBER 27, 2018; DEFENDANT ATTEMPTED TO SERVE AN ANSWER, WHICH WAS REJECTED, ON JANUARY 9, 2019; DEFENDANT'S EXCUSE WAS "THE DELAY WAS CAUSED BY THE INSURANCE CARRIER;" THAT EXCUSE WAS INSUFFICIENT AND DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ACCEPT THE ANSWER SHOULD HAVE BEEN DENIED (SECOND DEPT). 11

Table of Contents

LIS PENDENS. 12

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). 12

LONG-ARM JURISDICTION. 12

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). 12

MUNICIPAL LAW, CONTRACT LAW, NOTICE OF CLAIM. 13

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). 13

MUNICIPAL LAW, GENERAL MUNICIPAL LAW 207-A BENEFITS, ARBITRATION. 14

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). 14

MUNICIPAL LAW, LATE NOTICE OF CLAIM. 14

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT). 14

PRELIMINARY INJUNCTIONS, EMPLOYMENT LAW, CIVIL PROCEDURE, RESTRICTIVE COVENANTS. 15

THERE ARE SUBSTANTIVE QUESTIONS OF FACT ABOUT THE NATURE OF THE AGREEMENTS BETWEEN PLAINTIFF EMPLOYER AND DEFENDANT EMPLOYEE RE: THE SALE OF DEFENDANT'S TAX PREPARATION BUSINESS TO PLAINTIFF AND WHETHER DEFENDANT SOLD HER CLIENT LIST TO PLAINTIFF; PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THE RESTRICTIVE COVENANT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 15

Table of Contents

REAL PROPERTY TAX LAW, TENANT CAN CHALLENGE TAX ASSESSMENT. 15

THE TENANT (A NET LESSEE), WHICH WAS OBLIGATED BY THE TERMS OF THE LEASE TO PAY PROPERTY TAXES, CAN CHALLENGE A PROPERTY-TAX ASSESSMENT BY FILING A GRIEVANCE PURSUANT TO REAL PROPERTY TAX LAW (RPTL) 524 (3); THE APPELLATE DIVISION HAD RULED ONLY THE PROPERTY OWNER COULD CHALLENGE THE ASSESSMENT (CT APP). 15

RE-COMMENCEMENT OF DISMISSED LAWSUIT. 16

ONLY THE ORIGINAL PLAINTIFF CAN TAKE ADVANTAGE OF CPLR 205 (A) WHICH ALLOWS RE-COMMENCEMENT OF A LAWSUIT WITHIN SIX MONTHS OF A DISMISSAL WHICH WAS NOT ON THE MERITS (CT APP). 16

STATUTE OF LIMITATIONS, INSANITY TOLL. 16

QUESTIONS OF FACT ABOUT WHETHER THE INCAPACITATED PERSON (IP) WAS “INSANE” WITHIN THE MEANING OF THE CPLR WHEN HE WAS REPRESENTED BY THE DEFENDANT ATTORNEY MUST BE DETERMINED AT THE LEGAL MALPRACTICE TRIAL; IF THE IP WAS INSANE, THE MALPRACTICE STATUTE OF LIMITATIONS WILL BE TOLLED; IF NOT THE MALPRACTICE ACTION IS UNTIMELY (FIRST DEPT). 16

WORKERS' COMPENSATION, INADEQUATE RECORD FOR APPEAL. 17

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT’S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED (THIRD DEPT). 17

Table of Contents

AMENDMENT OF ANSWER.

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.

AMENDMENT OF COMPLAINT AFTER APPELLATE DISMISSAL.

SUPREME COURT DID NOT HAVE THE DISCRETION TO GRANT PLAINTIFF LEAVE TO AMEND A COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED FOR LACK OF STANDING BY THE APPELLATE DIVISION (FIRST DEPT).

Favourite Ltd. v Cico, 2022 NY Slip Op 03987, First Dept 6-21-22

Practice Point: Once the complaint was dismissed for lack of standing by the First Department, there was no pending action. Once the time for commencing a new action pursuant to CPLR 205(a) had expired plaintiff was out of luck. Supreme Court did not have the discretion to grant plaintiff's motion to amend the complaint after it had been dismissed by the First Department.

Table of Contents

AMENDMENT OF COMPLAINT.

THE COMPLAINT WAS NEVER PROPERLY AMENDED TO ADD DEFENDANT AS A PARTY PURSUANT TO CPLR 1003 OR CPLR 3025 REQUIRING DISMISSAL (FIRST DEPT).

ALP, Inc. v Moskowitz, 2022 NY Slip Op 03962, First Dept 6-16-22

Practice Point: Here the amendment of the complaint to add a party was not done by leave of court or a stipulation of all parties/ The action against the added party was dismissed.

COMPEL INDEPENDENT MEDICAL EXAMINATION, MENTAL CONDITION IN CONTROVERSY.

DEFENDANT'S MOTION TO COMPEL PLANTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE (FIRST DEPT).

Lopez v Bendell, 2022 NY Slip Op 03990, First Dept 6-21-22

Practice Point: Plaintiff had placed her mental condition in controversy by testifying about depression, anxiety, dizziness and headaches caused by mental anguish. Defendant was therefore entitled to compel a psychiatric exam (an independent medical examination [IME]). Here defendant's motion to vacate the note of issue should have been granted because defendant's discovery was not complete.

COVID-RELATED COURT PROCEDURES.

PLAINTIFF'S ATTORNEY WAS NOT AWARE OF COVID-RELATED PROCEDURAL CHANGES FOR CONDUCTING COMPLIANCE CONFERENCES; PLAINTIFF'S MOTION TO VACATE DISMISSAL OF THE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Willner v S Norsel Realties LLC, 2022 NY Slip Op 04111, First Dept 6-23-22

Practice Point: Plaintiff's attorney was not aware of procedural changes related to COVID and the action was dismissed because counsel did not submit stipulations before the scheduled compliance conference. This "law office failure" was a "reasonable excuse." Plaintiff's motion to vacate the dismissal of the action should have been granted.

DOMICILE, FOREIGN WILLS.

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT).

Matter of Noichl, 2022 NY Slip Op 03558, Third Dept 6-2-22

Practice Point: Determination of a person's domicile is a question of law and fact, depending in part on the person's intent. Here, if Germany was decedent's domicile at the time the holographic German will was executed, or at the time of death, New York may recognize the German holographic will. Matter sent back to develop a factual record on the domicile issue.

Table of Contents

EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

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, IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT).

Matter of Sara D. v Lassina D., 2022 NY Slip Op 04119, First Dept 6-28-22

Practice Point: Family Court can be petitioned to make findings which will allow a juvenile to apply for special immigrant juvenile status in order to avoid deportation to the juvenile's home country. Here the court was asked to make findings that reunification with the petitioner's parents is not viable. The First Department found that father had neglected petitioner and she therefore could not be returned to his care.

FORECLOSURE, LACK OF STANDING, ACCELERATION OF DEBT.

BECAUSE THE PRIOR FORECLOSURE ACTION WAS DISMISSED FOR LACK OF STANDING, THE PRIOR ACTION DID NOT ACCELERATE THE DEBT; THEREFORE DEFENDANT DID NOT DEMONSTRATE THE INSTANT ACTION WAS TIME-BARRED (SECOND DEPT).

Wells Fargo Bank, N.A. v Rutty, 2022 NY Slip Op 03926, Second Dept 6-15-22

Practice Point: If a prior foreclosure action was dismissed for lack of standing that action will not be deemed to have accelerated the debt. The prior action, therefore, will not have started the statute-of-limitations clock..

FORECLOSURE, SEVEN-YEAR DELAY IN MOVING FOR JUDGMENT, INTEREST TOLLED.

PLAINTIFF OFFERED NO EXPLANATION FOR THE SEVEN-YEAR DELAY BETWEEN THE ORDER OF REFERENCE AND THE MOTION FOR A JUDGMENT OF FORECLOSURE AND SALE; THE ACCRUAL OF INTEREST DURING THE DELAY SHOULD HAVE BEEN TOLLED (SECOND DEPT).

GMAC Mtge., LLC v Yun, 2022 NY Slip Op 03887, Second Dept 6-15-22

Practice Point: Here the plaintiff could not explain the seven-year delay between the order of reference and the motion for a judgment of foreclosure and sale. Interest should not have accrued during the delay.

Table of Contents

GOVERNMENTAL VERSUS PROPRIETARY FUNCTION, IMMUNITY, HARNESS RACING ACCIDENT.

THE NYS GAMING COMMISSION'S DUTIES TO INSPECT HORSES AND EQUIPMENT BEFORE A HARNESS RACE ARE PROPRIETARY, NOT GOVERMENTAL, IN NATURE; THEREFORE ORDINARY NEGLIGENCE PRINCIPLES APPLY AND THE IMMUNITY DEFENSE IS NOT AVAILABLE; DURING THE RACE A HORSE FELL AND CLAIMANT'S HORSE COLLIDED WITH THE FALLEN HORSE; THERE ARE QUESTIONS OF FACT ABOUT THE SAFETY OF THE FALLEN HORSE'S EQUIPMENT AND WHETHER THE HORSE EXHIBITED INDICATIONS HE WAS LAME; THERE ARE QUESTIONS OF FACT ABOUT THE APPLICABILTY OF THE ASSUMPTION OF THE RISK DOCTRINE; REGULATIONS RE: THE INSPECTION OF HORSES AND EQUIPMENT ALLOWED CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION TO BE IMPUTED (THIRD DEPT).

Bouchard v State of New York, 2022 NY Slip Op 04202, Third Dept 6-30-22

Practice Point: This opinion has valuable discussions of; (1) how to analyze whether a government is exercising a governmental function (to which the "special relationship" and "governmental immunity" doctrines apply) or a proprietary function (to which ordinary negligence principles apply); (2) the assumption of the risk doctrine; and (3) the imputation of constructive notice when there are regulations mandating inspections which allegedly would have revealed the dangerous condition. Here claimant was injured during a harness race when his horse collided with a fallen horse. The complaint alleged the NYS Gaming Commission did not inspect the fallen horse and the fallen horse's equipment prior to the race as required by the relevant regulations.

JOINT TRIAL, TRAFFIC ACCIDENTS.

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT).

Frank v Y. Mommy Taxi, Inc., 2022 NY Slip Op 04151, Second Dept 6-29-22

Practice Point: Here two separate traffic accidents should be tried together because plaintiff alleged the second accident exacerbated his injuries from the first accident.

LATE ANSWER, MOTION TO COMPEL ACCEPTANCE.

PLAINTIFF SERVED THE COMPLAINT ON NOVEMBER 27, 2018; DEFENDANT ATTEMPTED TO SERVE AN ANSWER, WHICH WAS REJECTED, ON JANUARY 9, 2019; DEFENDANT'S EXCUSE WAS "THE DELAY WAS CAUSED BY THE INSURANCE CARRIER;" THAT EXCUSE WAS INSUFFICIENT AND DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ACCEPT THE ANSWER SHOULD HAVE BEEN DENIED (SECOND DEPT).

Goldstein v Ilaz, 2022 NY Slip Op 04154, Second Dept 6-29-22

Practice Point: Here the defendant attempted to serve an answer, which was rejected, about a month and a half after plaintiff served the complaint. Defendant moved to compel the plaintiff to accept the answer. Defendant's excuse was that the "delay was caused by the insurance carrier" with no further explanation. The Second Department deemed the excuse insufficient and ruled that the motion to compel acceptance of the answer should not have been granted.

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.

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.

Table of Contents

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, GENERAL MUNICIPAL LAW 207-A BENEFITS, ARBITRATION.

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.

MUNICIPAL LAW, LATE NOTICE OF CLAIM.

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Matter of Gabriel v City of Long Beach, 2022 NY Slip Op 04169, Second Dept 6-29-22

Practice Point: Here the notice of claim was served only five days late. The city was thereby deemed to have had timely notice of the nature of the claim and the petitioner was deemed to have demonstrated a lack of prejudice. The fact that the petitioner did not have an adequate excuse was not a fatal defect. Leave to file a late notice of claim should have been granted.

PRELIMINARY INJUNCTIONS, EMPLOYMENT LAW, CIVIL PROCEDURE, RESTRICTIVE COVENANTS.

THERE ARE SUBSTANTIVE QUESTIONS OF FACT ABOUT THE NATURE OF THE AGREEMENTS BETWEEN PLAINTIFF EMPLOYER AND DEFENDANT EMPLOYEE RE: THE SALE OF DEFENDANT'S TAX PREPARATION BUSINESS TO PLAINTIFF AND WHETHER DEFENDANT SOLD HER CLIENT LIST TO PLAINTIFF; PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THE RESTRICTIVE COVENANT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

R&G Brenner Income Tax Consultants v Fonts, 2022 NY Slip Op 04039, Second Dept 6-22-22

Practice Point: Where there are substantive questions of fact, a preliminary injunction should not be granted because a likelihood of success on the merits has not been demonstrated.

REAL PROPERTY TAX LAW, TENANT CAN CHALLENGE TAX ASSESSMENT.

THE TENANT (A NET LESSEE), WHICH WAS OBLIGATED BY THE TERMS OF THE LEASE TO PAY PROPERTY TAXES, CAN CHALLENGE A PROPERTY-TAX ASSESSMENT BY FILING A GRIEVANCE PURSUANT TO REAL PROPERTY TAX LAW (RPTL) 524 (3); THE APPELLATE DIVISION HAD RULED ONLY THE PROPERTY OWNER COULD CHALLENGE THE ASSESSMENT (CT APP).

Matter of DCH Auto v Town of Mamaroneck, 2022 NY Slip Op 03929, CtApp 6-16-22

Practice Point: Clearing up an ambiguity in Real Property Tax Law RPTL section 524, the Court of Appeals held that a tenant (a net lessee), which is obligated by the terms of the lease to pay the property taxes, can file a grievance challenging the

property-tax assessment. The Appellate Division had held only the property owner could challenge an assessment.

RE-COMMENCEMENT OF DISMISSED LAWSUIT.

ONLY THE ORIGINAL PLAINTIFF CAN TAKE ADVANTAGE OF CPLR 205 (A) WHICH ALLOWS RE-COMMENCEMENT OF A LAWSUIT WITHIN SIX MONTHS OF A DISMISSAL WHICH WAS NOT ON THE MERITS (CT APP).

ACE Sec. Corp. v DB Structured Prods., Inc., 2022 NY Slip Op 03927, CtApp 6-16-22

Practice Point: Only the original plaintiff can take advantage of CPLR 205 (a) which allows re-commencement of a lawsuit within six months of a dismissal which was not on the merits.

STATUTE OF LIMITATIONS, INSANITY TOLL.

QUESTIONS OF FACT ABOUT WHETHER THE INCAPACITATED PERSON (IP) WAS "INSANE" WITHIN THE MEANING OF THE CPLR WHEN HE WAS REPRESENTED BY THE DEFENDANT ATTORNEY MUST BE DETERMINED AT THE LEGAL MALPRACTICE TRIAL; IF THE IP WAS INSANE, THE MALPRACTICE STATUTE OF LIMITATIONS WILL BE TOLLED; IF NOT THE MALPRACTICE ACTION IS UNTIMELY (FIRST DEPT).

Matter of Verdugo v Smiley & Smiley, LLP, 2022 NY Slip Op 04138, First Dept 6-28-22

Practice Point: There is an "insanity" statute-of -imitations toll in the CPLR. Here there a question of fact whether an incapacitated person was insane when he was represented by defendant attorney such that the legal malpractice statute of limitations was tolled.

Table of Contents

WORKERS' COMPENSATION, INADEQUATE RECORD FOR APPEAL.

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT'S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED (THIRD DEPT).

Matter of Sequino v Sears Holdings, 2022 NY Slip Op 04070, Third Dept 6-23-22

Practice Point: When the Workers' Compensation Board fails to adequately explain its denial of coverage for medical bills it concluded were not related to claimant's medical condition, appellate review by a court is not possible and the matter must be remitted.