NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
July 25 – 29, 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 25 – 29, 2022, and Posted on the New York Appellate Digest Website on Monday, August 1, 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. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep York Place in the Reversal Newsletter. Copyright 2022 New York Appellate Digest, LLC

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CONTRACT LAW, REAL PROPERTY LAW, LIQUIDATED DAMAGES.

RENOVATION WORK ON DEFENDANTS' TOWNHOUSE RENDERED PLAINTIFFS' TOWNHOUSE, WHICH WAS NEXT DOOR, UNINHABITABLE; A LICENSE AGREEMENT WHICH GRANTED DEFENDANTS ACCESS TO PLAINTIFFS' TOWNHOUSE INCLUDED A LIQUIDATED DAMAGES PROVISION WHICH WAS VALID AND ENFORCEABLE; PLAINTIFFS' ACTION SOUGHT SOME EQUITABLE RELIEF BUT PRIMARILY SOUGHT MONEY DAMAGES; THEREFORE PLANTIFFS' DEMAND FOR A JURY TRIAL SHOULD NOT HAVE BEEN STRUCK (FIRST DEPT).

Seymour v Hovnanian, 2022 NY Slip Op 04705, First Dept 7-26-22

Practice Point: This decision includes a good discussion of how the validity of a liquidated-damages provision should be analyzed. The court noted that, although plaintiffs' action sought some equitable relief, it primarily sought money damages. Therefore plaintiffs' demand for a jury trial should not have been struck.

CRIMINAL LAW, CRIMINALLY NEGLIGENT HOMICIDE, TRAFFIC ACCIDENTS.

ALTHOUGH DEFENDANT WAS SPEEDING AT THE TIME HE LOST CONTROL OF THE CAR, WENT DOWN AN EMBANKMENT AND STRUCK A TREE, KILLING A PASSENGER, THE EVIDENCE DID NOT DEMONSTRATE "DANGEROUS SPEEDING;" THE EVIDENCE WAS NOT LEGALLY SUFFICIENT TO SUPPORT THE CRIMINALLY NEGLIGENT HOMICIDE AND RECKLESS DRIVING CHARGES; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

People v Cardona, 2022 NY Slip Op 04733, Second Dept 7-27-22

Practice Point: Defendant was speeding (74 miles per hour on an exit ramp) when he lost control of the car and struck a tree, killing a passenger. The evidence did not demonstrate "dangerous speeding." Therefore the criminally negligent homicide and reckless driving convictions were not supported by legally sufficient evidence.

CRIMINAL LAW, GUILTY PLEAS, FAILURE TO INFORM DEFENDANT OF POSTRELEASE SUPERVISION.

FAILURE TO INFORM THE DEFENDANT OF THE SPECIFIC OR MAXIMUM PERIOD OF POSTRELEASE SUPERVISION RENDERED THE GUILTY PLEA INVOLUNTARY (SECOND DEPT).

People v Wolfe, 2022 NY Slip Op 04745, Second Dept 7-27-22

Practice Point: Failure to inform the defendant of the specific or maximum period of postrelease supervision aspect of the sentence rendered the guilty plea involuntary.

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CRIMINAL LAW, HABEAS CORPUS, BAIL, SPEEDY TRIAL.

THE PEOPLE WERE CHARGED WITH THE DELAY IN RESPONDING TO DEFENDANT'S OMNIBUS MOTION ENTITLING DEFENDANT TO RELEASE ON BAIL PURSUANT TO THE SPEEDY TRIAL STATUTE (SECOND DEPT).

People v Molina, 2022 NY Slip Op 04778, Second Dept 7-29-22

Practice Point: Plaintiff had been incarcerated for more than the 90 days allowed by CPL 30.30 and the 13-day delay occasioned by the People's failure to timely respond to defendant's omnibus motion was not adequately explained. Therefore defendant's habeas corpus petition was sustained and he was entitled to release on bail which he is capable of meeting or on his own recognizance.

CRIMINAL LAW, INCLUSORY CONCURRENT COUNT.

BURGLARY SECOND IS AN INCLUSORY CONCURRENT COUNT OF BURGLARY SECOND AS A SEXUALLY MOTIVATED FELONY (SECOND DEPT).

People v Hay, 2022 NY Slip Op 04737, Second Dept 7-27-22

Practice Point: Burglary second is an inclusory concurrent count of burglary second as a sexually motivated felony.

CRIMINAL LAW, MOTION TO VACATE SENTENCE, YOUTHFUL OFFENDERS, EFFECT OF CANCER DIAGNOSIS.

IN A PARTIAL CONCURRENCE/PARTIAL DISSENT TWO JUSTICES WOULD HAVE REDUCED DEFENDANT'S SENTENCE TO TIME SERVED IN THE INTEREST OF JUSTICE BECAUSE OF THE EVIDENCE THAT DEFENDANT'S LIFE-EXPECTANCY AFTER REMOVAL OF A BRAIN TUMOR IS TWO TO THREE YEARS, THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE (18), AND THE DEFENDANT'S ABSENCE FROM THE ROOM WHERE THE VICTIM WAS STABBED (THIRD DEPT).

People v McGill, 2022 NY Slip Op 04762, Third Dept 7-28-22

Practice Point: County Court properly declined to adjudicate defendant a youthful offender and properly denied his motion to vacate his robbery conviction. Two justices, however, argued the defendant's brain tumor and 2-to-3-year life-expectancy warranted reducing defendant's sentence to time served in the interest of justice.

CRIMINAL LAW, SERIOUS PHYSICAL INJURY.

THE EVIDENCE THE COMPLAINANT SUFFERED "SERIOUS PHYSICAL INJURY" FROM MULTIPLE STAB WOUNDS WAS LEGALLY INSUFFICIENT; CONVICTIONS REDUCED TO ATTEMPTED GANG ASSAULT, ASSAULT AND ROBBERY (SECOND DEPT).

People v Mayancela, 2022 NY Slip Op 04741, Second Dept 7-27-22

Practice Point: Here, although the complainant was stabbed multiple times, the wounds did not damage any organs and were treated with sutures. Therefore the proof the complainant suffered "serious physical injury" was legally insufficient. The convictions were reduced to attempted gang assault, assault and robbery.

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CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, MOOTNESS.

PETITIONER SEX OFFENDER'S APPEAL FROM THE DENIAL OF HIS HABEAS CORPUS PETITION WAS MOOT BECAUSE APPROPRIATE HOUSING HAD BEEN FOUND WHILE THE APPEAL WAS PENDING; THE THIRD DEPARTMENT CONSIDERED THE APPEAL UNDER THE EXCEPTION-TO-THE-MOOTNESS-DOCTRINE AND REITERATED THAT WHEN A LEVEL THREE SEX OFFENDER HAS COMPLETED HIS MAXIMUM PRISON TIME AND SUITABLE HOUSING IS NOT AVAILABLE, HE MUST BE TRANSFERRED TO A RESIDENTIAL TREATMENT FACILITY (RTF) (THIRD DEPT).

People ex rel. Jones v Collado, 2022 NY Slip Op 04768, Second Dept 7-28-22

Practice Point: Here the appeal from the denial of petitioner-sex-offender's habeas corpus petition was moot because appropriate post-release housing had been found. The Third Department considered the appeal pursuant to the exception-to-the-mootness-doctrine to reiterate that when a level three sex offender has completed his maximum prison time he must be placed in SARA compliant housing or, or if housing is not available, in a residential treatment facility (RTF).

DEBTOR-CREDITOR, FORECLOSURE, ACKNOWLEDGMENT OF DEBT, STATUTE OF LIMITATIONS.

THE BANK DID NOT PRESENT EVIDENCE IN ADMISSIBLE FORM TO SUPPORT ITS CLAIM THAT DEFENDANT ACKNOWLEDGED THE MORTGAGE DEBT, STARTING THE STATUTE OF LIMITATIONS ANEW; DEFENDANT'S MOTION TO DISMISS THE FORECLOSURE ACTION AS UNTIMELY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Bayview Loan Servicing, LLC v Paniagua, 2022 NY Slip Op 04708, Second Dept 7-27-22

Practice Point: Plaintiff bank did not demonstrate defendant acknowledged the mortgage debt in a loan modification agreement (thereby re-starting the statute of limitation for a foreclosure action). The evidence of the debt-acknowledgment presented by the bank did not meet the requirements of General Obligations Law 17-101. Therefore the statute of limitations was not revived. Defendant's motion to dismiss the foreclosure complaint as untimely should have been granted.

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

PETITIONER WAS PROVIDED WITH THE WRONG MISBEHAVIOR REPORT THEREBY PREVENTING HIM FROM FORMULATING A DEFENSE AND QUESTIONS FOR THE WITNESSES; THE MISBEHAVIOR DETERMINATION WAS ANNULLED AND A NEW HEARING ORDERED (THIRD DEPT).

Matter of Saunders v Annucci .2022 NY Slip Op 04772, Third Dept 7-28-22

Practice Point: The failure to provide the petitioner with the correct misbehavior report prevented the petitioner from formulating a defense and relevant questions for the witnesses. The misbehavior determination was annulled and a new hearing ordered.

EMPLOYMENT LAW, FREELANCE.

ACTIONS PURSUANT TO NEW YORK CITY'S "FREELANCE ISN'T FREE ACT" (FIFA) WHICH ALLEGED DEFENDANTS FAILED TO PAY PLAINTIFFS-FREELANCERS SURVIVED MOTIONS TO DISMISS (FIRST DEPT).

Chen v Romona Keveza Collection LLC, 2022 NY Slip Op 04702, First Dept 7-26-22

Practice Point: New York City enacted the "Freelance Isn't Free Act" (FIFA) in 2017–the first law in the nation to specifically address the failure to pay freelancers.

FAMILY LAW, VISITATION.

30-YEAR-OLD ALLEGATIONS OF FATHER'S SEXUAL ABUSE OF HIS 10-YEAR-OLD NIECE DID NOT JUSTIFY THE LIMITED PARENTING TIME AWARDED FATHER; FATHER HAD DEMONSTRATED HIS ABILITY TO PROVIDE FOR THE CHILDREN'S WELL-BEING AND THE CASEWORKERS HAD NO CONCERNS ABOUT FATHER (THIRD DEPT).

Matter of Benjamin V. v Shantika W., 2022 NY Slip Op 04774, Third Dept 7-28-22

Practice Point: Allegations of sexual abuse by father's 10-yearr-old niece made 30 years ago did not justify the limited supervised parenting time awarded father. The record demonstrated father's ability to provide for the children's well-being and the caseworkers testified they had no concerns about father.

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FAMILY LAW, VISITATION.

GRANDMOTHER'S PETITION TO MODIFY THE VISITATION ARRANGEMENT SHOULD HAVE BEEN GRANTED; MOTHER'S VIOLATION OF THE ORDER ALLOWING VISITATION BY GRANDMOTHER CONSTITUTED A CHANGE IN CIRCUMSTANCES (SECOND DEPT).

Matter of Dubose v Jackson, 2022 NY Slip Op 04723, Second Dept 7-27-22

Practice Point: Here grandmother had been awarded visitation rights with the child. Mother's violation of the order allowing visitation by grandmother constituted a change in circumstances warranting the granting of grandmother's petition and modification of the visitation schedule.

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

Pennymac Corp. v Levy, 2022 NY Slip Op 04732, Second Dept 7-27-22

Practice Point: The bank in a foreclosure action must demonstrate strict compliance with the requirements for mailing the RPAPL 1304 notice. Failure to demonstrate strict compliance with the mailing requirements with admissible evidence precludes summary judgment.

LABOR LAW-CONSTRUCTION LAW, FAILURE TO FOLLOW INSTRUCTION.

PLAINTIFF FELL THROUGH PLANKING WHICH DID NOT ADEQUATELY PROTECT A SHAFT OPENING; THE FACT THAT PLAINTIFF'S FOREMAN INSTRUCTED PLAINTIFF NOT TO ENTER THE SHAFT SPEAKS TO COMPARATIVE NEGLIGENCE WHICH IS NOT A BAR TO SUMMARY JUDGMENT ON A LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

Zong Wang Yang v City of New York, 2022 NY Slip Op 04761, Second Dept 7-27-22

Practice Point: Plaintiff fell through planking placed over a shaft after he was instructed not to enter the inadequately protected shaft-area. Failure to heed the instruction speaks to comparative negligence which is not a bar to summary judgment on a Labor Law 240(1) cause of action.

NEGLIGENCE, HOMEOWNER'S LIABILITY, ASSAULT IN HOME.

DEFENDANT HOMEOWNER DID NOT HAVE THE OPPORTUNITY TO CONTROL THE CONDUCT OF HER ESTRANGED HUSBAND WHO ALLEGEDLY ASSAULTED PLAINTIFF IN DEFENDANT'S HOME; THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES WAS THE ESTRANGED HUSBAND'S ACT; DEFENDANT HOMEOWNER'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Maruca v DiGesu, 2022 NY Slip Op 04719, Second Dept 7-29-22

Practice Point; Homeowners have a duty to act reasonably to prevent harm to those oh their property. Here, however, defendant homeowner did not have the opportunity to control her estranged husband's conduct at the time he allegedly assaulted the plaintiff in defendant's home. Therefore the sole proximate of plaintiff's injuries was the estranged husband's act and defendant's motion to dismiss the complaint should have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE SHOULD HAVE BEEN GRANTED: ALTHOUGH A PLAINTIFF'S COMPARATIVE NEGLIGENCE IS NOT A BAR TO SUMMARY JUDGMENT, THE ISSUE CAN BE DECIDED AT THE SUMMARY JUDGMENT STAGE WHERE PLAINTIFF MOVES FOR SUMMARY JUDGMENT DISMISSING DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE; PLAINTIFF'S MOTION WAS NOT PREMATURE (SECOND DEPT).

Xiuying Cui v Hussain, 2022 NY Slip Op 04759, Second Dept 7-27-22

Practice Point: Although summary judgment in a traffic accident case can be awarded without consideration of plaintiff's comparative negligence, the issue can be considered at the summary judgment stage when the plaintiff moves for summary judgment dismissing defendant's comparative-negligence affirmative defense.

Practice Point: Here the court found that plaintiff's summary judgment motion was not premature because the defendant did not demonstrate further discovery would lead to relevant evidence.

NEGLIGENCE, TRAFFIC ACCIDENTS, EVIDENCE, INSURANCE COVERAGE.

PASSING REFERENCES TO DEFENDANTS' INSURANCE COVERAGE IN THE TRAFFIC ACCIDENT CASE DID NOT WARRANT SETTING ASIDE PLAINTIFF'S VERDICT (FIRST DEPT).

Gbadehan v Williams, 2022 NY Slip Op 04703, First Dept 7-26-22

Practice Point: Passing references to defendants' insurance coverage in this traffic accident case did not warrant setting aside plaintiffs' verdict.

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ZONING, LAND USE, TOWN LAW, CIVIL PROCEDURE.

THE TOWN BOARD OF APPEALS' FAILURE TO ISSUE A DECISION ON PETITIONER'S APPLICATION FOR A SPECIAL EXCEPTION PERMIT AND AN AREA VARIANCE WITHIN THE 62 DAYS PRESCRIBED BY THE TOWN LAW WAS NOT A DENIAL BY DEFAULT; THEREFORE SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION AND THE MATTER WAS NOT RIPE FOR REVIEW; SUPREME COURT SHOULD NOT HAVE ANNULLED THE "DEFAULT DENIAL" AND ORDERED THE TOWN TO ISSUE THE PERMIT AND VARIANCE (SECOND DEPT).

Matter of 999 Hempstead Turnpike, LLC v Board of Appeals of the Town of Hempstead, 2022 NY Slip Op 04721, Second Dept 7-29-22

Practice Point: A town Board of Appeals' failure to issue a decision on an application for a permit and an area variance within the 62 days prescribed by the Town Law is not a denial of the petition by default. Supreme Court, therefore, did not have subject matter jurisdiction over he purported "denial by default" and the matter was not ripe for review.

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