NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
July 4 – 8, 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 July 4 – 8, 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 Decisions on the Official New York Courts Website. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

Table of Contents

Contents

Table of Contents

Table of Contents

ANIMAL LAW, DOG-BITE, CIVIL PROCEDURE, DISCOVERY OF VETERINARY RECORDS.

IN THIS DOG-BITE CASE, VETERINARY RECORDS ARE DISCOVERABLE BY SUBPOENA (FOURTH DEPT).

Ashley M. v Marcinkowski, 2022 NY Slip Op 04437, Fourth Dept 7-8-22

Practice Point: Pursuant to Education Law 6714, veterinary records in this dog-bite case are discoverable by subpoena.

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, DEBTOR-CREDITOR, GENERAL OBLIGATIONS LAW.

PETITIONERS SOUGHT FUNDS THE DECEDENT HAD TAKEN OUT OF THE CORPORATION AS CLAIMS ON DECEDENT'S ESTATE, ALLEGING THAT THE STATUTE OF LIMITATIONS STARTED ANEW WHEN THE DECEDENT ACKNOWELDGED THE DEBT IN A DEPOSITION; THE STATUTE-OF-LIMITATIONS TOLL IN THE GENERAL OBLIGATIONS LAW ONLY APPLIES TO AN ACKNOWLEDGMENT OF THE DEBT IN WRITING SIGNED BY THE PARTY TO BE CHARGED, NOT TO THE QUASI-CONTRACT ALLEGED BY PETITIONERS (FOURTH DEPT).

Matter of Reich, 2022 NY Slip Op 04446, Fourth Dept 7-8-22

Practice Point: In order to start the statute of limitations anew on a debt pursuant to General Obligations Law 17-101, the debt must be acknowledged in a writing signed by the party to be charged.

CIVIL PROCEDURE, RELATION-BACK DOCTRINE.

AFTER THE STATUTE OF LIMITATIONS HAD RUN IN THIS SLIP AND FALL CASE PLAINTIFF SOUGHT TO AMEND HER COMPLAINT TO ADD PARTIES UNDER THE "RELATION BACK" DOCTRINE; HOWEVER THE ADDED PARTIES DID NOT MEET THE "UNITY OF INTEREST" REQUIREMENT; THE MOTION TO AMEND SHOULD HAVE BEEN DENIED (FOURTH DEPT).

Stepanian v Bed, Bath, & Beyond, Inc., 2022 NY Slip Op 04477, Fourth Dept 7-8-22

Practice Point: To add parties under the "relation back" doctrine, the parities must be "united in interest" with those named in the original complaint. This decision discusses the criteria for "united in interest" in some detail and is worth consulting on that issue.

Table of Contents

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REDUCED TO ATTEMPTED ASSAULT SECOND (FOURTH DEPT).

People v Lopez-Sarmiento,2022 NY Slip Op 04493, Fourth Dept 7-8-22

Practice Point: Here the evidence the victim suffered "physical injury" as defined in the Penal Law was deemed legally insufficient. The assault second conviction was reduced to attempted assault second.

CRIMINAL LAW, RIGHT TO CONFRONT THE CREATOR OF A TESTIMONIAL DOCUMENT.

THE CJA FORM WAS PUT IN EVIDENCE TO PROVE WHERE DEFENDANT LIVED, WHICH WAS AN ELEMENT OF THE CRIMINAL-POSSESSION-OF-A-WEAPON CHARGE; BUT THE CJA EMPLOYEE WHO TESTIFIED WAS NOT THE EMPLOYEE WHO CREATED THE DOCUMENT; BECAUSE THE CJA EMPLOYEE COULD NOT BE CROSS-EXAMINED ABOUT THE CREATION OF THE DOCUMENT, ITS ADMISSION VIOLATED THE CONFRONTATION CLAUSE (SECOND DEPT).

People v Franklin, 2022 NY Slip Op 04308, Second Dept 7-6-22

Practice Point: Here a document was admitted into evidence to prove where defendant lived, which was an element of the criminal-possession-of-a-weapon charge. Because the person who created the document did not testify and therefore could not be cross-examined about its contents, defendant's right to confront the witnesses against him was violated. New trial ordered.

CRIMINAL LAW, ILLEGAL CONCURRENT SENTENCES.

ALTHOUGH THE ISSUES WERE NOT RAISED ON APPEAL, THE APPELLATE COURT VACATED THE SENTENCES EITHER BECAUSE THE CONCURRENT SENTENCES WERE ILLEGAL OR BECAUSE THE GUILTY PLEAS WERE INDUCED BY THE PROMISE OF ILLEGAL CONCURRENT SENTENCES (FOURTH DEPT).

People v Horton, 2022 NY Slip Op 04501, Fourth Dept 7-8-22

Practice Point: Sentences for crimes committed when defendant has been released on his own recognizance can not be concurrent unless the judge puts the relevant facts and reasoning on the record. The same goes for assault second. Here the reasons for the concurrent sentences were not put on the record, rendering the concurrent sentences illegal. Because all the guilty pleas were induced by the promise of concurrent sentences, all the sentences were vacated. The "illegal concurrent sentences" issue had not been brought up on appeal.

CRIMINAL LAW, POLICE ACTING IN THE PUBLIC SERVICE FUNCTION, SEARCH OF INJURED PERSON.

THE POLICE WERE "ACTING IN THE PUBLIC SERVICE FUNCTION" WHEN THEY SEARCHED THE INJURED DEFENDANT AND FOUND A CARTRIDGE; DEFENDANT WAS DRIFTING IN AND OUT OF CONSCIOUSNESS; THE POLICE PROPERLY SEARCHED HIS POCKETS FOR IDENTIFICATION; SUPPRESSION DENIED (FIRST DEPT).

People v Hatchett, 2022 NY Slip Op 04282, First Dept 7-5-22

Practice Point: When the police aid an injured person and search the person's pockets for identification, they are "acting in the public service function." Suppression of any contraband found in the search will be denied.

Table of Contents

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), INEFFECTIVE ASSISTANCE.

THE PEOPLE DID NOT PRESENT EVIDENCE OF THE TEMPORAL REQUIREMENTS FOR AN ASSESSMENT OF 20 POINTS FOR RISK FACTOR 4 AND DEFENSE COUNSEL AGREED WITH THAT 20-POINT ASSESSMENT, THEREBY WAIVING ANY OBJECTION TO IT ON APPEAL; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; NEW SORA HEARING ORDERED (SECOND DEPT).

People v Echols, 2022 NY Slip Op 04310, Second Dept 7-6-22

Practice Point: At the SORA risk-level hearing, defense counsel agreed with an assessment of 20 points for risk level 4 despite the People's failure to submit any evidence in support of it. Because counsel agreed to the assessment, any objection to it was waived and could not be raised on appeal. However, the ineffective-assistance argument, based upon defense counsel's failure to object to that same 20 point assessment, was properly raised on appeal and was the basis for reversal.

CRIMINAL LAW, STREET STOPS, PURSUIT BY POLICE.

GIVEN WHAT THE INFORMANT TOLD THE POLICE, THE FACT THAT DEFENDANT GRABBED AT HIS WAISTBAND WHEN THE POLICE APPROACHED HIM ON THE STREET PROVIDED REASONABLE SUSPICION THE DEFENDANT HAD A WEAPON AND THEREBY JUSTIFIED PURSUIT; THE DISSENT ARGUED THE INFORMATION FROM THE INFORMANT WAS NOT ENOUGH BY ITSELF AND THE PEOPLE DID NOT PROVE DEFDENDANT GRABBED AT HIS WAISTBAND BEFORE OR AFTER THE CHASE STARTED (FOURTH DEPT).

People v Leonard, 2022 NY Slip Op 04468, Fourth Dept 7-8-22

Practice Point: Coupled with information provided from an informant claiming the defendant had guns and was violent, the defendant's grabbing at his waistband as the police approached him on the street provided the police with reasonable suspicion the defendant had a weapon, thereby justifying police pursuit when defendant fled. The dissent argued the information from the informant did not provide reasonable suspicion and the People did not prove defendant grabbed at his waistband before he fled.

FAMILY LAW, CONSENT TO ADOPTION.

FATHER DID NOT DEMONSTRATE HIS CONSENT TO ADOPTION WAS REQUIRED; ALTHOUGH FATHER WAS INCARCERATED FOR MUCH OF THE TIME SINCE THE CHILD WAS BORN, FATHER DID NOT SUPPORT THE CHILD OR MAKE ANY EFFORT TO GAIN PARENTAL ACCESS TO THE CHILD DURING THE PERIODS HE WAS NOT INCARCERATED (SECOND DEPT).

Matter of Statini v Reed, 2022 NY Slip Op 04304, Second Dept 7-6-22

Practice Point: In the context of whether father's consent to adoption of his child (born out-of-wedlock) is required, the fact that father was incarcerated for much of

the time since the child was born did not relieve him of his obligation to support the child. Father made no effort to gain parental access to the child, or to support the child, during the periods he was not in prison. Father's consent to adoption of the child was not required.

FAMILY LAW, NEGLECT.

ONE OF MOTHER'S CHILDREN OPENED A LOCKED WINDOW, TOOK OUT THE SCREEN AND DROPPED HIS SIBLING TWO STORIES WHILE MOTHER WAS HOME; MOTHER COULD NOT HAVE FORESEEN THE INCIDENT; THE NEGLECT FINDING WAS REVERSED (FOURTH DEPT).

Matter of Silas W., 2022 NY Slip Op 04506, Fourth Dept 7-8-22

Practice Point: Mother was in the bathroom with the door open when one of her children opened a locked window, took out the screen and dropped his sibling two stories. That scenario did not support the neglect finding. Neither the children's hygiene nor the condition of the apartment warranted a neglect finding.

FAMILY LAW, QUALIFIED DOMESTICE RELATION ORDER (QDRO).

THE QUALIFIED DOMESTIC RELATION ORDER (QDRO) AS DESCRIBED IN THE STIPULATION OF SETTLEMENT INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE CANNOT BE MODIFIED BY THE COURT; NO APPEAL LIES OF RIGHT FROM A QDRO, AN APPLICATION FOR LEAVE TO APPEAL MUST BE MADE (FOURTH DEPT).

Gay v Gay, 2022 NY Slip Op 04480, Fourth Dept 7-8-22

Practice Point: A qualified domestic relations order (QDRO) as described in a stipulation of settlement incorporated but not merged into the judgment of divorce

cannot be modified by the court. No appeal lies of right from a QDRO, an application for permission to appeal must be made.

FAMILY LAW, TEMPORARY CUSTODY, HEARING REQUIRED.

RE: A MOTION FOR TEMPORARY CUSTODY, IF ALLEGATIONS IN THE AFFIDAVITS ARE CONTROVERTED, A HEARING MUST BE HELD; TO BASE A TEMPORARY-CUSTODY RULING ON CONTROVERTED ALLEGATIONS IS AN ERROR OF LAW (SECOND DEPT).

Chukwuemeka v Chukuemeka, 2022 NY Slip Op 04287, Second Dept 7-6-22

Practice Point: A motion for temporary custody may be decided on the papers if the allegations are not controverted. If allegations are controverted, it is an error of law to determine the issue without a hearing.

FAMILY LAW, JUDGES, ATTORNEYS, ADJOURNMENTS.

THE JUDGE HAD BEEN MADE AWARE A WEEK BEFORE THE HEARING THAT MOTHER'S ATTORNEY WAS NO LONGER REPRESENTING HER; AT THE HEARING MOTHER EXPLAINED SHE HAD COMMUNICATED WITH ANOTHER LAWYER WHO COULD NOT ATTEND THAT DAY; MOTHER ASKED FOR AN ADJOURNMENT; THE JUDGE ABUSED HER DISCRETION IN DENYING THE REQUEST (FOURTH DEPT).

Matter of Dupont v Armstrong, 2022 NY Slip Op 04509, Fourth Dept 7-8-22

Practice Point: Here mother had never requested an adjournment before and the judge was aware mother's relationship with her attorney had broken down. At the time of the hearing mother told the judge she had communicated with another lawyer who could not attend that day and asked for an adjournment. The judge's denial of the request was an abuse of discretion.

FAMILY LAW, JUDGES, COVID-RELATED ADJOURNMENT.

MOTHER WAS EXPERIENCING COVID-LIKE SYMPTOMS AND THE COURT RULES PROHIBITED HER ENTRY; HER REQUEST FOR AN ADJOURMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

Matter of Jiryan S., 2022 NY Slip Op 04514. Fourth Dept 7-8-22

Practice Point: Here mother was experiencing COVID-like symptoms and requested an adjournment. Court rules prohibited her entry into the building. Her request for an adjournment should have been granted.

FORECLOSURE, BANKRUPTCY, CIVIL PROCEDURE.

IN THIS FORECLOSURE ACTION, THE BANKRUPTCY STAY DID NOT TERMINATE WHEN DEFENDANT BOUGHT THE SUBJECT PROPERTY FROM THE BANKRUPTCY ESTATE; THE STAY TERMINATED LATER WHEN DEFENDANT RECEIVED A DISCHARGE FROM THE BANKRUPTCY COURT; THE FORECLOSURE ACTION WAS THEREFORE TIMELY (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Lubonty, 2022 NY Slip Op 04288, Second Dept 7-6-22

Practice Point: Here whether the foreclosure action was timely depended on when the bankruptcy stay terminated. The defendant in the foreclosure action was the "debtor" in the bankruptcy proceeding. The defendant bought the property which was the subject of the foreclosure action from the bankruptcy estate. Based on the applicable bankruptcy statute, the bankruptcy stay did not terminate when defendant bought the property. It terminated later when defendant received a discharge from the Bankruptcy Court. Because the stay terminated on the later date, the foreclosure action was timely.

FORECLOSURE, REFEREE'S REPORT MUST BE SUPPORTED BY BUSINESS RECORDS.

THE PROOF OF THE AMOUNT DUE PURSUANT TO THE MORTGAGE WAS NOT SUPPORTED BY THE RELEVANT BUSINESS RECORDS; THEREFORE THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

U.S. Bank N.A. v Barton, 2022 NY Slip Op 04319, Second Dept 7-6-22

Practice Point: In foreclosure actions where the proof is presented by affidavit, if the affidavit relies on business records which are not attached, the affidavit is inadmissible hearsay.

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

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STRICT COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Federal Natl. Mtge. Assn. v Young, 2022 NY Slip Op 04292, Second Dept 7-6-22

Practice Point: The mailing requirements of RPAPL 1304 must be strictly complied with and compliance must be proven in the bank's summary judgment motion papers. Without proof of strict compliance, the motion must be denied.

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

THE NOTICE OF FORECLOSURE WAS SENT TO DEFENDANT IN AN ENVELOPE WHICH INCLUDED OTHER NOTICES, A VIOLATION OF RPAPL 1304 (SECOND DEPT).

US Bank N.A. v Lanzetta, 2022 NY Slip Op 04322, Second Dept 7-6-22

Practice Point: Here the notice of foreclosure was sent to defendant in an envelope with other notices, a violation of RPAPL 1304, which must be strictly complied with.

INSURANCE LAW, CONTRACT LAW, COVENANT OF GOOD FAITH AND FAIR DEALING.

PLAINTIFF ALLEGED DEFENDANT INSURER BREACHED THE INSURANCE CONTRACT BY FAILING TO PAY THE FULL AMOUNT OF THE COVERAGE; THAT ALLEGATION DOES NOT SUPPORT AN ADDITIONAL CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (FOURTH DEPT).

Brown v Erie Ins. Co., 2022 NY Slip Op 04459, Fourth Dept 7-8-22

Practice Point: In the context of an insurance policy, a cause of action for breach of the implied covenant of good faith and fair dealing must be supported by allegations of the insurer's gross disregard of the insured's interests, which is not demonstrated by the alleged failure to pay the full amount of the coverage (a simple breach of contract).

Table of Contents

LABOR LAW-CONSTRUCTION LAW, STATUTORY AGENT.

HERE THE FRAMING COMPANY HIRED BY THE GENERAL CONTRACTOR AND GIVEN SUPERVISORY CONTROL OVER PLAINTIFF'S WORK WAS LIABLE FOR PLAINTIFF'S INJURY AS A "STATUTORY AGENT" OF THE GENERAL CONTRACTOR WITHIN THE MEANING OF THE LABOR LAW 240 (1) (SECOND DEPT).

Mogrovejo v HG Hous. Dev. Fund Co., Inc., 2022 NY Slip Op 04299, Second Dept 7-6-22

Practice Point: The general contractor hired the framing company. The framing company hired plaintiff's employer to do the framing. Because the framing company had supervisory control over plaintiff's work, it was liable for plaintiff's injury as a statutory agent under Labor Law 240 (1) and could not escape liability by delegating its supervisory role.

LABOR LAW-CONSTRUCTION LAW.

THERE WERE QUESTIONS OF FACT WHETHER THE ACCIDENT—THE COLLAPSE OF A DECK—EVER HAPPENED IN THIS LABOR LAW 24O (1) ACTION; SUPREME COURT REVERSED (FOURTH DEPT).

Hann v S&J Morrell, Inc., 2022 NY Slip Op 04447, Fourth Dept 7-8-22

Practice Point: Unusual Labor Law 240(1) case where Supreme Court granted plaintiff's summary judgment motion but the appellate court held there were questions of fact whether the accident—the collapse of a deck—ever happened.

Table of Contents

LANDLORD-TENANT, CASUALTY CLAUSE IN LEASE, COVID.

THE CASUALTY CLAUSE IN THE LEASE DID NOT APPLY TO EXCUSE DEFENDANT-TENANT'S NONPAYMENT OF RENT DURING THE COVID PANDEMIC; THE FORCE MAJEURE, FRUSTRATION OF PURPOSE AND UNCLEAN HANDS DOCTRINES ALSO DID NOT APPLY (FOURTH DEPT).

Arista Dev., LLC v Clearmind Holdings, LLC, 2022 NY Slip Op 04451, Fourth Dept 7-8-22

Practice Point: The casualty clause in the lease applied only to singular events, not to the COVID pandemic. Defendant's nonpayment of rent during the COVID pandemic was not excused by the terms of the lease.

MEDICAL MALPRACTICE, CONFLICTING EXPERT OPINIONS.

CONFLICTING EXPERT OPINIONS PRECLUDED DISMISSAL OF MEDICAL MALPRACTICE CAUSES OF ACTION STEMMING THE ALLEGED PREMATURE DISCHARGE OF PLAINTIFF FROM EMERGENCY CARE AFTER SHE EXPERIENCED SYMPTOMS OF A STROKE (FOURTH DEPT).

Clark v Rachfal, 2022 NY Slip Op 04472, Fourth Dept 7-8-22

Practice Point: Conflicting expert opinions preclude summary judgment in medical malpractice actions.

Table of Contents

MEDICAL MALPRACTICE, NEGLIGENCE OF NONPARTY DOCTORS.

THE PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN SET ASIDE IN THE INTEREST OF JUSTICE; THE JUDGE PRECLUDED CROSS-EXAMINATION OF PLAINTIFF'S EXPERT ABOUT WHETHER THE OTHER DOCTORS WHO CONSULTED ON PLAINTIFF'S TREATMENT DEPARTED FROM ACCEPTED PRACTICE BY FAILING TO DO FURTHER DIAGNOSTIC TESTING; IF SO, FAULT WOULD BE SHARED PURSUANT TO CPLR 1601 (SECOND DEPT).

Schuster v Sourour, 2022 NY Slip Op 04317, Second Dept 7-6-22

Practice Point: Here the defendant doctor's failure to do further diagnostic testing for cancer was deemed to have decreased the chance of a better outcome. Therefore the plaintiff's verdict was supported by the evidence and properly survived a motion set aside as a matter of law. However, the judge erroneously precluded cross-examination of plaintiff's expert about whether the other doctors who consulted on plaintiff's treatment departed from accepted practice failing to order further diagnostic testing. If so, fault would have been shared pursuant to CPLR 1601.

MENTAL HYGIENE LAW, GUARDIANSHIPS, AUTISM NOT A DISABILITY.

PETITIONER, WHO IS MILDLY AUTISTIC, DEMONSTRATED (1) HE IS NOT DISABLED WITHIN THE MEANING OF SURROGATE'S COURT PROCEDURE ACT (SCPA) ARTICLE 17-A AND (2) HE UNDERSTANDS AND IS ABLE TO MANAGE HIS FINANCIAL AFFAIRS; THE PETITION TO DISSOLVE THE GUARDIANSHIP OF HIS PROPERTY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Matter of Robert C. B., 2022 NY Slip Op 04301, Second Dept 7-6-22

Practice Point: The medical records demonstrated petitioner's mild autism is not a disability within the meaning of the Surrogate's Court Procedure Act. Petitioner demonstrated through his own testimony that he understands and is able to manage his financial affairs. The petition to dissolve the guardianship of his property should have been granted.

MUNICIPAL LAW, FAILURE TO SCHEDULE 50-H HEARING.

PLAINTIFF'S FAILURE TO SCHEDULE A 50-H HEARING AFTER ADJOURNING IT TWICE REQUIRED DISMISSAL OF THE RELEVANT CAUSES OF ACTION IN THIS DEFAMATION SUIT AGAINST A COUNTY EXECUTIVE (FOURTH DEPT).

Landa v Poloncarz, 2022 NY Slip Op 04490, Fourth Dept 7-8-22

Practice Point: Here plaintiff twice adjourned the 50-h hearing and then did not respond to defendant's attempt to schedule a third. Under those circumstances it was plaintiff's responsibility to schedule a hearing. Failure to do so required dismissal of the relevant causes of action (without prejudice).

Table of Contents

NEGLIGENCE, SUMMARY JUDGMENT MOTION MUST ADDRESS AFFIRMATIVE DEFENSES.

A PLAINTIFF BRINGING A SUMMARY JUDGMENT MOTION MUST ADDRESS AFFIRMATIVE DEFENSES RAISED IN THE ANSWER; HERE IN THIS TRAFFIC ACCIDENT CASE THE GRAVES AMENDMENT, WHICH PROVIDES THAT THE OWNER OF A LEASED CAR IS NOT LIABLE FOR THE NEGLIGENCE OF THE DRIVER, WAS RAISED AS AN AFFIRMATIVE DEFENSE; BECAUSE PLAINTIFF DID NOT ADDRESS THAT ISSUE IN THE SUMMARY JUDGMENT MOTION, THE MOTION SHOULD HAVE BEEN DENIED (SECOND DEPT).

Pierrelouis v Kuten, 2022 NY Slip Op 04314, Second Dept 7-6-22

Practice Point: A plaintiff bringing a motion for summary judgment must address affirmative defenses raised in the answer. Failure to do so requires denial of the motion. Here the Graves Amendment was raised as an affirmative defense in this traffic accident case. The Graver Amendment provides that companies in the business of leasing cars are not vicariously liable for the negligence of the drivers. Plaintiff did not address that defense in the motion for summary judgment.

NEGLIGENCE, WORKERS' COMPENSATION, ACCIDENTAL DISCHARGE OF A FIREARM BY COWORKER.

THE ACCIDENTAL DISCHARGE OF A FIREARM BY PLAINTIFF'S COWORKER DURING A FIREARMS TRAINING SESSION FOR ARMORED-CAR GUARDS WAS WITHIN THE DEFENDANT COWORKER'S SCOPE OF EMPLOYMENT; WORKERS' COMPENSATION IS PLAINTIFF'S EXCLUSIVE REMEDY (FOURTH DEPT).

Guida v Rivera Investigations, Inc., 2022 NY Slip Op 04443, Fourth Dept 7-8-22

Practice Point: During a firearms training course required by plaintiff's employer, a coworker negligently took out his loaded firearm which accidentally discharged, striking plaintiff. Because the coworker's actions, although negligent, were within the scope of the coworker's employment, Workers' Compensation was plaintiff's exclusive remedy.

NEGLIGENCE, WORKERS' COMPENSATION, COLLATERAL ESTOPPEL.

THE IDENTITY OF PLAINTIFF'S EMPLOYER WAS NOT A DISPUTED ISSUE IN THE WORKERS' COMPENSATION PROCEEDING; THEREFORE DEFENDANTS WERE NOT COLLATERALLY ESTOPPED FROM CONTESTING THE IDENTITY OF PLAINTIFF'S EMPLOYER IN THIS RELATED NEGLIGENCE ACTION AND ARGUING PLAINTIFF'S EXCLUSIVE REMEDY IS WORKERS' COMPENSATION; HOWEVER DEFENDANTS PRESENTED CONFLICTING EVIDENCE OF THE IDENTITY OF PLAINTIFF'S EMPLOYER AND THEREFORE WERE NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

Calixte v City of New York, 2022 NY Slip Op 04286, Second Dept 7-6-22

Practice Point: In this traffic accident case the identity of plaintiff's employer was not in dispute in the prior Workers' Compensation proceeding. The collateral estoppel doctrine, therefore, did not apply and defendant can contest the identity of

plaintiff's employer in the related negligence proceeding. If both plaintiff and defendant were employees of the same employer, Workers' Compensation would be plaintiff's only remedy.

REAL ESTATE, CONTRACT LAW, MERGER OF PURCHASE AGREEMENT AND DEED.

PLAINTIFFS ALLEGED THE CONTRACT FOR THE PURCHASE OF LAND INCLUDED A PARCEL OF LAND NOT INCLUDED IN THE DEED AND SOUGHT A CORRECTED DEED; PURSUANT TO THE MERGER DOCTRINE, THE CONTRACT AND THE DEED MERGED AT THE CLOSING AND THE PROPERTY DESCRIPTION IN THE DEED IS DEEMED TO REFLECT THE FINAL AGREEMENT OF THE PARTIES (ABSENT FRAUD OR AMBIGUITY IN THE DEED); PLAINTIFFS' COMPLAINT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

Pickard v Campbell, 2022 NY Slip Op 04442, Fourth Dept 7-8-22

Practice Point: Any discrepancy between the property as described in a real estate contract and as described in the deed is resolved by the merger doctrine. Absent fraud or ambiguity in the deed, the deed description controls.

SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT CREATE OR HAVE CONSTRUCTIVE KNOWLEDGE OF THE PUDDLE ON THE FLOOR WHERE PLAINTIFF SLIPPED AND FELL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

Propst v Niagara County Jail, 2022 NY Slip Op 04486, Fourth Dept 7-8-22

Practice Point: To warrant summary judgment in a slip and fall case, a defendant must show it did not create or have notice of the condition, here a puddle on the floor, which caused plaintiff to fall. The absence of constructive notice is usually demonstrated by an inspection of the area close in time to the fall. Here the defendants presented evidence of an inspection an hour and 45 minutes before the fall, which was deemed to raise a question of fact on constructive notice for the jury.

TRUSTS AND ESTATES, CONTRACT LAW, DEMENTIA IS NOT INCAPACITY OR INCOMPETENCE.

PETITIONER SOUGHT TO DEMONSTRATE THAT HIS DECEASED MOTHER DID NOT HAVE THE CAPACITY TO EXECUTE A DOCUMENT DESIGNATING RESPONDENT AS HER AGENT TO CONTROL THE DISPOSITION OF HER REMAINS; PETITIONER SUBMITTED PROOF HIS MOTHER HAD BEEN DIAGNOSED WITH DEMENTIA, BUT DEMENTIA IS NOT THE EQUIVALENT OF INCOMPETENCE OR INCAPACITY; THE PETITION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

Matter of Hurlbut v Leo M. Bean Funeral Home, Inc., 2022 NY Slip Op 04439, Fourth Dept 7-8-22

Practice Point: A proceeding pursuant to the Public Health Law to determine the disposition of the remains of a decedent is in the nature of a special proceeding and

is handled like a summary judgment motion. Here the petitioner did not raise a question of fact about whether the decedent had the capacity to designate the respondent as her agent to control the disposition of her remains. Proof decedent had been diagnosed with dementia did not raise a question of fact about decedent's competence or capacity.