

NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 29 – September 2, 2022, and Posted on the New York Appellate Digest Website Monday, September 5, 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 Your Place in the Reversal Newsletter.
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Weekly Reversal
Newsletter
August 29 –
September 2, 2022

Contents

CIVIL PROCEDURE, DEFAULT, REASONABLE EXCUSE	4
DEFENDANT DID NOT OFFER A REASONABLE EXCUSE FOR FAILING TO TIMELY ANSWER THE COMPLAINT; DEFENDANT’S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).	4
CIVIL PROCEDURE, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.	4
DEFENDANTS’ REPEATED FAILURES TO COMPLY WITH DISCOVERY DEMANDS WARRANTED STRIKING THE ANSWER AND COUNTERCLAIMS; SUPREME COURT HAD IMPOSED LESS SEVERE SANCTIONS, BUT THE APPELLATE COURT REVERSED AND IMPOSED THE ULTIMATE SANCTION—A RARE EXAMPLE OF CONDUCT DEEMED “WILLFUL AND CONTUMACIOUS” (SECOND DEPT).	4
CONTRACT LAW, SECURITIES, RESIDENTIAL-MORTGAGE-BACKED-SECURITIES.	5
PLAINTIFFS ALLEGED THE RESIDENTIAL-MORTGAGE-BACKED-SECURITIES ISSUED BY THE DEFENDANT TRUSTEES WERE WORTHLESS BECAUSE OF DEFENDANTS’ BREACHES OF CONTRACTUAL, FIDUCIARY AND STATUTORY DUTIES; MOST (BUT NOT ALL) OF DEFENDANTS’ MOTIONS TO DISMISS WERE DENIED BASED UPON CONTRACT-INTERPRETATION PRINCIPLES (FIRST DEPT).	5
CONTRACT LAW, UNSIGNED CONTRACT ENFORCEABLE.	6
ALTHOUGH THE HOME-INSPECTION CONTRACT WAS NOT SIGNED, PLAINTIFF TESTIFIED SHE WAS AWARE OF THE TERMS OF THE CONTRACT AND AGREED TO THEM; THEREFORE THE UNSIGNED CONTRACT WAS ENFORCEABLE AND PLAINTIFF’S FAILURE TO COMPLY WITH THE NOTIFICATION PROVISION ENTITLED DEFENDANT TO SUMMARY JUDGMENT (SECOND DEPT).	6
CRIMINAL LAW, WAIVER OF INDICTMENT, APPEALS.	6
THE RECORD WAS SILENT ON WHETHER DEFENDANT SIGNED THE WAIVER OF INDICTMENT IN OPEN COURT; DEFENDANT’S GUILTY PLEA WAS VACATED AND THE SUPERIOR COURT INFORMATION WAS DISMISSED (THIRD DEPT).	6
DISCIPLINARY HEARINGS (INMATES).	7
AN INMATE’S RELEASE ON PAROLE DOES NOT RENDER HIS APPEAL OF A DISCIPLINARY DETERMINATION MOOT (THIRD DEPT).	7
FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR.....	7
ONCE PLAINTIFF’S FORECLOSURE ACTION WAS DISCONTINUED BY STIPULATION, THE FORECLOSURE COMPLAINT COULD BE AMENDED TO SEEK RECOVERY ON THE NOTE (SECOND DEPT).....	7

[Table of Contents](#)

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), SEPARATE ENVELOPE RULE. 8

THE BANK DID NOT COMPLY WITH THE “SEPARATE ENVELOPE” RULE OF RPAPL 1304 WHICH REQUIRES THAT NOTHING ELSE BE INCLUDED IN THE ENVELOPE WITH THE NOTICE OF FORECLOSURE; THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT). 8

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), STANDING. 8

EVIDENCE OF COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304 FIRST SUBMITTED IN REPLY SHOULD NOT HAVE BEEN CONSIDERED; THE EVIDENCE THE BANK HAD STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT). 8

MENTAL HYGIENE LAW, TRUSTS AND ESTATES, GUARDIAN OF THE PROPERTY OF INCAPACITATED PERSON, ADMINISTRATIVE EXPENSES. 9

AFTER THE INCAPACITATED PERSON’S DEATH, THE GUARDIAN OF THE PROPERTY IS ALLOWED TO PAY ADMINISTRATIVE EXPENSES, BUT NOT CLAIMS UNRELATED TO ADMINISTRATIVE EXPENSES, FROM THE GUARDIANSHIP ESTATE (SECOND DEPT). 9

NEGLIGENCE, BICYCLE-PEDESTRIAN COLLISION, EXPERT EVIDENCE. 9

IN THIS BICYCLE-PEDESTRIAN COLLISION CASE WHERE THERE WAS A VIDEO OF THE INCIDENT, DEFENDANT’S EXPERT DEMONSTRATED, USING FACTS IN THE RECORD, THAT DEFENDANT BICYCLIST HAD THE RIGHT OF WAY, WAS TRAVELLING AT A REASONABLE SPEED, AND WAS NOT ABLE TO AVOID THE COLLISION WHEN PLAINTIFF STEPPED OFF THE CURB; PLAINTIFF’S EXPERT’S OPINION TO THE CONTRARY WAS NOT SUPPORTED BY FACTS IN THE RECORD; DEFENDANT’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT). 9

NEGLIGENCE, FALLING TREE LIMB, EXPERT EVIDENCE. 10

PLAINTIFF’S EXPERT’S AFFIDAVIT DID NOT RAISE A QUESTION OF FACT WHETHER THE DEFENDANT PROPERTY OWNERS HAD CONSTRUCTIVE KNOWLEDGE OF THE DETERIORATION OF A TREE LIMB WHICH FELL ON PLAINTIFF’S CAR (SECOND DEPT). 10

NEGLIGENCE, SLIP AND FALLS, IMPROPER USE OF ESCALATOR, EXPERT EVIDENCE. 10

THE 15-YEAR-OLD PLAINTIFF WAS RIDING THE ESCALATOR IN DEFENDANT’S THEATER IMPROPERLY WHEN HE FELL OFF BACKWARDS TO THE FLOOR; THERE WAS NO EVIDENCE OF A DEFECTIVE CONDITION AND PLAINTIFF’S EXPERT AFFIDAVIT WAS SPECULATIVE; THE THEATER’S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT). 10

[Table of Contents](#)

NEGLIGENCE, TRAFFIC ACCIDENTS, DAMAGES..... 11

THE JURY FOUND PLAINTIFF SUFFERED PERMANENT INJURY IN THE TRAFFIC ACCIDENT BUT AWARDED \$0 DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE MEDICAL EXPENSES; THE DAMAGES AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD HAVE BEEN SET ASIDE (SECOND DEPT)..... 11

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS..... 11

IN THIS REAR-END COLLISION CASE, THE ALLEGATION PLAINTIFF STOPPED SUDDENLY WAS NOT SUFFICIENT TO RAISE A QUESTION OF FACT AND DID NOT PRECLUDE THE DISMISSAL OF THE COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT)..... 11

PISTOL PERMITS, CONSTITUTIONAL LAW..... 12

PETITIONER’S APPLICATION FOR A PISTOL PERMIT SHOULD HAVE BEEN GRANTED; NEW YORK’S “PROPER CAUSE” STANDARD IS NO LONGER APPLICABLE PURSUANT THE US SUPREME COURT’S RULING IN “NEW YORK STATE RIFLE & PISTOL ASSN V BRUEN” (FIRST DEPT). 12

RETIREMENT AND SOCIAL SECURITY LAW, DISABILITY, EVIDENCE. 12

THE RULING THAT PETITIONER-CORRECTION-OFFICER’S DISABLING CONDITION WAS NOT CAUSED BY AN ALTERCATION WITH AN INMATE WAS SUPPORTED BY “SUBSTANTIAL EVIDENCE;” “SUBSTANTIAL EVIDENCE” IN THIS CONTEXT IS DEFINED (SECOND DEPT)..... 12

CIVIL PROCEDURE, DEFAULT, REASONABLE EXCUSE.

DEFENDANT DID NOT OFFER A REASONABLE EXCUSE FOR FAILING TO TIMELY ANSWER THE COMPLAINT; DEFENDANT’S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[195-197 Hewes, LLC v Citimortgage, Inc., 2022 NY Slip Op 05065, Second Dept 8-31-22](#)

Practice Point: Here defendant’s failure to offer a reasonable excuse for failing to timely answer the complaint required denial of defendant’s motion to vacate the default judgment. Apparently the COVID toll of time limits did not suffice.

AUGUST 31, 2022

CIVIL PROCEDURE, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.

DEFENDANTS’ REPEATED FAILURES TO COMPLY WITH DISCOVERY DEMANDS WARRANTED STRIKING THE ANSWER AND COUNTERCLAIMS; SUPREME COURT HAD IMPOSED LESS SEVERE SANCTIONS, BUT THE APPELLATE COURT REVERSED AND IMPOSED THE ULTIMATE SANCTION—A RARE EXAMPLE OF CONDUCT DEEMED “WILLFUL AND CONTUMACIOUS” (SECOND DEPT).

[255 Butler Assoc., LLC v 255 Butler, LLC, 2022 NY Slip Op 05067, Second Dept 8-31-22](#)

Practice Point: This is a rare case where Supreme Court’s sanctions for defendants’ failures to comply with discovery demands were deemed inadequate. The appellate court struck defendants’ answer and counterclaims finding defendants’ conduct “willful and contumacious.”

AUGUST 31, 2022

CONTRACT LAW, SECURITIES, RESIDENTIAL-MORTGAGE-BACKED-SECURITIES.

PLAINTIFFS ALLEGED THE RESIDENTIAL-MORTGAGE-BACKED-SECURITIES ISSUED BY THE DEFENDANT TRUSTEES WERE WORTHLESS BECAUSE OF DEFENDANTS' BREACHES OF CONTRACTUAL, FIDUCIARY AND STATUTORY DUTIES; MOST (BUT NOT ALL) OF DEFENDANTS' MOTIONS TO DISMISS WERE DENIED BASED UPON CONTRACT-INTERPRETATION PRINCIPLES (FIRST DEPT).

[IKB Intl., S.A. v Wells Fargo Bank, N.A., 2022 NY Slip Op 05058, First Dept 8-30-22](#)

Practice Point: The plaintiffs in this residential-mortgage-backed-securities action alleged the certificates issued by the defendant trustees were almost worthless as a result of the defendants' breach of contract and fiduciary and statutory duties. Most of the plaintiffs' causes of action survived defendants' motions to dismiss. The decision includes a comprehensive discussion of the law of contract-interpretation which is worth consulting.

AUGUST 30, 2022

[Table of Contents](#)

CONTRACT LAW, UNSIGNED CONTRACT ENFORCEABLE.

ALTHOUGH THE HOME-INSPECTION CONTRACT WAS NOT SIGNED, PLAINTIFF TESTIFIED SHE WAS AWARE OF THE TERMS OF THE CONTRACT AND AGREED TO THEM; THEREFORE THE UNSIGNED CONTRACT WAS ENFORCEABLE AND PLAINTIFF'S FAILURE TO COMPLY WITH THE NOTIFICATION PROVISION ENTITLED DEFENDANT TO SUMMARY JUDGMENT (SECOND DEPT).

[Cotich v Town of Newburgh, 2022 NY Slip Op 05075, Second Dept 8-31-22](#)

Practice Point: Although the home inspection contract was not signed, plaintiff testified she was aware of the terms and agreed to them. The contract was therefore enforceable and plaintiff's failure to comply with the notification provision entitled defendant to summary judgment.

AUGUST 31, 2022

CRIMINAL LAW, WAIVER OF INDICTMENT, APPEALS.

THE RECORD WAS SILENT ON WHETHER DEFENDANT SIGNED THE WAIVER OF INDICTMENT IN OPEN COURT; DEFENDANT'S GUILTY PLEA WAS VACATED AND THE SUPERIOR COURT INFORMATION WAS DISMISSED (THIRD DEPT).

[People v Rickman, 2022 NY Slip Op 05112, Third Dept 9-1-22](#)

Practice Point: If the record does not reflect that the waiver of indictment was signed in open court, the defendant's guilty plea must be vacated and the superior court information dismissed.

SEPTEMBER 1, 2022

DISCIPLINARY HEARINGS (INMATES).

AN INMATE’S RELEASE ON PAROLE DOES NOT RENDER HIS APPEAL OF A DISCIPLINARY DETERMINATION MOOT (THIRD DEPT).

[Matter of Ryhal v Annucci, 2022 NY Slip Op 05117, Third Dept 9-1-22](#)

Practice Point: An inmate’s conditional release to parole does not render the inmate’s appeal of a disciplinary determination moot.

SEPTEMBER 1, 2022

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

ONCE PLAINTIFF’S FORECLOSURE ACTION WAS DISCONTINUED BY STIPULATION, THE FORECLOSURE COMPLAINT COULD BE AMENDED TO SEEK RECOVERY ON THE NOTE (SECOND DEPT).

[Stewart Tit. Ins. Co. v Zaltsman, 2022 NY Slip Op 05107, Second Dept 8-31-22](#)

Practice Point: Here the foreclosure action was discontinued and plaintiff was allowed to amend the foreclosure complaint to seek recovery on the note.

AUGUST 31, 2022

[Table of Contents](#)

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

THE BANK DID NOT COMPLY WITH THE “SEPARATE ENVELOPE” RULE OF RPAPL 1304 WHICH REQUIRES THAT NOTHING ELSE BE INCLUDED IN THE ENVELOPE WITH THE NOTICE OF FORECLOSURE; THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

[Deutsche Bank Natl. Trust Co. v Ghosh, 2022 NY Slip Op 05076, Second Dept 8-31-22](#)

Practice Point: If the bank includes other information in the envelope containing the notice of foreclosure, the bank has not complied with RPAPL 1304 and is not entitled to summary judgment.

AUGUST 31, 2022

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

EVIDENCE OF COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304 FIRST SUBMITTED IN REPLY SHOULD NOT HAVE BEEN CONSIDERED; THE EVIDENCE THE BANK HAD STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT).

[Wells Fargo Bank, N.A. v Murray, 2022 NY Slip Op 05110, Second Dept 8-31-22](#)

Practice Point: Evidence of compliance with the notice-of-foreclosure mailing requirements of RPAPL 1304 first submitted in reply should not have been considered.

Practice Point: The bank did not demonstrate standing to bring the foreclosure action.

AUGUST 31, 2022

MENTAL HYGIENE LAW, TRUSTS AND ESTATES, GUARDIAN OF THE PROPERTY OF INCAPACITATED PERSON, ADMINISTRATIVE EXPENSES.

AFTER THE INCAPACITATED PERSON'S DEATH, THE GUARDIAN OF THE PROPERTY IS ALLOWED TO PAY ADMINISTRATIVE EXPENSES, BUT NOT CLAIMS UNRELATED TO ADMINISTRATIVE EXPENSES, FROM THE GUARDIANSHIP ESTATE (SECOND DEPT).

[Matter of Lillian G. \(Steven G.–Gary G.\), 2022 NY Slip Op 05087, Second Dept 8-31-22](#)

Practice Point: A guardian of an incapacitated person's property may only pay administrative expenses from the guardianship estate after the incapacitated person's death. Here the court should not have ordered payment of a claim unrelated to administrative expenses from the guardianship estate.

AUGUST 31, 2022

NEGLIGENCE, BICYCLE-PEDESTRIAN COLLISION, EXPERT EVIDENCE.

IN THIS BICYCLE-PEDESTRIAN COLLISION CASE WHERE THERE WAS A VIDEO OF THE INCIDENT, DEFENDANT'S EXPERT DEMONSTRATED, USING FACTS IN THE RECORD, THAT DEFENDANT BICYCLIST HAD THE RIGHT OF WAY, WAS TRAVELLING AT A REASONABLE SPEED, AND WAS NOT ABLE TO AVOID THE COLLISION WHEN PLAINTIFF STEPPED OFF THE CURB; PLAINTIFF'S EXPERT'S OPINION TO THE CONTRARY WAS NOT SUPPORTED BY FACTS IN THE RECORD; DEFENDANT'S MOTION FOR

[Min Zhong v Matranga, 2022 NY Slip Op 05063, First Dept 8-30-22](#)

Practice Point: Expert opinion which is not supported by facts in the record will not raise a question of fact sufficient to preclude summary judgment.

AUGUST 30, 2022

NEGLIGENCE, FALLING TREE LIMB, EXPERT EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT RAISE A QUESTION OF FACT WHETHER THE DEFENDANT PROPERTY OWNERS HAD CONSTRUCTIVE KNOWLEDGE OF THE DETERIORATION OF A TREE LIMB WHICH FELL ON PLAINTIFF'S CAR (SECOND DEPT).

[Sasso v Village of Bronxville, 2022 NY Slip Op 05105, Second Dept 8-31-22](#)

Practice Point: Here a tree limb fell on plaintiff's car. Plaintiff's expert concluded the tree limb was deteriorated, but only after close inspection of the limb. The expert evidence did not raise a question of fact about whether the property owner's had constructive knowledge of the condition of the limb.

AUGUST 31, 2022

NEGLIGENCE, SLIP AND FALLS, IMPROPER USE OF ESCALATOR, EXPERT EVIDENCE.

THE 15-YEAR-OLD PLAINTIFF WAS RIDING THE ESCALATOR IN DEFENDANT'S THEATER IMPROPERLY WHEN HE FELL OFF BACKWARDS TO THE FLOOR; THERE WAS NO EVIDENCE OF A DEFECTIVE CONDITION AND PLAINTIFF'S EXPERT AFFIDAVIT WAS SPECULATIVE; THE THEATER'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

[Boris L. v AMC Entertainment Holdings, Inc., 2022 NY Slip Op 05080, Second Dept 8-31-22](#)

Practice Point: Here plaintiff's fall from an escalator was caused by the improper way he was riding the escalator, not by any defect in the property. The property owner's motion for summary judgment should have been granted.

AUGUST 31, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, DAMAGES.

THE JURY FOUND PLAINTIFF SUFFERED PERMANENT INJURY IN THE TRAFFIC ACCIDENT BUT AWARDED \$0 DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE MEDICAL EXPENSES; THE DAMAGES AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

[Carter v City of New Rochelle, 2022 NY Slip Op 05072, Second Dept 8-31-22](#)

Practice Point: Where a jury finds plaintiff was permanently injured in an accident but awards nothing for future pain and suffering and future medical expenses, the damages award should be set aside as against the weight of the evidence.

AUGUST 31, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

IN THIS REAR-END COLLISION CASE, THE ALLEGATION PLAINTIFF STOPPED SUDDENLY WAS NOT SUFFICIENT TO RAISE A QUESTION OF FACT AND DID NOT PRECLUDE THE DISMISSAL OF THE COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

[Mahmud v Feng Ouyang, 2022 NY Slip Op 05081, Second Dept 8-31-22](#)

Practice Point: In this rear-end collision case, defendant's allegation plaintiff stopped suddenly was not enough to raise a question of fact and did not preclude the dismissal of the comparative-negligence affirmative defense.

AUGUST 31, 2022

PISTOL PERMITS, CONSTITUTIONAL LAW.

PETITIONER’S APPLICATION FOR A PISTOL PERMIT SHOULD HAVE BEEN GRANTED; NEW YORK’S “PROPER CAUSE” STANDARD IS NO LONGER APPLICABLE PURSUANT THE US SUPREME COURT’S RULING IN “NEW YORK STATE RIFLE & PISTOL ASSN V BRUEN” (FIRST DEPT).

[Matter of Callahan v City of New York, 2022 NY Slip Op 05057, First Dept 8-30-22](#)

Practice Point: Pursuant to the US Supreme Court’s ruling in New York State Rifle & Pistol Assn., Inc. v Bruen (597 US __, 142 S Ct 2111 [2022]) the “proper cause” standard for issuing a pistol permit no longer applies. Petitioner’s application should have been granted.

AUGUST 30, 2022

RETIREMENT AND SOCIAL SECURITY LAW, DISABILITY, EVIDENCE.

THE RULING THAT PETITIONER-CORRECTION-OFFICER’S DISABLING CONDITION WAS NOT CAUSED BY AN ALTERCATION WITH AN INMATE WAS SUPPORTED BY “SUBSTANTIAL EVIDENCE;” “SUBSTANTIAL EVIDENCE” IN THIS CONTEXT IS DEFINED (SECOND DEPT).

[Matter of Singleton v New York City Employees’ Retirement Sys., 2022 NY Slip Op 05089, Second Dept 8-31-22](#)

Practice Point: In the context of a Retirement and Social Security Law disability-benefits hearing to determine whether a correction officer’s disabling condition was caused by an altercation with an inmate, the denial of disability benefits must be supported by “substantial evidence” which requires “some credible evidence,” meaning evidence from a “credible source.” Here the denial of benefits was upheld.

AUGUST 31, 2022