# NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
August 29 – September 2, 2022

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. 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 Report.

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## 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).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment should not have been granted because defendant did not offer a reasonable excuse for the failure to timely answer:

Supreme Court should have denied the defendant's cross motion, in effect, to vacate its default in answering the complaint and to compel the plaintiff to accept its late answer … . "A defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" … . Here, the defendant failed to proffer any excuse, let alone a reasonable excuse, for failing to serve an answer prior to the tolling period created by the executive orders issued by former Governor Andrew Cuomo as a result of the COVID-19 pandemic … as well as its failure to serve an answer or move to compel acceptance of its late answer for months after the expiration of the executive orders. Since the defendant failed to demonstrate a reasonable excuse, it is unnecessary to consider whether it sufficiently demonstrated the existence of a potentially meritorious defense … . 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).

The Second Department, reversing Supreme Court, determined defendants-landlords' answer and counterclaims in this lease-related dispute with the plaintiff-tenant. should have been struck as a sanction for defendants' repeated failures to comply with discovery demands:

Before imposing the "drastic" remedy of striking a pleading, there must be a clear showing that a party's failure to comply with discovery is willful and contumacious … .. "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time" ,,, ,

Here, contrary to the Supreme Court's assessment, the defendants' behavior was willful and contumacious. The tenant demonstrated that the defendants "repeated[ly] fail[ed] to comply with court-ordered discovery" over "an extended period of time[,]" and the court itself found that the defendants offered "inadequate explanations for their failures to comply" … . Under the circumstances presented here, we find that the court should have granted that branch of the tenant's motion which was pursuant to CPLR 3126 to strike the defendants' answer and counterclaims in its entirety … . 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 stuck defendants' answer and counterclaims finding defendants' conduct "willful and contumacious."

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## 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).

The First Department, reversing (modifying) Supreme Court in this residential-mortgage-backed-securities case, over an extensive two-justice partial dissent, determined certain post-Event of Default breach of contract and breach of fiduciary duty claims should have been dismissed, and the pre-Event of Default document defect repurchase enforcement claims should not have been dismissed. "Plaintiffs purchased residential mortgage-backed securities (RMBS) certificates issued by RMBS trusts for which defendants served as the trustees. In six separate actions brought in May 2016, plaintiffs allege that their investments are almost worthless as a result of defendants' breaches of their contractual, fiduciary, and statutory duties." The majority decision focuses on refuting the arguments in the partial dissent, resulting in a comprehensive overview of contract-interpretation-law which is worth reading but cannot be fairly summarized here. Generally, Supreme Court's denial of most of the defendants' motions to dismiss was affirmed. 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

## 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).

The Second Department, reversing Supreme Court, determined defendant home-inspection company was entitled to enforcement of a provision in an unsigned contract. The home inspection contract provided that defendant would not be liable if plaintiff failed to timely notify defendant of any alleged defects in the property. Defendant moved for summary judgment based on plaintiff's failure to notify. The fact that the contract was not signed did not raise a question of fact because plaintiff testified she was aware of the terms of the contract and agreed to them:

"[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" … . Here, the plaintiff testified at her deposition that she was "certain" that she looked at the contract "at the time of the inspections," that she understood the contents of the contract, and that "after reading the agreement before the July 2016 inspection" she "accepted these terms" and paid ARPI its fee. This testimony is bolstered by the fact that the plaintiff signed an identical contract four months earlier for a home inspection performed by the defendants. Accordingly, the defendants demonstrated, prima facie, that the July 2016 contract was valid and enforceable … . 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).

The Third Department, vacating defendant's guilty plea and dismissing the superior court information, determined the record was silent about whether defendant signed the waiver of indictment in open court:

A defendant "may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney" and "such waiver shall be evidenced by [a] written instrument signed by the defendant in open court in the presence of his or her counsel" (NY Const, art I, § 6; see CPL 195.20)…. The record contains a written waiver of indictment signed by defendant and witnessed by counsel on August 3, 2020, the date he appeared before County Court and entered his guilty plea. The minutes of that appearance reflect that defendant orally agreed to waive indictment and affirmed that his signature is on the written waiver, but the minutes are silent as to whether defendant signed the written waiver in open court. Moreover, there is no reference in the written waiver or in County Court's order approving the waiver that indicates that the waiver was signed in open court. In light of this jurisdictional defect, defendant's guilty plea must be vacated and the superior court information must be dismissed …. 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).

The Third Department determined that, although petitioner had been conditionally released to parole supervision, his challenge to a disciplinary determination had not been rendered moot:

… [D]uring the pendency of this appeal, petitioner was conditionally released to parole supervision. Accordingly, petitioner's challenge to the Board's prior decisions denying his release have been rendered moot … . However, petitioner's challenge to the disciplinary determination has not been rendered moot by his conditional release … .. Accordingly, and as respondents concede that the claim was not time-barred based upon the application of the tolling provisions of certain executive orders that were issued by the Governor in response to the COVID-19 pandemic … , we remit the matter to Supreme Court for respondents to file an answer pursuant to CPLR 7804 (f) … . 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).

The Second Department, reversing Supreme Court, determined the plaintiff, after its foreclosure action was discontinued, could amend the foreclosure complaint to seek recovery on the note:

"'RPAPL 1301(3) . . . prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court in which the foreclosure action was brought'" ( … see RPAPL 1301[3]). Conversely, "'where a foreclosure action is no longer pending and did not result in a judgment in the plaintiff's favor, the plaintiff is not precluded from commencing a separate action without leave of the court'" … .

Here, pursuant to the so-ordered stipulation and the plaintiff's release of the mortgage, the cause of action to foreclose the mortgage was, in effect, discontinued, without the entry of any judgment in the plaintiff's favor … . Since the cause of action to foreclose the mortgage was no longer pending, the plaintiff was not precluded from seeking to recover on the note by RPAPL 1301(3), "'a statute which must be strictly construed'" … .

Furthermore, "there is no reason the plaintiff could not seek such relief by seeking leave to amend its complaint, rather than by commencing a new action" … . 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

## 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).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not comply with the "separate envelope" for the notice

of foreclosure required by RPAPL 1304. Therefore the bank's summary judgment motion should not have been granted:

… [T]he plaintiff failed to establish its prima facie entitlement to judgment as a matter of law, as it failed to show its strict compliance with RPAPL 1304(2). The "separate envelope" mandate of RPAPL 1304(2) provides that "[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice." The copies of the 90-day notice submitted by the plaintiff included additional notices not contemplated by RPAPL 1304(2). Since the plaintiff failed to demonstrate that the RPAPL 1304 notice was "'served in an envelope that was separate from any other mailing or notice'" …. it failed to establish its strict compliance with RPAPL 1304 ,,, , 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).

The Second Department, reversing Supreme Court, determined plaintiff's proof of mailing of the foreclosure notice first submitted in reply should not have been considered, and plaintiff did not demonstrate it had standing to bring the foreclosure action:

… [T]he affidavits that the plaintiff appended to its moving papers failed to establish that the RPAPL 1304 notices were mailed by first-class mail in accordance with RPAPL 1304. While the plaintiff submitted an additional affidavit in reply, with proof of first-class mailing attached, this evidence should not have been considered in the determination of whether the plaintiff met its prima facie burden, as the issue which the new evidence was intended to address was not an issue raised for the first time in the defendants' opposition, and the defendants were not afforded an opportunity to submit a surreply in response to the plaintiff's newly submitted evidence in reply … . …

[Re; standing:] …[T]he plaintiff attached to the complaint copies of the 2003 note and 2004 note, which together constituted the consolidated note, and each note was accompanied by an undated purported allonge endorsed to the plaintiff. However, the plaintiff failed to demonstrate that the purported allonges, each of which was on a piece of paper completely separate from the corresponding note, was "so firmly affixed" to the corresponding note "as to become a part thereof," as required by UCC 3-202(2) … . 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).

The Second Department, reversing Supreme Court, determined the guardian (Mock) of the incapacitated person's (Lillian's) property should not have been ordered to pay a claim out of the guardianship estate after Lillian's death. Only administrative expenses can be paid out of the guardianship estate:

Mock's authority as the guardian of Lillian's property expired with Lillian's death (see Mental Hygiene Law § 81.36[a][3] …), "and the property in the guardianship account that remained after the fees of the guardianship were paid would normally have passed to her estate" (… see SCPA 103[19]). Mental Hygiene Law § 81.44(e) allows a guardian to retain, "pending the settlement of the guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts." The legislature intended to allow guardians "a reserve to cover reasonably anticipated administrative expenses," but did not intend to allow guardians "to retain funds following the death of an incapacitated person for the purpose of paying a claim" … . Inasmuch as the $255,000 sought by the petitioner is unrelated to the administration of Lillian's guardianship, Mock lacked the authority to make payment to the petitioner from the guardianship estate … . Accordingly, the Supreme Court erred in granting the petitioner's cross motion and in directing Mock to pay the petitioner the sum of $255,000 from the guardianship estate. 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; PLANTIFF'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).

The Frist Department, reversing Supreme Court, over a dissent, determined defendant bicyclist's motion for summary judgment in this bicycle-pedestrian collision case should have been granted. Thee was a video of the incident. Defendant had the green light when plaintiff stepped off the curb into the bike lane. Defendant's expert presented evidence defendant was travelling at a reasonable speed and could not have avoided striking the plaintiff without striking an obstruction or entering a traffic lane. Plaintiff's expert's opinions that defendant was travelling at an excessive speed and could have stopped before striking plaintiff were not based upon facts in the record:

… [P]laintiff failed to raise an issue of fact. There is no evidence that defendant operated his bicycle at an excessive rate of speed, in a negligent manner, or without due care to avoid colliding with any pedestrian, in violation of Vehicle and Traffic Law §§ 1180(a), 1146. Plaintiff attempts to raise an issue of fact through her expert, who opines, without any factual basis in the record, and in a conclusory and speculative manner, that defendant operated his bicycle at an excessive speed when compared to the speed of the three other bicyclists, and that in the three seconds (at most) that defendant had to react from the moment he is seen entering the screen, he could have slowed down, stopped, or maneuvered his bicycle to go around plaintiff to avoid the collision, or to make the impact substantially less severe.

Opinion evidence must be based on facts in the record. An expert cannot speculate, guess, or reach their conclusion by assuming material facts not supported by the evidence … The opinion must be supported either by facts disclosed by the evidence or by facts known to the expert personally. It is essential that the facts upon which the opinion is based be established, or fairly inferable, from the evidence … . 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 PLANTIFF'S CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owners (Monacos) did not have constructive notice of the deteriorated condition of a tree limb which fell on plaintiff's car:

In cases involving fallen trees, a property owner will only be held liable for a tree that falls outside of his or her premises and injures another if he or she knew or should have known of the defective condition of the tree … . Constructive notice may be based upon signs of decay or other defects that are readily observable by someone on the ground or that a reasonable inspection would have revealed … . "At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm" … . * * *

The plaintiff's expert's affidavit failed to raise a triable issue of fact as to whether any visible defect or decay would have been readily observable by the Monacos prior to the fall of the limb … . Although the plaintiff's expert concluded that there was visible decay at the top of the branch where it had been attached to the trunk, approximately 12 feet above grade, and that such decay caused the branch to fall, his conclusions were based upon close observation, and therefore, failed to raise a triable issue of fact as to whether the Monacos should have realized that a potentially defective condition existed … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's injury was not the result of a defective condition on defendant movie theater's property. The 15-year-old plaintiff was sitting on one rail of an escalator with his feet on the other rail and leaning back against the wall as the escalator descended. But the wall came to an end halfway down and plaintiff fell backwards to the floor:

"In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a

defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" … . Here, the defendants established, prima facie, that the escalator and the adjacent wall were not in violation of any applicable statutes or regulations and that they maintained their premises in a reasonably safe condition … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants violated their common-law duty to maintain the premises in a reasonably safe condition … . The affidavit of the plaintiff's expert was speculative and insufficient to raise a triable issue of fact … . 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).

The Second Department, reversing Supreme Court, determined the damages-award in this traffic accident case was against the weight of the evidence. The jury found that plaintiff suffered permanent injuries but awarded nothing for future pain and suffering and future medical expenses. Plaintiff's motion to set aside the verdict pursuant to CPLR 4404(a) should have been granted:

A jury verdict on the issue of damages may be set aside as contrary to the weight of the evidence only if the evidence on that issue so preponderated in favor of the movant that the jury could not have reached its determination on any fair interpretation of the evidence … . Further, while the amount of damages to be

awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference … , a jury award may be set aside if it deviates materially from what would be reasonable compensation (see CPLR 5501[c] …).

Where, as here, "the jury . . . concludes that a plaintiff was injured as a result of an accident, the jury's failure to award damages for pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation" … . 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).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case. Defendant's allegation plaintiff stopped suddenly is not sufficient to raise a question of fact and will not support a comparative-negligence affirmative defense:

… [T]the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his own affidavit, in which he averred that his vehicle was slowing due to traffic when it was struck in the rear by the defendant's vehicle … . The plaintiff also established his prima facie entitlement to judgment as a matter of law dismissing the defendant's third affirmative defense, which alleged comparative fault, by demonstrating that he was not negligent in the

happening of the accident … .. In opposition to the plaintiff's prima facie showings, the defendant failed to raise a triable issue of fact. Contrary to the defendant's contention, his claim that the plaintiff made a sudden stop, standing alone, was insufficient to raise a triable issue of fact as to whether the plaintiff negligently contributed to the accident under the circumstances of this case … . 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).

The First Department, reversing Supreme Court, determined the recent US Supreme Court decision New York State Rifle & Pistol Assn., Inc. v Bruen (597 US _, 142 S Ct 2111 [2022] required that petitioner's application for a pistol permit be granted. New York's "proper cause" standard is no longer applicable:

Petitioner commenced this CPLR article 78 proceeding challenging the determination by the New York City Police Department denying an application to renew a business carry handgun license. Supreme Court denied and dismissed the petition on the ground that the Police Department had a rational basis to deny the renewal of a business carry license where petitioner's application did not establish "proper cause" within the meaning of Penal Law § 400.00 (see 38 RCNY 5-03). Supreme Court also found petitioner's constitutional rights were not violated.

We are constrained by the recent United States Supreme Court decision in New York State Rifle & Pistol Assn., Inc. v Bruen (597 US _, 142 S Ct 2111 [2022])

which mandates the grant of this CPLR article 78 petition. Specifically, in Bruen , the United States Supreme Court held that denial of a license applications for failing to satisfy New York's "proper cause" standard, under which the applicants had to demonstrate a special need for self-protection distinguishable from that of the general community, was unconstitutional as violative of the Second Amendment to the United States Constitution, which protects an individual's fundamental right to keep a firearm, and the Fourteenth Amendment to the United States Constitution, which makes this right equally applicable throughout the states. 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).

The Second Department, reversing Supreme Court, over a dissent, determined that substantial evidence supported the ruling by the Board of Trustees of the New York City Employees' Retirement System (hereinafter the Board of Trustees) that petitioner-correction-officer's disabling condition was not related to an altercation with an inmate. Therefore petitioner was not entitled to disability benefits. The dissent would have ordered a new hearing because of the possibility untrue information in the record (i.e., that petitioner altered an MRI report) affected the ruling:

Ordinarily, the decision of the board of trustees as to the cause of an officer's disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious" … . Substantial evidence has been construed in disability cases, as requiring some credible evidence … . Credible evidence has been described as evidence that proceeds from a credible source, which reasonably tends to support the proposition for which it is offered … . * * *

Contrary to the petitioner's contention and the position of our dissenting colleague, the record does not demonstrate that the Board of Trustees was misled by reports prepared by the Medical Board that contained a statement that the petitioner altered an MRI report or by statements that he returned to "full duty" after the incident and continued to work for "several years." With regard to the MRI report, … the Chair of the Medical Board informed the Board of Trustees that the discrepancy between the MRI reports submitted on two different days was resolved by the inspector general's office and that the addendum was written by a doctor. With regard to the issue of whether the petitioner returned to full duty and continued to work for several years, when he worked for approximately one year and seven months after the incident, the petitioner had multiple opportunities to testify and to present evidence of these facts, which the Board of Trustees considered. 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