

# NEW YORK APPELLATE DIGEST, LLC

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Civil Procedure  
Reversal Newsletter  
December 2022

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[Deutsche Bank Natl. Trust Co. v Lamarre, 2022 NY Slip Op 07056, Second Dept 12-14-22](#)

**Practice Point:** The plaintiff bank in this foreclosure action made a defective motion for an order of reference within one year of defendant’s default. That motion was sufficient to demonstrate plaintiff did not intend to abandon the action, even though motion was rejected and plaintiff did not correct the defects in the motion for ten years. The judge should not have, sua sponte, dismissed the complaint and the matter should have been restored to the calendar.

DECEMBER 14, 2022

COURT OF CLAIMS, FAILURE TO SERVE NOTICE OF INTENT TO FILE CLAIM ON NYS THRUWAY AUTHORITY.

CLAIMANT IN THIS LABOR LAW 240(1) AND 241(6) ACTION AGAINST THE STATE SERVED THE ATTORNEY GENERAL WITH THE NOTICE OF INTENTION TO FILE A CLAIM BUT NOT THE NEW YORK STATE THRUWAY AUTHORITY (NYSTA); ALTHOUGH THE EXCUSE (IGNORANCE OF THE LAW) WAS NOT VALID, THE ACTION HAD MERIT AND THE NYSTA HAD TIMELY KNOWLEDGE OF THE FACTS; THEREFORE CLAIMANT'S MOTION TO SERVE AND FILE A LATE CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

[Swart v State of New York, 2022 NY Slip Op 07088, Second Dept 12-14-22](#)

**Practice Point:** The Court of Claims, pursuant to Court of Claims Act section 10(6), has the discretion to allow a claimant to file a late claim. Here the excuse, ignorance of the law, was not valid. But the claim was deemed to have merit and the respondent had timely knowledge of the underlying facts. Therefore the Court of Claims should have granted claimant's motion to file a late claim.

DECEMBER 14, 2022

COURT OF CLAIMS, NOTICE OF INTENT TO FILE CLAIM, JURISDICTIONAL DEFECT.

STATING THE WRONG DATE FOR THE ALLEGED NEGLIGENCE IN THE NOTICE OF INTENTION TO FILE A CLAIM RENDERED THE NOTICE JURISDICTIONALLY DEFECTIVE; THE NOTICE THEREFORE DID NOT EXTEND THE 90-DAY PERIOD FOR FILING A CLAIM, RENDERING THE CLAIM FILED MORE THAN A YEAR AND A HALF LATER UNTIMELY; THE DENTAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

[Sacher v State of New York, 2022 NY Slip Op 07087, Second Dept 12-14-22](#)

**Practice Point:** Including the wrong date for the allegedly negligent act in the notice of intention to file a claim renders the notice jurisdictionally defective pursuant to the Court of Claims Act.

**Practice Point:** Ordinarily filing a notice of intention to file a claim extends the period for filing a claim from 90 days to two years. However, the extension is not triggered by a jurisdictionally defective notice of claim. The claim here, filed more than a year and a half after the notice of intention, was therefore untimely.

DECEMBER 14, 2022

DEFAULT, VACATE DEFAULT JUDGMENT.

DEFENDANT DID NOT MEET THE CRITERIA FOR VACATION OF A DEFAULT JUDGMENT UNDER EITHER CPLR 5015 OR 317; CRITERIA EXPLAINED (FIRST DEPT).

[259 Milford, LLC v FV-1, Inc., 2022 NY Slip Op 06898, Second Dept 12-7-22](#)

Practice Point: The criteria for vacation of a default judgment pursuant to CPLR 5015 and 317 are different and are explained in this decision. The defendant did not meet the criteria for either statute.

DECEMBER 7, 2022

DEFAULT, VACATE DEFAULT, JUDGMENT.

DEFENDANT DID NOT UPDATE ITS ADDRESS FILED WITH THE SECRETARY OF STATE FOR SERVICE OF PROCESS AND DID NOT HAVE A REASONABLE EXCUSE FOR DEFAULT IN THIS SLIP AND FALL CASE; HOWEVER, NO REASONABLE EXCUSE NEED BE SHOWN IN A MOTION TO VACATE A DEFAULT PURSUANT TO CPLR 317; DEFAULT VACATED (FIRST DEPT).

[Gomez v Karyes Realty Corp., 2022 NY Slip Op 07187, First Dept 12-20-22](#)

Practice Point: No reasonable excuse for a default need be shown in a motion the vacate the default pursuant to CPLR 317, Here the defendant's failure to update its address for the service of process with the Secretary of State was not an attempt to avoid service. The motion to vacate the default should have been granted.

DECEMBER 20, 2022

JUDGMENTS, RESETTLEMENT OF JUDGMENT, FAMILY LAW.

RESETTLEMENT OF THE JUDGMENT OF DIVORCE WAS PROPER ONLY TO THE EXTENT OF CORRECTING A MISTAKE IN THE JUDGMENT; RESETTLEMENT SHOULD NOT HAVE BEEN USED TO AMEND THE JUDGMENT (SECOND DEPT).

[Ferrigan v Ferrigan, 2022 NY Slip Op 07058, Second Dept 12-14-22](#)

Practice Point: Here resettlement of the judgment of divorce pursuant to CPLR 5019 was appropriate only to the extent of correcting a mistake by conforming the judgment to the stipulation. Resettlement should not have been used to amend the judgment to include a provision which was not in the stipulation.

DECEMBER 14, 2022

LAW-OFFICE FAILURE.

DEFENDANT'S COUNSEL MISCALENDARED THE RETURN DATE FOR THE MOTION FOR SUMMARY JUDGMENT; THE MOTION TO VACATE THE JUDGMENT DUE TO LAW OFFICE FAILURE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

[First Am. Tit. Ins. Co. v Successful Abstract, LLC, 2022 NY Slip Op 07186, First Dept 12-20-22](#)

Practice Point: Miscalendaring the return date for the motion for summary judgment was deemed a reasonable excuse for the default (law office failure).

DECEMBER 20, 2022



MEDICAID, PLENARY ACTION BY NURSING HOME TO DETERMINE RESIDENT'S ELIGIBILITY.

PLAINTIFF NURSING HOME CAN BRING A PLENARY ACTION TO DETERMINE A RESIDENT'S MEDICAID ELIGIBILITY WITHOUT BEING BOUND BY THE RESIDENT'S FAILURE TO REQUEST AN ADMINISTRATIVE APPEAL OR THE FOUR-MONTH STATUTE OF LIMITATIONS (SECOND DEPT).

[Kings Harbor Multicare Ctr. v Pierre, 2022 NY Slip Op 06920, Second Dept 12-7-22](#)

**Practice Point:** A nursing home can bring a plenary action in its own right to determine the Medicaid eligibility of its resident without regard for whether the resident pursued an administrative appeal and is not constrained by the four-month statute of limitations in CPLR 217.

DECEMBER 7, 2022

MEDICAL RECORDS, PRIVILEGE.

DEFENDANT IN THIS PERSONAL INJURY CASE DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY SUBMITTING MENTAL HEALTH RECORDS TO THE SENTENCING COURT IN THE RELATED CRIMINAL CASE; THE RECORDS WERE SUBMITTED AS PART OF A MITIGATION REPORT WHICH IS DEEMED "CONFIDENTIAL" PURSUANT TO THE CRIMINAL PROCEDURE LAW; TWO-JUSTICE DISSENT (FOURTH DEPT).

[Johnson v Amadorzabala,, 2022 NY Slip Op 07355, Fourth Dept 12-23-22](#)

**Practice Point:** The defendant in this personal injury case did not waive the physician-patient privilege by submitting mental health records to the sentencing court in the related criminal case. Under the Criminal Procedure Law, the mitigation report was for the judge's eyes only and was confidential.

DECEMBER 23, 2022

MOOTNESS DOCTRINE.

THE SO-ORDERED STIPULATION BETWEEN THE PARTIES RENDERED THE RELATED CAUSE OF ACTION IN THE COMPLAINT MOOT; THE OTHER CAUSE OF ACTION RELIED ON SPECULATION ABOUT FUTURE EVENTS AND THEREFORE WAS NOT RIPE FOR JUDICIAL REVIEW (SECOND DEPT).

[Kennedy v Suffolk County, 2022 NY Slip Op 07226, Second Dept 12-21-22](#)

**Practice Point:** If a cause of action has already been addressed by a so-ordered stipulation, the cause of action is precluded by the mootness doctrine. If a cause of action is based on speculation about future events, it is not ripe for judicial review.

DECEMBER 21, 2022

NOTICE OF SETTLEMENT AND PROPOSED JUDGMENT, ORDER TO SUBMIT, FAILURE TO SUBMIT WITHIN 60 DAYS.

AFTER DEFENDANT'S DEFAULT AND FOLLOWING AN INQUEST ON DAMAGES PLAINTIFF WAS AWARDED ABOUT \$275,000; THE JUDGE ORDERED PLAINTIFF TO SUBMIT A NOTICE OF SETTLEMENT AND A PROPOSED JUDGMENT WITHIN 60 DAYS AS REQUIRED BY 22 NYCRR 202.48; PLANTIFF DID NOT DO SO FOR MORE THAN TWO AND A HALF YEARS; THE ORDER GRANTING THE DEFAULT JUDGMENT AND THE DECISION ON THE INQUEST WERE VACATED (SECOND DEPT).

[Cruz v Pierce, 2022 NY Slip Op 07054, Second Dept 12-14-22](#)

**Practice Point:** Here plaintiff was granted a default judgment and, after an inquest of damages, was awarded nearly \$275,000. The judge ordered plaintiff to submit a notice of settlement and a proposed judgment within 60 days as required by 22

NYCRR 202.48. Plaintiff failed to do so and the order granting the default judgment and the decision awarding damages were vacated.

DECEMBER 14, 2022

PRIMA FACIE TORT.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT BECAUSE IT DID NOT ALLEGE THE SOLE MOTIVATION OF DEFENDANTS WAS DISINETERESTED MALEVOLENCE (FOURTH DEPT).

[Spine Surgery of Buffalo Niagara, LLC v Geico Cas. Co., 2022 NY Slip Op 07343, Fourth Dept 12-23-22](#)

Practice Point: The criteria for prima facie tort include an allegation that the “sole motivation” for a defendant’s conduct was “disinterested malevolence.”

DECEMBER 23, 2022

STATEMENT OF MATERIAL FACTS.

THE MOTION COURT ABUSED ITS DISCRETION BY DEEMING PLAINTIFF’S STATEMENT OF MATERIAL FACTS ADMITTED BECAUSE DEFENDANTS DID NOT SUBMIT A COUNTER STATEMENT OF UNDISPUTED FACTS (FOURTH DEPT).

[On the Water Prods., LLC v Glynos, 2022 NY Slip Op 07320, Fourth Dept 12-23-22](#)

Practice Point: Here plaintiff submitted a statement of material facts but defendants did not submit a counter statement of undisputed facts. The motion court was not required to deem the statement of material facts admitted and should not have done

so under the specific circumstances of this case. Plaintiff's motion for summary judgment in this breach of contract action should not have been granted.

DECEMBER 23, 2022

VERDICTS, MOTION TO SET ASIDE VERDICT.

THE MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD NOT HAVE BEEN GRANTED; THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; A NEW TRIAL IS NECESSARY BECAUSE AN APPELLATE COURT CANNOT MAKE NEW FINDINGS OF FACT IN A JURY TRIAL (SECOND DEPT).

[Osorio v New York City Health & Hosps. Corp., 2022 NY Slip Op 07072, Second Dept 12-14-22](#)

Practice Point: When an appellate court determines the verdict should be set aside as against the weight of the evidence in a jury trial it must order a new trial because an appellate court does not have the authority to make new findings of fact in a jury trial.

DECEMBER 14, 2022

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