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The Second Department, reversing (modifying) Supreme Court, noted that the contention defendant was illegally sentenced as a second violent felony offender need not be preserved for appeal:

As the People properly concede, the defendant's contention that he was illegally sentenced as a second violent felony offender is not subject to the preservation rule … . Here, the defendant was illegally sentenced as a second violent felony offender since he committed the instant offense before he was sentenced on the prior violent felony conviction … . Thus, the prior violent felony conviction cannot serve as a predicate violent felony offense for sentencing purposes (see Penal Law § 70.04[1][b][ii]). People v Lynch, 2022 NY Slip Op 06141, Second Dept 11-2-22

Practice Point: Here the defendant committed the instant offense before he was sentenced on the prior violent felony. Therefore he should not have been adjudicated a second violent felony offender. The issue need not be preserved for appeal.

NOVEMBER 2, 2022

APPEALS, CRIMINAL LAW, JUDGES, GROUND FOR SUPPRESSION NOT ARGUED BY THE PARTIES.

AN APPELLATE COURT MAY CONSIDER A SUPPRESSION RULING GROUNDED ON A THEORY NOT RELIED UPON OR ARGUED BY THE PARTIES AS LONG AS THE RULING IS BASED UPON THE EVIDENCE AND IS FULLY LAID OUT AND EXPLAINED BY THE MOTION COURT; HERE THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT DID NOT APPLY AND THE EVIDENCE SEIZED FROM DEFENDANT'S VEHICLE SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Chambers, determined: (1) the appellate court can consider an appeal of a suppression ruling which was not based on a theory argued by the parties below, but which was based upon the hearing evidence and fully laid out and explained by the motion court; and (2) the automobile exception to the warrant requirement did not apply and the evidence seized from defendant's vehicle should have been suppressed:

The narrow reading of Tates [189 AD3d 1088] advocated by the People is consistent with the approach taken by the Appellate Division, Fourth Department, and the Appellate Division, First Department, in comparable cases involving the suppression court's application of the automobile exception to the warrant requirement … The general rule articulated in these cases is that the suppression court is "entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People" … . * * *

"[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated" … . Pursuant to the automobile exception to the warrant requirement, a

warrantless search of a vehicle is permitted when the police have probable cause to believe the vehicle contains contraband, a weapon, or evidence of a crime … .

Here, "the circumstances known to the police at the time of the search did not rise to the level of probable cause" … . People v Marcial, 2022 NY Slip Op 06142, Second Dept 11-2-22

Practice Point: An appellate court may consider a suppression court's ruling which is grounded upon a theory (here the automobile exception to the warrant requirement) not raised or argued by the parties, as long as the ruling is based upon the evidence and is fully laid out and explained by the motion court.

Practice Point: Here the automobile exception to the warrant requirement did not apply and the evidence seized from defendant's vehicle should have been suppressed.

NOVEMBER 2, 2022

APPEALS, FAMILY LAW, CUSTODY, CHANGED CIRCUMSTANCES RENDER APPEAL-RECORD INADEQUATE.

CHANGED CIRCUMSTANCES RENDERED THE RECORD ON APPEAL INADEQUATE IN THIS CHILD CUSTODY CASE; MATTER SENT BACK TO FAMILY COURT FOR A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined that changed circumstances brought to the court's attention by the attorney for the child in this child custody matter rendered the record on appeal in sufficient. The matter was sent back for a hearing:

… [N]ew developments have arisen since the orders appealed from were issued, which have been brought to this Court's attention by the attorney for the child and acknowledged by the father. These developments include the father's incarceration, allegations of neglect against the father, and the Family Court's issuance of an order temporarily placing the child in the custody of the child's paternal grandmother. As the Court of Appeals has recognized, changed

circumstances may have particular significance in child custody matters and may render a record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the child … . In light of the new developments brought to this Court's attention, the record is no longer sufficient to review whether the Family Court's determination regarding custody and parental access is in the best interests of the child … . Matter of Baker v James, 2022 NY Slip Op 06125, Second Dept 11-2-22

Practice Point: Where changed circumstance in a child custody case render the record on appeal inadequate, the appellate court will sent the case back to Family Court for a hearing.

NOVEMBER 2, 2022

ARBITRATION, INSURANCE LAW.

THE ARBITRATOR'S RULING IN THIS STATUTORY, COMPULSORY ARBITRATION WAS ARBITRARY AND CAPRICIOUS, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitrator's ruling in this no=fault insurance case was arbitrary and capricious, noting that judicial review of statutory, compulsory arbitration is more stringent than review of a voluntary agreement to arbitrate. Plaintiff GEICO paid the injured driver's no-fault benefits and sought reimbursement from the insurer of the loaner car involved in the accident. The arbitrator denied reimbursement and the Second Department reversed:

Where, as here, the obligation to arbitrate arises through a statutory mandate, the arbitrator's determination is subject to "closer judicial scrutiny" under CPLR 7511(b) than it would receive had the arbitration been conducted pursuant to a voluntary agreement between the parties … . To be upheld, an award in a compulsory arbitration proceeding "must have evidentiary support and cannot be arbitrary and capricious" … . "Moreover, with respect to determinations of law, the

applicable standard in mandatory no-fault arbitrations is whether 'any reasonable hypothesis can be found to support the questioned interpretation'" … . …

The arbitrator's interpretation of the rental agreement … as relieving [defendant insurance company] of its obligation to provide mandatory personal injury protection (hereinafter PIP) coverage was contrary to 11 NYCRR part 65, which provides … that all motor vehicle insurance policies must contain a mandatory PIP endorsement; expressly sets forth the language of the PIP endorsement; permits deviations from the prescribed language only upon prior approval; and prohibits any release, express or implied, from mandatory or optional PIP benefits … . Matter of GEICO Gen. Ins. Co. v Wesco Ins. Co., 2022 NY Slip Op 06926, Second Dept 12-7-22

Similar issues and result in Matter of Wesco Ins. Co. v GEICO Indem. Co., 2022 NY Slip Op 06933, Second Dept 12-7-22

Practice Point: The Second Department explained that the criteria for judicial review of statutory, compulsory arbitration is more stringent than for judicial review of arbitration by voluntary agreement.

DECEMBER 7, 2022

ARBITRATION, NURSING HOME ADMISSION AGREEMENT.

PLAINTIFF, DECEDENT'S SON, SIGNED THE NURSING HOME ADMISSION AGREEMENT WHEN HIS FATHER, WHO HAD DEMENTIA, WAS ADMITTED; THE NURSING HOME DID NOT DEMONSTRATE PLAINTIFF, BY SIGNING THE ADMISSION AGREEMENT, HAD THE AUTHORITY TO BIND DECEDENT TO ARBITRATION OF DECEDENT'S NEGLIGENCE/PERSONAL INJURY ACTION AGAINST THE NURSING HOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant nursing home did not demonstrate plaintiff had the authority to bind the decedent to arbitration concerning the decedent's negligence/personal injury action against the nursing home. Plaintiff is the decedent's son who signed the admission agreement

when his father, who suffered from dementia, was admitted. The nursing home did not present sufficient proof of plaintiff's authority to sign the admission agreement on decedent's behalf:

A party seeking to compel arbitration must establish "the existence of a valid agreement to arbitrate" … . Here, the defendants failed to meet that burden because they did not submit sufficient evidence of the plaintiff's authority to bind the decedent to arbitration at the time he signed the admission agreement on the decedent's behalf. Most significantly, the defendants failed to submit the instrument through which the plaintiff allegedly derived his authority to bind the decedent to arbitration … . Evidence showing that the plaintiff represented to the defendants that he held a power of attorney when signing the admission agreement was insufficient to establish that he, in fact, held such authority as a matter of law … . Contrary to the defendants' further contention, neither the plaintiff's status as the decedent's son … , nor his apparent willingness to be the decedent's "responsible party" under the terms of the admission agreement … , have any bearing on his authority to bind the decedent to arbitration…. . Wolf v Hollis Operating Co., LLC, 2022 NY Slip Op 06954, Second Dept 12-7-22

Practice Point: Plaintiff, decedent's son, signed the nursing-home admission agreement when decedent, who had dementia, was admitted. The nursing home did not demonstrate plaintiff, by signing the agreement, had the authority to bind decedent to arbitration of decedent's negligence/personal injury action against the nursing home. The fact that plaintiff represented that he had power of attorney for decedent was not enough.

DECEMBER 7, 2022

ARBITRATION.

A QUESTION OF FACT WHETHER THE PARTIES AGREED TO ARBITRATE THE DISPUTE REQUIRES A FRAMED-ISSUE HEARING; THE PROPER PROCEDURE IF ARBITRATION IS REQUIRED IS TO STAY THE UNDERLYING SUIT, NOT DISMISS IT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) there was a question of fact whether the parties agreed to arbitrate the dispute, requiring a framed-issue hearing; and (2) arbitration is not a defense to an action; so where arbitration is required the underlying action is stayed, not dismissed:

… [Q]uestions of fact exist as to whether the parties agreed to arbitrate the instant dispute, which questions require a hearing (see CPLR 7503[a] …). We therefore remit the matter … for a framed-issue hearing, and thereafter, a new determination of that branch of [the] motion which was pursuant to CPLR 7503 to compel arbitration.

… Supreme Court should have denied [the] motion which was pursuant to CPLR 3211(a)(1) to dismiss the … complaint based upon the arbitration agreement. "An agreement to arbitrate is not a defense to an action," and "[t]hus, it may not be the basis for a motion to dismiss" … . The proper remedy, should a valid agreement to arbitrate exist, is an order compelling arbitration, which operates to stay the action (see CPLR 7503[a] …). Ferarro v East Coast Dormer, Inc., 2022 NY Slip Op 05679, Second Dept 10-12-22

Practice Point: If there is a question of fact whether the parties agreed to arbitrate a dispute, a framed-issue hearing is required. If there is a valid agreement to arbitrate, the underlying action should be stayed pending the arbitration, not dismissed.

OCTOBER 12, 2022

ATTORNEYS, CONTINGENCY FEE FOR DISCHARGED ATTORNEYS.

THE DISCHARGED LAW FIRM HANDLED THE PERSONAL INJURY CASE FOR TWO YEARS; ALTHOUGH THE FIRM DID NOT SUBMIT ANY TIME RECORDS, SUPREME COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD THE DISCHARGED FIRM A PORTION OF THE CONTINGENCY FEE AFTER THE CASE SETTLED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court abused its discretion in refusing to award attorney's fees to a law firm (Gross) which represented the plaintiff in a personal injury case for two years before being discharged. The case ultimately settled:

After being retained, Gross filed a no-fault benefits application, referred the plaintiff to several doctors, scheduled and rescheduled independent medical examinations, and helped the plaintiff obtain a presettlement loan. The principal of Gross also asserted that the firm investigated the accident scene, obtained and reviewed medical records and other relevant documents, and "spen[t] a great deal . . . of time" on the phone with the plaintiff "answering his many questions about his claim." The plaintiff ultimately discharged Gross. In May 2018, the plaintiff retained nonparty Gregory Spektor & Associates, P.C. (hereinafter Spektor). In December 2018, Spektor filed a summons and complaint in this action on the plaintiff's behalf. In July 2020, the plaintiff obtained a $100,000 settlement.* * *

… [I]t cannot be said that the services performed by Gross were of no value … . Although Gross failed to submit time records showing the hours allegedly spent investigating and discussing the claim with the plaintiff, Gross submitted evidence showing that it performed various services in connection with the plaintiff's case over a period in excess of two years, including, but not limited to, ensuring the plaintiff's appearances for independent medical examinations to determine the extent of his injuries and the need for additional treatment, and obtaining documentation vital to the plaintiff's case … . Considering the amount of time spent by Gross working on matters pertaining to the plaintiff's case, the nature of the work performed, and the relative contributions of counsel, we deem it appropriate to award 10% of the net contingency fee to Gross. Jules v David, 2022 NY Slip Op 06696, Second Dept 11-23-22

Practice Point: Supreme Court abused its discretion in refusing to award a discharged law firm a portion of the contingency fee after the case settled. Although the firm did not submit any time records in this personal injury case, it did schedule independent medical exams, review medical records, investigate the accident scene, obtain documents, etc.

NOVEMBER 23, 2022

ATTORNEYS, CONTRACT LAW, BILLING FOR ATTORNEYS NOT ADMITTED IN NEW YORK.

THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT ALLEGING BILLING FOR SERVICES RENDERED BY ATTORNEYS NOT ADMITTED IN NEW YORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint stated a cause of action against defendant attorneys (BSF) alleging BSF billed for expenses associated with attorneys not admitted in New York:

The complaint stated a limited cause of action for breach of contract against BSF. The complaint sufficiently alleged that BSF overbilled or billed for unnecessary expenses associated with attorneys not admitted to practice law in, or based out of, New York, and the documentary submissions do not utterly refute those allegations … . Kaufman v Boies Schiller Flexner, LLP, 2022 NY Slip Op 06883, First Dept 12-6-22

Practice Point: Here plaintiff stated a cause of action against a law firm alleging the firm billed for unnecessary expenses associated with attorneys not admitted in New York.

DECEMBER 6, 2022

ATTORNEYS, DIVORCE, 60-DAY BILLING REQUIREMENT.

ALTHOUGH DEFENDANT-WIFE'S ATTORNEY IN THIS DIVORCE ACTION MISSED A COUPLE OF THE 60-DAY BILLING PERIODS, THE ATTORNEY WAS IN SUBSTANTIAL COMPLIANCE WITH 22 NYCRR 1400.3(9) AND THE WIFE'S REQUEST FOR ATTORNEY'S FEES SHOULD NOT HAVE BEEN DENIED; $135,315.90 AWARDED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant-wife's attorney was in substantial compliance with the billing requirements of 22 NYCRR 1400.3(9) and the wife's request for attorney's fess in this divorce action should not have been denied:

… [T]he defendant's attorney was in substantial compliance with 22 NYCRR 1400.3(9) … . Although the attorney for the defendant was dilatory in sending an initial invoice approximately 154 days after he was retained, the billable hours during that interval were itemized and accounted for, and the remainder of the invoices he sent all complied with the 60-day rule. Under the circumstances, the court should not have precluded the defendant from recovering an award of attorneys' fees for failure to comply with 22 NYCRR 1400.3(9), and we conclude that the plaintiff should be responsible for the balance of the defendant's attorneys' fees and expenses, net of his prior payments, less $3,487.50 related to a duplicative motion for expenses, which amounts to $135,315.90. Spataro v Spataro, 2022 NY Slip Op 07470, Second Dept 12-28-22

Practice Point: 22 NYCRR 1400.3(9) requires attorneys in divorce proceeding to bill every 60 days. Here the attorney missed a couple of the 60-day billing periods but the client's request for attorney's fees should not have been denied on that ground. The appellate division awarded $135,315.90.

DECEMBER 28, 2022

ATTORNEYS, LIABILITY TO THIRD PARTIES.

ABSENT FRAUD, COLLUSION OR A MALICIOUS OR TORTIOUS ACT, DEFENDANT ATTORNEYS COULD NOT BE LIABLE FOR ACTING WITHIN THE SCOPE OF THEIR AUTHORITY AS AGENTS OF THE CLIENTS AND ALLEGEDLY ADVISING THEIR CLIENTS TO BREACH A CONTRACT WITH PLAINTIFFS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant attorneys (Jin Hu defendants) could not be liable to third parties (plaintiffs) for allegedly advising their clients (DeVito defendants) to breach a real estate purchase contract:

… "[I]nasmuch as the relationship created between an attorney and his client is that of principal and agent, an attorney is not liable for inducing his [or her] principal to breach a contract with a third person, at least where he [or she] is acting on behalf of his principal within the scope of his [or her] authority" … . "Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client" … .

Here, the allegations in the complaint regarding the conduct of the Jin Hu defendants were impermissibly vague and conclusory … . Additionally, the complaint failed to sufficiently allege that the Jin Hu defendants acted outside the scope of their authority as counsel for the DeVito defendants or engaged in any conduct that could make them liable to the plaintiffs … . Asamblea De Iglesias Christianas, Inc. v DeVito, 2022 NY Slip Op 06456, Second Dept 11-16-22

Practice Point: Absent fraud, collusion of a malicious of tortios act, an attorney, as the agent for the principal (the client) acting within the scope of the attorney's authority, cannot be liable to the plaintiff for advising the client to breach a contract with the plaintiff.

NOVEMBER 16, 2022

CHILD VICTIMS ACT, DISCOVERABILITY OF FOSTER HOME RECORDS.

IN THIS CHILD VICTIMS ACT SUIT ALLEGING ABUSE BY AN EMPLOYEE OF A GROUP FOSTER HOME, THE JUDGE SHOULD HAVE HELD A DISCOVERABILITY HEARING BEFORE DETERMINING WHICH FOSTER-CARE RECORDS WERE DISCOVERABLE (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the judge should have held a discoverability hearing before which foster-care records could be released to the plaintiff. Plaintiff alleged he was abused in 1991 and 1992 by an employee of a group foster home (Little Flower):

Social Services Law § 372(3) requires "authorized agenc[ies]," including Little Flower, to "generate and keep records of those [children] who are placed in [their] care" … . Foster care records are deemed confidential (see Social Services Law § 372[3]), "considering that they must contain individualized and often highly personal information about the [children]" … . The confidential nature of such records serves "[t]o safeguard both the child and [his or her] natural parents" … , as well as others who may be "the subjects of such records" … . Although foster care records are entitled to a presumption of confidentiality, they may nonetheless be deemed discoverable pursuant to the provisions of CPLR article 31 … . Moreover, since "[the] statutory confidentiality requirement is intended [in part] to protect the privacy of children in foster care," it should not be used "to prevent former foster children from obtaining access to their own records" … , although this does not mean that they are always entitled to unfettered disclosure thereof. Even when considering a request for disclosure from a former foster child, "[a]n agency [may] move for a protective order where some part of the record should not be produced" … . * * *

Supreme Court improvidently exercised its discretion when it declined to conduct a discoverability hearing before deciding that branch of Little Flower's motion which sought a protective order regarding the purportedly confidential portions of the records. We therefore remit the matter to the Supreme Court, Nassau County, to conduct such a hearing and to "clearly specify the grounds for its denial or approval of disclosure with respect to each document or category of documents"

… . Cowan v Nassau County Dept. of Social Servs., 2022 NY Slip Op 05989, Second Dept 10-26-22

Practice Point: Here, in this Child Victims Act suit, the judge should have held a discoverability hearing before deciding which foster-care records could be released to plaintiff. Plaintiff alleged he was abused in 1991 and 1992 by an employee of a group foster home.

OCTOBER 26, 2022

CHILD VICTIMS ACT, EMPLOYMENT LAW.

PLAINTIFF, IN THIS CHILD VICTIMS ACT SUIT, ALLEGED HE WAS ABUSED BY AN EMPLOYEE OF FAMILY SERVICES OF WESTCHESTER (FSW) AND BROUGHT CAUSES OF ACTION FOR NEGLIGENT HIRING AND NEGLIGENT SUPERVISION AGAINST FSW; THOSE CAUSES OF ACTION WERE DISMISSED FOR FAILURE TO SUFFICIENTLY ALLEGE FSW WAS AWARE OF THE EMPLOYEE'S PROPENSITY TO COMMIT THE WRONGFUL ACTS ALLEGED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's negligence hiring and negligent supervision causes of action against Family Services of Westchester (FSW) should have been dismissed. Plaintiff, in this Child Victims Act suit, alleged he was abused by a youth mentor employed by FSW when he was 10 – 12 years old:

To sustain a cause of action sounding in negligent supervision of a child under the alleged facts of this case, the plaintiff must establish that the defendant "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . Similarly, "'[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision [of an employee], it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … .

Here, the complaint failed to state a cause of action to recover damages for negligent supervision of the plaintiff, since it failed to sufficiently allege that the third party acts were foreseeable … . Similarly, the complaint failed to state causes of action to recover damages for negligent hiring and negligent training and supervision related to the plaintiff's alleged youth mentor, since it failed to sufficiently allege that FSW knew, or should have known, of a propensity on the part of the youth mentor to commit the alleged wrongful acts … . Fuller v Family Servs. of Westchester, Inc., 2022 NY Slip Op 05992, Second Dept 10-26-22

Practice Point: Here in this Child Victims Act suit alleging abuse by an employee of Family Services of Westchester (FSW), the complaint did not state causes of action against FSW for negligent hiring or negligent supervision because the complaint did not sufficiently allege FSW was aware of the employee's propensity for the wrongful conduct alleged.

OCTOBER 26, 2022

CHILD VICTIMS ACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, EDUCATION-SCHOOL LAW.

PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY A PRIEST WHILE ATTENDING DEFENDANT'S SCHOOL; THE COMPLAINT STATED CAUSES OF ACTION FOR NEGLIGENT HIRING, NEGLIGENT SUPERVISION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this Child Victims Act action alleging sexual abuse by a priest while plaintiff was attending defendant's parish school stated causes of action for negligent hiring, negligent supervision and intentional infliction of emotional distress. "The complaint alleged .* * * the priest … was an employee and/or an agent of the defendant, that the defendant had knowledge that the priest was abusing students, including the plaintiff, or that he had the propensity to abuse, and that the sexual abuse of the plaintiff occurred during school activities and during times at which the plaintiff was under the defendant's supervision and care, custody, and control.":

An employer can be held liable under theories of negligent hiring, retention, and supervision where the complaint alleges that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Causes of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity … .

… [A] school "has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" … . "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" … .

… [T]reating the allegations in the complaint as true, including that the defendant had knowledge of the priest's sexual abuse of the plaintiff and other children and concealed that abuse, and giving the plaintiff the benefit of every possible favorable inference, the alleged conduct would be sufficiently outrageous in character and extreme in degree to set forth a cause of action for intentional infliction of emotional distress … . Novak v Sisters of the Heart of Mary, 2022 NY Slip Op 06814, Second Dept 11-30-22

Practice Point: In an action pursuant to the Child Victims Act, plaintiff alleged he was sexually abused by a priest while attending defendant's school. The complaint alleged defendant knew about the abuse. The complaint causes of action for negligent hiring, negligent supervision and intentional infliction of emotional distress.

NOVEMBER 30, 2022

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, NEGLIGENCE.

HERE PLAINTIFF BROUGHT SUIT AGAINST A SCHOOL DISTRICT PURSUANT TO THE CHILD VICTIMS ACT ALLEGING THE SCHOOL DISTRICT NEGLIGENTLY FAILED TO PROTECT HER FROM SEXUAL ASSAULT BY A FELLOW STUDENT; THE FACT THAT THE STUDENT COULD NOT BE CRIMINALLY PROSECUTED FOR THE ASSAULT BECAUSE OF HIS AGE DID NOT PRECLUDE REVIVAL OF THE CAUSES OF ACTION AGAINST THE SCHOOL DISTRICT; IN OTHER WORDS THE CHILD VICTIMS ACT APPLIES TO REVIVE NEGLIGENCE CAUSES OF ACTION EVEN IF THE UNDERLYING SEXUAL ASSAULT COULD NOT HAVE BEEN PROSECUTED (SECOND DEPT).

The Second Department determined negligent supervision and negligent hiring causes of action against a school district, pursuant to the Child Victims Act (CVA), alleging the failure to protect plaintiff from sexual abuse by a fellow minor student, properly survived motions to dismiss. The case raised a question of first impression: Does the CVA revive causes of action which are based upon the actions of a minor who could not be criminally prosecuted for sexual offenses because of his age? The answer is "yes:"

… [W]e are presented with an issue of first impression as to whether CPLR 214-g may be used to revive civil claims and causes of action asserted against a school district that are based on alleged acts of sexual assault committed by a minor who could not have been subjected to criminal liability at the time the alleged acts of sexual assault occurred. Resolution of this issue requires the Court to determine the meaning of the phrase "conduct which would constitute a sexual offense as defined in [Penal Law article 130]" as used in CPLR 214-g, and in particular, whether that phrase is limited to conduct that would subject the person who committed the acts of sexual assault to criminal liability. * * *

… [W]e find that the plain meaning of the phrase "conduct which would constitute a sexual offense as defined in [Penal Law article 130]" as used in CPLR 214-g refers to the conduct described in the enumerated provisions of the Penal Law, and is not limited to those situations in which the conduct would subject the actor to criminal liability … . Anonymous v Castagnola, 2022 NY Slip Op 06682, Second Dept 11-23-22

Practice Point: Here, presenting a question of first impression, negligent supervision and negligent hiring causes of action against a school district alleging the failure to protect the plaintiff from sexual assault by a fellow minor student were deemed revived by the Child Victims Act, despite the fact that the student who assaulted plaintiff could not have been criminally prosecuted because of his age.

NOVEMBER 23, 2022

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, SOCIAL SERVICES LAW.

IN THIS CHILD VICTIMS ACT SUIT AGAINST DEFENDANT SCHOOL DISTRICT ALLEGING THE ABUSE OF PLAINTIFF-STUDENT BY A TEACHER AND HER STEPFATHER IN THE 1970'S, THE FAILURE-TO-REPORT-ABUSE CAUSES OF ACTION PURSUANT TO THE SOCIAL SERVICES LAW SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act lawsuit, determined the causes of action alleging the defendant school district failed to report the abuse of plaintiff-student by a teacher (Bova) pursuant to the Social Services Law should have been dismissed:

Social Services Law § 413, which went into effect on September 1, 1973, provides that certain school officials "are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child" … . Social Services Law § 420(2) provides that "[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." For purposes of Social Services Law § 413, an "abused child" means "a child under eighteen years of age and who is defined as an abused child by the family court act" … . Family Court Act § 1012(e) defines an "abused child" as one harmed by a "parent or other person legally responsible for his [or her] care." … .

… Supreme Court should have granted that branch of the District's motion which was to dismiss the ninth cause of action, alleging that it failed to report suspected child abuse committed by Bova, because Bova was not a "person legally responsible" for the plaintiff's care … . The court also should have granted that branch of the District's motion which was to dismiss the tenth cause of action, alleging that it failed to report suspected child abuse committed by the plaintiff's stepfather, insofar as asserted against it. The complaint does not contain any allegation that the District received information about abuse committed by the plaintiff's stepfather at any time after the end of the 1972-1973 school year in June 1973, which was months prior to September 1, 1973, the date that Social Services Law § 413 went into effect … . Finally, …punitive damages are not available against the District … . Hanson v Hicksville Union Free Sch. Dist., 2022 NY Slip Op 05519, Second Dept 10-5-22

Practice Point: In this Child Victims Act suit against defendant school district alleging abuse of plaintiff-student by a teacher and her stepfather in the 1970's, the Social Services Law causes of action alleging the district failed to report the abuse were dismissed because: (1) the teacher was not legally responsible for plaintiff's care; and (2) the Social Services Law requiring the school to report abuse by the stepfather was not in effect at the time.

OCTOBER 5, 2022

CHILD VICTIMS ACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

THE COMPLAINT STATED A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST THE DIOCESE; PURSUANT TO THE CHILD VICTIMS ACT, PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY A PRIEST WHEN HE WAS 15 TO 16 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant Diocese's motion to dismiss the intentional infliction of emotional distress cause of

action should not have been granted. Plaintiff, pursuant to the Child Victims Act, alleged he was sexually abused by a priest when he was 15 to 15 years old:

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" … . Here, treating as true the plaintiff's allegations in the second amended complaint, that the defendants had knowledge of the priest's sexual abuse of the plaintiff and other children, yet concealed the abuse and permitted it to continue, and according the plaintiff the benefit of every possible favorable inference, the alleged conduct was sufficiently outrageous in character and extreme in degree to set forth a cause of action for intentional infliction of emotional distress … . The plaintiff also sufficiently alleged a causal connection between the defendants' alleged outrageous conduct and the plaintiff's injuries … . Moreover, this cause of action is not duplicative of the cause of action seeking to recover damages for negligence … . Eskridge v Diocese of Brooklyn, 2022 NY Slip Op 06788, Second Dept 11-30-22

Practice Point: Here the complaint stated a cause of action for intentional infliction of emotional distress against the Diocese based on the alleged sexual abuse of plaintiff by a priest, criteria explained.

NOVEMBER 30, 2022

CIVIL PROCEDURE, ATTORNEYS, SANCTIONS FOR VIOLATION OF DISCOVERY ORDERS.

PLAINTIFF'S FAILURE TO COMPLY WITH DISCOVERY ORDERS WAS WILLFUL AND CONTUMACIOUS BUT DID NOT WARRANT SUPREME COURT'S STRIKING THE COMPLAINT; THE APPELLATE DIVISION IMPOSED EVIDENTIARY SANCTIONS AND ORDERED PLAINTIFF'S COUNSEL TO PAY DEFENDANT $3000 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, agreed plaintiff's failure to comply with discovery orders was willful and contumacious, but

determined striking the complaint was too severe a sanction. The appellate division's sanctions included ordering plaintiff's counsel to pay defendant $3000:

… [T]he record demonstrates that the plaintiff violated court orders directing her to appear for a continued deposition by a certain date, to provide a full set of copies of photographs that she referenced during her first deposition or provide an affidavit as to the nonexistence of those photographs, and to execute authorizations for certain medical providers, a pattern that supports an inference of willful and contumacious behavior … . Furthermore, the plaintiff's procedural objection to the defendant's motion was without merit. However, under the circumstances, we find that the striking of the complaint was too drastic a remedy … . Accordingly, that branch of the defendant's motion which was pursuant to CPLR 3126 to strike the complaint should have been granted only to the extent of (1) precluding the plaintiff from using at trial any photograph that was not produced in response to the defendant's discovery demands, (2) directing the plaintiff to provide the defendant with medical authorizations for Jamaica Hospital, and (3) directing the plaintiff's counsel to personally pay the sum of $3,000 as a sanction to the defendant … . Castillo v Charles, 2022 NY Slip Op 06103, Second Dept 11-2-22

Practice Point: Here the appellate division found plaintiff's failure to comply with discovery orders willful and contumacious but did not agree with Supreme Court's striking of the complaint. The appellate court imposed evidentiary sanctions and ordered plaintiff's counsel to pay defendant $3000.

NOVEMBER 2, 2022

CIVIL PROCEDURE, EQUITABLE COUNTERCLAIMS, WAIVER OF JURY TRIAL.

THE DEFENDANT INTERPOSED COUNTERCLAIMS OF AN EQUITABLE NATURE AND THEREBY WAIVED A JURY TRIAL ON ALL CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's making equitable counterclaims waived a jury trial on all causes of action:

Where, as here, a defendant interposes counterclaims of an equitable nature related to a cause of action asserted in the complaint, the defendant waives a jury trial on all causes of action, whether legal or equitable in nature … . Accordingly, the Supreme Court should have granted the plaintiff's motion to strike the defendant's demand for a jury trial. … . Conwell Props., Inc. v DAG Rte. Six, LLC, 2022 NY Slip Op 06785, Second Dept 11-30-22

Practice Point: Where a defendant interposes counterclaims which are equitable in nature, the defendant waives a jury trial on all causes of action.

NOVEMBER 30, 2022

CIVIL PROCEDURE, MARKED OFF AS INACTIVE.

WHERE AN ACTION HAS BEEN MARKED OFF AS "INACTIVE," THERE IS NO NOTE OF ISSUE, THERE HAS BEEN NO 90-DAY DEMAND AND THERE IS NO ORDER DISMISSING THE COMPLAINT, RESTORATION TO THE CALENDAR AT ANY TIME IS AUTOMATIC (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to retore the action to the calendar after it was marked off because plaintiff failed to appear should have been granted. A note of issue had not been filed, there had been no 90-day notice pursuant to CPLR 3216, and there was no order directing dismissal of the complaint. Therefore restoration to the calendar at any time is automatic:

Where, as here, the case was marked "inactive" before a note of issue had been filed, there was no 90-day notice pursuant to CPLR 3216, and there was no order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 for failure to appear at a compliance conference, "'restoring a case marked "inactive" is automatic'" … . Under these circumstances, a motion to restore the action to the calendar should be granted "'without considering whether the plaintiff had a reasonable excuse for the delay or whether [it] engaged in dilatory conduct'" … . Moreover, since this action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404, the plaintiff was not required to move to

restore the action to the calendar within any specified time frame … . Thus, contrary to the Supreme Court's determination, the plaintiff's motion was not untimely. Fifth Third Mtge. Co. v Schiro, 2022 NY Slip Op 06689. Second Dept 11-23-22

Practice Point: Where a case has been marked off as "inactive," there is no note of issue, there has been no 90-day demand and there is not order dismissing the complaint, restoration to the calendar at any time is automatic.

NOVEMBER 23, 2022

CIVIL PROCEDURE, ORDER TO SUBMIT NOTICE OF SETTLEMENT AND PROPOSED JUDGMENT.

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).

The Second Department, reversing Supreme Court, determined the order granting a default judgment and the decision awarding nearly $275,000 must be vacated because plaintiff did not submit a notice of settlement and a proposed judgment within 60 days as required by 22 NYCRR 202.48:

Pursuant to 22 NYCRR 202.48(a), "[p]roposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted." "Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (id. § 202.48[b]). Here, it is undisputed that, on January 10, 2017, the plaintiff was

directed to settle a judgment on notice. Thus, pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed judgment within 60 days after January 10, 2017 … . It is also undisputed that the plaintiff failed to submit a notice of settlement and proposed judgment until July 2, 2019, nearly 2½ years after the Supreme Court directed the plaintiff to settle a judgment on notice. Thus, the plaintiff failed to timely settle a judgment pursuant to the requirements of 22 NYCRR 202.48(a).

… [T]he plaintiff failed to show good cause for his lengthy delay in submitting a notice of settlement and proposed judgment in compliance with the Supreme Court's directive … . Thus, under the particular circumstances of this case, the court should have granted that branch of the defendant's motion which was pursuant to 22 NYCRR 202.48 to vacate the order dated July 23, 2014. … [T]he decision rendered after the inquest must also be vacated. 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

CIVIL PROCEDURE, 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).

The Second Department, reversing (modifying) Supreme Court, determined the judgment of divorce should have been resettled to the extent that the judgment conform with the stipulation. But the judgment should not have been modified to

include a provision which was not in the stipulation. Resettlement cannot be used to amend the judgment, as opposed to correcting a mistake:

Resettlement of a judgment of divorce pursuant to CPLR 5019(a) is an appropriate remedy when the judgment does not accurately incorporate the terms of a stipulation of settlement … . Here, although the judgment of divorce provided that the defendant was responsible for providing health insurance for the parties' children, that provision was inconsistent with the terms of the stipulation. Specifically, the stipulation contained a provision which set forth that the plaintiff was responsible for providing health insurance for the parties' children through her employer unless she became unemployed, and then the defendant would be responsible for providing health insurance for them through his employer. …

… Supreme Court should have denied that branch of the defendant's motion which was to resettle the judgment of divorce to the extent it sought to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to be solely responsible to provide health insurance for the parties' children … . The amendment proposed by the defendant failed to comport with the terms of the stipulation regarding the responsibility of the parties as to the health insurance for their children and was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment "not affecting a substantial right of a party" (CPLR 5019[a] …). 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

CIVIL PROCEDURE, ABANDONMENT, FORECLOSURE.

PLAINTIFF BANK MADE A DEFECTIVE MOTION (WHICH WAS REJECTED) FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT AND DID NOT CORRECT THE ERRORS IN THE MOTION FOR TEN YEARS; THE MAJORITY HELD THE ACTION HAD NOT BEEN ABANDONED, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT AND THE ACTION SHOULD BE RESTORED TO THE CALENDAR (SECOND DEPT).

The Second Department, reversing Supreme Court's sua sponte dismissal of the complaint, over an extensive dissent, determined plaintiff bank in this foreclosure action, by filing a motion for an order of reference within one year of defendant's default, demonstrated it did not intend to abandon the action and the matter, therefore, should be restored to the calendar. The facts that the motion was initially rejected and plaintiff delayed ten years before addressing the defects in the motion did not require a different result:

Supreme Court erred in, sua sponte, directing dismissal of the complaint in this action pursuant to CPLR 3215(c). The plaintiff demonstrated that it filed a motion, inter alia, for an order of reference on October 24, 2008, which was within one year of the defendants' default in the action. Presenting this motion to the court was sufficient to demonstrate the plaintiff's intent to have the action proceed, notwithstanding that the motion papers were ultimately rejected by the court as defective … .. Although our dissenting colleague notes that the plaintiff thereafter failed to explain its failure to fix the defects that resulted in the motion papers being rejected for a period of 10 years, once a plaintiff establishes "compliance with CPLR 3215(c)," it is "not required, under the plain language of that subdivision, to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c)" ,,, ,Thus, because the plaintiff did not abandon the action, the court should have granted the plaintiff's motion to vacate the dismissal order and to restore the action to the active calendar … . 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

CIVIL PROCEDURE, ATTORNEYS, NEGLECT VS LAW OFFICE FAILURE.

HERE THE FAILURE TO OPPOSE THE MOTION FOR SUMMARY JUDGMENT WAS DUE TO NEGLECT WHICH DOES NOT WARRANT VACATUR; THE MOTION TO VACATE THE ORDER ENTERED ON PLAINTIFF'S DEFAULT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the order entered upon plaintiff's default should not have been granted:

Pursuant to CPLR 5015(a)(1), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person . . . upon the ground of . . . excusable default." "A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion" . "Law office failure may qualify as a reasonable excuse for a party's default if the claim of such failure is supported by a credible" and detailed explanation of the default … . The determination as to what constitutes a reasonable excuse is a matter of the court's discretion, but mere neglect will not suffice … .

… [A] managing attorney at the law firm representing the plaintiff was notified of the February 28, 2018 adjourned deadline to submit opposition papers to the defendants' motion, and a member of the firm entered a "follow up docket date" for February 7, 2018, "to ensure that the opposition was being handled" … . However, instead of "follow[ing] up with the managing attorney to make sure the

opposition was assigned," the member of the law firm returned the file to the file room. As the member of the law firm affirmed, "[i]t simply was not addressed properly." … [T]he plaintiff did not move to vacate the order dated August 29, 2018, for approximately eight months, or 253 days, after being served with the order and notice of entry … .

… [T]he plaintiff's failure to oppose the defendants' motion was the equivalent of mere neglect and was therefore insufficient to warrant vacatur … . Sauteanu v BJ's Wholesale Club, Inc., 2022 NY Slip Op 06509, Second Dept 11-16-22

Practice Point: A motion to vacate an order entered upon a party's default may be granted on law-office-failure grounds but not if the matter was simply neglected. Here the plaintiff did not move to vacate the order for 253 days after service of the order and notice of entry. The court found the plaintiff's failure to oppose the summary judgment was due to neglect and the motion to vacate the order should not have been granted.

NOVEMBER 16, 2022

CIVIL PROCEDURE, ATTORNEYS, WAIVER OF LACK-OF-PERSONAL-JURISDICTION DEFENSE.

DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE BY COUNSEL'S FILING A NOTICE OF APPEARANCE WITHOUT RAISING THE JURISDICTION OBJECTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant waived a lack-of-personal-jurisdiction defense by counsel's filing a notice of appearance without raising the jurisdictional objection:

"'By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction'" … . Here, the defendant appeared in the action by its counsel's filing of the notice of appearance … , and neither the defendant nor its attorney moved to dismiss the complaint for lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading. Thus, the defendant waived any

objection based on lack of personal jurisdiction by failing to move to dismiss the complaint on this ground at the time its counsel filed a notice of appearance in the action or to serve an answer which raised this jurisdictional objection … . Capital One N.A. v Ezkor, 2022 NY Slip Op 05829, Second Dept 10-19-22

Similar issue and result in: HSBC Bank USA N.A. v Mohammed, 2022 NY Slip Op 05843, Second Dept 10-19-22

Practice Point: Counsel's filing a notice of appearance without raising a lack-of-personal-jurisdiction objection waives the objection.

OCTOBER 19, 2022

CIVIL PROCEDURE, CONSOLIDATION OF TRIALS.

THE MOTION TO CONSOLIDATE THE TRIALS OF TWO ACTIONS STEMMING FROM THE SAME FIRE, WHERE ONE PARTY WAS BOTH A DEFENDANT AND A PLAINTIFF, SHOULD HAVE BEEN GRANTED; ANY PREJUDICE RESULTING FROM THE JURY'S KNOWLEDGE OF THE EXISTENCE OF INSURANCE (ONE OF THE ACTIONS IS AGAINST AN INSURER) CAN BE HANDLED WITH JURY INSTRUCTIONS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the motion to consolidate the trials of two actions stemming from the same fire which damages two adjoining properties should have been granted. The court noted that one party is both a plaintiff and a defendant:

Although a motion pursuant to CPLR 602(a) is addressed to the sound discretion of the trial court … , consolidation or joinder for trial is favored to avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts … . "Where common questions of law or fact exist, a motion [pursuant to CPLR 602(a)] to consolidate [or for a joint trial] should be granted, absent a showing of prejudice to a substantial right by the party opposing the motion" … .

Here … the two actions involve common questions of law and fact. Assuming, arguendo, that the respondents would be prejudiced if the two actions are tried before the same jury since it would bring to the jury's attention the existence of insurance … , any such prejudice is outweighed by the possibility of inconsistent verdicts if separate trials ensue … . Furthermore, the possibility of such prejudice can be mitigated by appropriate jury instructions … . Moreover, a joint trial, rather than consolidation, is appropriate where a party is both a plaintiff and a defendant … . Calle v 2118 Flatbush Ave. Realty, LLC, 2022 NY Slip Op 05981, Second Dept 10-26-22

Practice Point: Here the motion pursuant to CPLR 602 to consolidate the trials of two actions stemming from the same fire should have been granted. One party was both a defendant and a plaintiff. The fact that consolidation would bring the existence of insurance to the jury's attention (one of the parties is an insurer), although prejudicial, can be handled by jury instructions.

OCTOBER 26, 2022

CIVIL PROCEDURE, DISCOVERY ORDERS.

REPEATED FAILURES TO COMPLY WITH DISCOVERY ORDERS WITH NO EXCUSE WARRANTED STRIKING DEFENDANTS' ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' failure to comply with discovery orders justified striking the answer:

Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 3126 to strike the defendants' answer. The defendants' willful and contumacious conduct can be inferred from their repeated failures, over an extended period of time, to comply with the plaintiffs' discovery demands and the court's discovery orders without an adequate excuse … . L.K. v City of New York, 2022 NY Slip Op 06236, Second Dept 11-9-22

Practice Point: Here the defendants offered no excuse for their failure to comply with discovery orders and the appellate court struck their answer.

NOVEMBER 9, 2022

CIVIL PROCEDURE, DISCOVERY SANCTIONS, ATTORNEYS.

PLAINTIFF'S DISCOVERY-RELATED ACTIONS WERE NOT WILLFUL AND CONTUMACIOUS SUCH THAT THE COMPLAINT SHOULD HAVE BEEN DISMISSED; HOWEVER PLAINTIFF'S DISCOVERY DELAYS WARRANTED VACATING THE NOTE OF ISSUE AND PAYMENT OF $3000 TO DEFENDANTS' ATTORNEY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint in this traffic accident case should not have been dismissed as a discovery sanction. But defendant's motion to vacate the note of issue due to plaintiff's delay in disclosing prior relevant injuries should have been granted. In addition the appellate court ordered plaintiff's attorney to pay defendants' attorney $3000:

Supreme Court improvidently exercised its discretion in granting the defendants' motion to the extent of directing dismissal of the complaint pursuant to CPLR 3126(3). Although the plaintiff initially failed to provide authorizations for the release of medical records relating to pertinent injuries which pre-date the subject accident, the plaintiff did provide date-restricted authorizations for the release of medical records relating to pertinent injuries approximately one week after the defendants requested them. … [D]efendants did not clearly demonstrate that the plaintiff's discovery-related conduct was willful and contumacious … .

However, in light of the plaintiff's delay in disclosing information about prior injuries that bear on the controversy and would assist preparation for trial … . the Supreme Court should have granted the defendants' motion to the extent of vacating the note of issue … , directing the plaintiff to provide the defendants with authorizations permitting the release of medical records relating to pertinent injuries which pre-date the subject accident, and directing the plaintiff's attorney to pay the sum of $3,000 to the defendants' attorney….. Lopez v Maggies Paratransit Corp., 2022 NY Slip Op 06793, Second Dept 11-30-22

Practice Point: Here in this traffic accident case plaintiff's delays in providing information about prior relevant injuries warranted vacating the note of issue and payment of $3000 by plaintiff's attorney to defendants' attorney.

NOVEMBER 30, 2022

CIVIL PROCEDURE, DISMISSAL DOES NOT TERMINATE ACTION.

AN ORDER DISMISSING AN ACTION DOES NOT CONCLUDE THE ACTION WHICH CAN ONLY BE ACCOMPLISHED BY FINAL JUDGMENT ENTERED BY THE CLERK; HERE, ALTHOUGH THE ACTION HAD BEEN DISMISSED BY AN ORDER, ABSENT A JUDGMENT THE ACTION REMAINED VIABLE AND THE COURT SHOULD HAVE CONSIDERED PLAINTIFF'S POST-DISMISSAL MOTION ON THE MERITS (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, determined: (1) an order dismissing an action does not terminate the action which can only be accomplished by a judgment; and (2) here, although the action had been dismissed, the action was still viable in the absence of a judgment and plaintiff's motion for the appointment of a receiver should have been considered on the merits:

… [A]n order of dismissal is not the same as a judgment under CPLR 5011. CPLR 5011 is routinely utilized by practitioners and courts without controversy, as its mechanics are well-understood and not particularly complicated. A judgment is a paper that reflects the resolution of an action or proceeding … . A judgment may be either interlocutory or final. It "shall refer to, and state the result of, the verdict or decision, or recite the default upon which it is based" (CPLR 5011 …). A judgment is entered by the clerk at the conclusion of an action or proceeding (see CPLR 5016[a]). An action is not actually concluded until a final judgment is entered … . HSBC Bank USA, N.A. v Rubin, 2022 NY Slip Op 05682, Second Dept 10-12-22

Practice Point: An order dismissing an action does not conclude the action. Only a final judgment entered by the clerk terminates an action. Here there was an order

dismissing the action but no judgment had been entered. Therefore, plaintiff's post-dismissal motion should have been considered on the merits.

OCTOBER 12, 2022

CIVIL PROCEDURE, JUDGES, MOTION TO VACATE ORDER.

A MOTION TO VACATE AN ORDER SHOULD BE TRANSFERRED TO THE JUDGE WHO MADE THE ORDER; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) a motion to vacate an order should be transferred to the judge who made the order; and (2) the judge should not have, sua sponte, dismissed the foreclosure complaint:

A motion to vacate an order "shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it" (CPLR 2221[a]). "A motion made to other than a proper judge . . . shall be transferred to the proper judge" (CPLR 2221[c]). Here, instead of denying the first motion with leave to renew before Justice Schulman, the Supreme Court should have transferred the first motion to Justice Schulman … . …

"'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . Here, the plaintiff's failure to comply with the directives of the order … was not a sufficient ground upon which to direct dismissal of the complaint in the first action … . Citimortgage, Inc. v Dedalto, 2022 NY Slip Op 06105, Second Dept 11-2-22

Practice Point: A motion to vacate an order should be transferred to the judge who made the order.

Practice Point: A judge's power to, sua sponte, dismiss a complaint is limited and should only be exercised in extraordinary circumstances (not present in this case).

NOVEMBER 2, 2022

CIVIL PROCEDURE, JUDGES, REQUEST FOR INTERPRETER.

THE JUDGE SHOULD HAVE GRANTED DEFENDANTS' ATTORNEY'S REQUEST FOR AN INTERPRETER; A NEW HEARING TO DETERMINE THE VALIDITY OF SERVICE OF PROCESS IN THIS FORECLOSURE ACTION WAS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' attorney's request for an interpreter should have been granted. Defendant Rowshan claimed she was never served in this foreclosure action and she testified at the hearing on the validity of the service of process:

Pursuant to 22 NYCRR 217.1(a), "[i]n all civil . . . cases, when a court determines that a party . . . is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the clerk of the court or another designated administrative officer shall schedule an interpreter . . . from an approved list maintained by the Office of Court Administration." "'The determination whether a court-appointed interpreter is necessary lies within the sound discretion of the trial court, which is in the best position to make the fact-intensive inquiries necessary to determine whether there exists a language barrier'" so as to require an interpreter … .

Here, the record reflects that Rowshan was unable to meaningfully participate in the hearing due to her limited capacity to understand and communicate in English … . In multiple instances throughout her testimony, Rowshan's testimony was not responsive to the questions posed to her, Rowshan did not know the meaning of simple words, and she made confusing statements demonstrating her limitations in understanding English. * * *

Since the Supreme Court determined, after the hearing, that Rowshan's testimony was lacking in credibility due to "contradictions, misstatements and inconsistencies," the record reflects that the denial of the defendants' application for an interpreter may have influenced the court's determination. HSBC Bank USA, N.A. v Parvez, 2022 NY Slip Op 05683, Second Dept 10-12-22

Practice Point: Here the judge's failure to grant defendants' attorney's request for an interpreter required reversal and a new hearing. The defendant's testimony revealed her limited understanding of English and the court's ruling was based upon a determination of her credibility.

OCTOBER 12, 2022

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

THE ADDITIONAL NOTICE REQUIREMENT IN CPLR 3215(G)(4) DOES NOT APPLY TO SERVICE UPON A LIMITED LIABILITY COMPANY, AS OPPOSED TO A CORPORATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff was not required to comply with the additional notice requirement in CPLR 3215(g)(4) which does not apply to service upon a limited liability company (the defendant here), as opposed to corporations:

The court [in denying plaintiff's motion for a default judgment] determined that the plaintiff had failed to comply with CPLR 3215(g)(4) and that the respondent had a reasonable excuse for failing to answer the complaint in that it had not been served with process. …

Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate compliance with the additional notice requirement of CPLR 3215(g)(4) … . "By its express terms, the notice requirement is limited to situations where a default judgment is sought against a 'domestic or authorized foreign corporation' which has been served pursuant to Business Corporation Law § 306(b), and does not pertain to a limited liability company" … . Mitchell v Kingsbrook Jewish Med. Ctr., 2022 NY Slip Op 06477, Second Dept 11-16-22

Practice Point: The additional notice requirement for a default judgment pursuant to CPLR 3215(g)(4) does not apply to service on a limited liability company, as opposed to a corporation.

NOVEMBER 16, 2022

CIVIL PROCEDURE, 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).

The Second Department, reversing Supreme Court, determined; (1) the stipulation between the two parties rendered the related cause of action in the complaint moot' and (2) the other cause of action in the complaint was based on speculation about future events and therefore was not ripe for judicial review:

… [P]ursuant to the mootness doctrine, courts are precluded "from considering questions which, although once live, have become moot by passage of time or change in circumstances" … . By contrast, if an "anticipated harm is insignificant, remote or contingent the controversy is not ripe" for judicial review … . "To determine whether a matter is ripe for judicial review, it is necessary first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" … .

… [T]he first cause of action was resolved by the parties' so-ordered stipulation. … [T]hat cause of action was rendered academic pursuant to the mootness doctrine … . … [T]he second cause of action relied on speculation about what the County and its various departments might do in response to future audits, and therefore the contemplated harm was both remote and contingent and the controversy was not ripe for judicial review … . 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

CIVIL PROCEDURE, 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).

The Second Department, reversing Supreme Court in this medical malpractice case. determined the motion to set aside the verdict as a matter of law should not have been granted. but the motion to set aside the verdict as against the weight of the evidence should have been granted, explaining the difference:

"'A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party'" … . "In considering such a motion, the facts must be considered in a light most favorable to the nonmovant" … . …

… "[A] motion to set aside a jury verdict as contrary to the weight of the evidence should be granted '[o]nly where the evidence so preponderates in favor of the unsuccessful litigant that the verdict could not have been reached on any fair interpretation of the evidence'" … . … "'Whether a particular factual determination is against the weight of the evidence is itself a factual question. In reviewing a judgment of the Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury, as in this case, and the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial, since it does not have the power to make new findings of fact in a jury case'" … . * * *

As to the weight of the evidence, based on the record, we find that the verdict in favor of the plaintiffs could not have been reached on any fair interpretation of the evidence, and must be set aside (see CPLR 4404[a] …). Accordingly, we reverse the judgment, reinstate the complaint, grant that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the verdict as contrary to the weight of the evidence and for a new trial, and remit the matter to the Supreme Court, Queens County, for a new trial…. . 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

CIVIL PROCEDURE, PROOF OF SERVICE OF PROCESS.

ALTHOUGH THE FAILURE TO FILE PROOF OF SERVICE IS NOT A JURISDICTIONAL DEFECT AND CAN BE CURED SUA SPONTE, HERE THE PLAINTIFFS DID NOT PROPERLY SEEK LEAVE TO EXCUSE THE FAILURE AND THE JUDGE DID NOT GRANT PLAINTIFFS LEAVE TO FILE A LATE PROOF OF SERVICE; THE SERVICE WHICH WAS ALLOWED TO STAND BY THE JUDGE WAS THEREFORE A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not granted plaintiffs leave to file late proof of service on defendant Joffe. Plaintiffs offered no excuse for the failure:

Supreme Court granted that branch of the plaintiffs' motion which was for a declaration that Joffe was properly served with process pursuant to CPLR 308(2) and 313. The court did not acknowledge or address Joffe's argument that the plaintiffs' proof of service had not been filed with the court within the requisite time. The court recognized, but did not reach the merits of, that branch of the plaintiffs' motion which was, in the alternative, pursuant to CPLR 306-b to extend

the time to serve Joffe by 120 additional days. The court, in effect, denied the alternative branch of the plaintiffs' motion on the ground that it was academic.

… CPLR 308(2) provides that "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later."

… [T]he failure to file timely proof of service does not constitute a jurisdictional defect … . Rather, "[t]he failure to file proof of service is a procedural irregularity . . . that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004" … .

Here, since the plaintiffs did not properly seek leave to excuse their failure to timely file proof of service, and the Supreme Court did not grant them leave to file proof of service beyond the statutory window (see CPLR 308[2]), the proof of service relating to Joffe was a nullity … . Under the circumstances, the court should have denied that branch of the plaintiffs' motion which was for a declaration that Joffe was properly served with process pursuant to CPLR 308(2) and 313. Chunyin Li v Joffe, 2022 NY Slip Op 06227, Second Dept 11-9-22

Practice Point: The failure to file proof of service is not a jurisdictional defect and can be cured by the judge sua sponte. Here however the plaintiffs did not properly seek leave to excuse their failure to timely file proof of service and the judge did not grant plaintiffs leave to file late proof of service, rendering the service on the defendant (allowed to stand by the judge) a nullity.

NOVEMBER 9, 2022

CIVIL PROCEDURE, 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).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment did not meet the criteria of either CPLR 5015(a)(1) or CPLR 317:

"A defendant seeking to vacate a judgment pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" … . * * *

Here, the defendant failed to provide a "detailed and credible explanation" for the default … . Rather, the defendant submitted only an affidavit of an employee of its loan servicer averring that the defendant's agent for process had emailed the summons and complaint to the servicer, and the complaint had been "routed in error to the incorrect email address within" the servicer, which prevented the servicer from "timely notify[ing] its counsel of the [instant] action." That conclusory and nondetailed allegation does not constitute a reasonable excuse warranting vacatur of the default … . * * *

Although the defendant expressly moved pursuant to CPLR 5015(a)(1) only, the Supreme Court properly considered whether the defendant set forth grounds to vacate its default pursuant to CPLR 317 … . CPLR 317 provides, in relevant part, that a party served with a summons other than by personal delivery and who does not appear "may be allowed to defend the action within one year after he [or she] obtains knowledge of entry of the judgment . . . upon a finding of the court that he [or she] did not personally receive notice of the summons in time to defend and has a meritorious defense." A defendant moving pursuant to CPLR 317 is not required to set forth a reasonable excuse for the delay in answering the complaint … . However, "'to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action'" … .

… [T]he defendant did not even deny receipt of the summons and complaint. 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

CIVIL PROCEDURE, VACATE DEFAULT.

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).

The First Department, reversing Supreme Court, determined defendant property-owner's (St. Andrews') motion to vacate the default judgment in this slip and fall case should have been granted. St. Andrews had not updated its address with the Secretary of State and did not have a reasonable excuse. However a reasonable excuse is not required by CPLR 317:

St. Andrews's principal demonstrated that he had received a letter notification of plaintiff's accident before commencement of the action which he forwarded to his insurance broker, but that he never received any further notice until he received the information subpoena. The principal of DP Realty [designated by St. Andrews to receive service of process] also averred that he was unaware of the summons and complaint ever having been received, and therefore it would not have forwarded any papers to St. Andrews. That evidence was sufficient under CPLR 317 to establish St. Andrews's lack of personal notice of the summons in time to defend. St. Andrews also demonstrated a meritorious defense in that the Yonkers City Code "does not expressly make the landowner liable for failure to perform" the duty to clean snow and ice from the sidewalk, and an abutting landowner is not liable in the absence of such a statute for failure to clear snow, ice and dirt … .

… [P]laintiff demonstrated that St. Andrews never updated its address with the Secretary of State, and thus could not show a reasonable excuse for its default under CPLR 5015(a)(1). However, no showing of a reasonable excuse is required under CPLR 317 … , and it cannot be inferred solely from the failure to update defendant's address with the Secretary of State that defendant was deliberately avoiding receiving notice … . In light of the strong public policy favoring resolution of cases on their merits … , we find that St. Andrews demonstrated entitlement to vacatur under CPLR 317… . 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

CIVIL PROCEDURE.

IF THE NOTE OF ISSUE HAS BEEN VACATED, THE CPLR 3404 REQUIREMENTS FOR RESTORING THE ACTION TO THE CALENDAR DO NOT APPLY; THERFORE THE MOTION TO RESTORE NEED NOT BE MADE WITHIN A YEAR AND NEED NOT DEMONSTRATE A MERITIORIOUS CAUSE OF ACTION, REASONABLE EXCUSE, NO INTENT TO ABANDON, AND LACK OF PREJUDICE TO DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar should have been granted. Although the action had been stricken from the trial calendar more than a year before, the requirements of CPLR 3404 (demonstration of a meritorious cause of action, reasonable excuse, no intent to abandon and lack of prejudice to defendant) did not apply because the note of issue had been vacated:

Supreme Court erred in denying the plaintiff's renewed motion to restore the action to the active calendar. While a party moving to restore an action more than

one year after it was stricken from the trial calendar pursuant to CPLR 3404 must demonstrate a meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant … , CPLR 3404 did not apply here because the case reverted to its pre-note of issue status once the note of issue was vacated … . "[S]ince this action could not properly be marked off pursuant to CPLR 3404, the plaintiff was not obligated to move to restore within any specified time frame," or to establish his entitlement to restoration of the action under the standard applicable to automatic dismissals pursuant to CPLR 3404 … . Thus, in the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff's renewed motion should have been granted … . Insuasti v La Boom Disco, Inc., 2022 NY Slip Op 05684, Second Dept 10-12-22

Practice Point: Once an action has been stricken from the trial calendar, CPLR 3404 requires that a motion to restore be made within a year and demonstrate a meritorious cause of action, reasonable excuse, no intent to abandon, and lack of prejudice to defendant. However, CPLR 3404 does not apply where, as here, the note of issue has been vacated and no 90-day demand pursuant to CPLR 3216 has been made.

OCTOBER 12, 2022

CONTRACT LAW, ATTORNEYS.

THE ELECTRONIC LEGAL RESEARCH (LEXISNEXIS) CONTRACT SIGNED BY PLAINTIFF ATTORNEY WAS NOT PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the legal research contract (LexisNexis) signed by plaintiff-attorney was not procedurally or substantively unconscionable:

A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, namely, some showing of "an absence of meaningful choice on the part of one of

the parties together with contract terms which are unreasonably favorable to the other party" … . Procedural unconscionability examines the circumstances at the time an agreement was entered into, including the commercial setting, whether deceptive or high-pressured tactics were employed, whether a party had a reasonable opportunity to understand the terms of the contract, which party drafted the contract, whether fine print was used in an agreement as to material terms, whether there was an alternative supply for the goods or services in question, the experience and education of the party claiming unconscionability, whether there was disparity in the bargaining power, and whether a contract of adhesion is at issue … . Whether a contract is procedurally unconscionable presents a question of law for the court although it is a fact-based determination … .

… Plaintiff is an attorney, who did not assert any mental deficiencies, but only alleged duress from defendants' conduct in pursuing his signature on the 2020 Agreement. The urgency underlying plaintiff's signing the 2020 Agreement, without reading it, apart from promised lower service rates, is unclear. Plaintiff has not demonstrated how there is inequality in the bargaining power in this instance. Plaintiff is on equal footing with the defendants in understanding contract law, as well as the consequences of signing a contract. Moreover, the terms in the 2020 Agreement were similar to the majority of the material terms in the parties' 2019 Agreement, which plaintiff does not claim was unconscionable. Kaufman v Relx Inc., 2022 NY Slip Op 07192, First Dept 12-20-22

Practice Point: Here the plaintiff-attorney alleged the electronic legal research contract he signed with LexisNexis was unconscionable. The decision explains procedural and substantive unconscionability and held plaintiff, as an attorney, was on equal footing in negotiating the contract.

DECEMBER 20, 2022

CONTRACT LAW, DAMAGES.

THE DEFAULTING DEFENDANT WAS DEEMED TO HAVE ADMITTED ALL THE ALLEGATIONS IN THE BREACH-OF-CONTRACT COMPLAINT; THERFORE WHETHER DEFENDANT CAUSED THE DAMAGES SUSTAINED BY PLAINTIFF SHOULD NOT HAVE BEEN CONSIDERED IN THE INQUEST; THE FACT THAT THE AMOUNT OF DAMAGES IS UNCERTAIN DOES NOT JUSTIFY THE FAILURE TO AWARD DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's default admitted all the allegations in the complaint. Therefore damages should have been awarded for breach of contract:

A defaulting defendant is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" … . "The sole issue to be determined at an inquest is the extent of damages sustained by the plaintiff" … . Here, the inquest court erred in considering the question of whether the defendants caused the damages sustained by the plaintiff … .

… [W]hile there is some uncertainty with respect to the plaintiff's claim of lost profits, "when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A [party] violating [a] contract should not be permitted entirely to escape liability because the amount of the damages which [the party] has caused is uncertain" … . LD Acquisition Co. 9, LLC v TSH Trade Group, LLC, 2022 NY Slip Op 07227, Second Dept 12-21-22

Practice Point: A defaulting defendant is deemed to have admitted all the allegations in the complaint. Therefore whether the defendant caused the damages alleged in the complaint should not be considered in the inquest. Here the failure to award any damages for breach of contract was not appropriate.

DECEMBER 21, 2022

CONTRACT LAW, CORPORATION LAW, PIERCING THE CORPORATE VEIL.

THE COMPLAINT ADEQUATELY ALLEGED FACTS SUPPORTING PIERCING THE CORPORATE VEIL; THE CAUSES OF ACTION FOR UNJUST ENRICHMENT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) the complaint sufficiently alleged the corporate veil should be pierced, and (2) the unjust enrichment and breach of the implied covenant of good faith and fair dealing causes of action should not have been dismissed:

… [A] plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" … . "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" … . "Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" … . A cause of action under the doctrine of piercing the corporate veil is not required to meet any heightened level of particularity in its allegations … .

… [T]he plaintiffs adequately pleaded allegations that [the individual defendants] dominated [the corporations], and that they engaged in acts amounting to an abuse of the corporate form to perpetrate a wrong or injustice against the plaintiffs … . …

Where, as here, the existence of a contract, in this case, the alleged agreements [are] in dispute, a plaintiff may allege a cause of action to recover damages for unjust enrichment as an alternative to a cause of action alleging breach of contract (see CPLR 3014 …). Consequently, the cause of action alleging unjust enrichment was not duplicative of the breach of contract cause of action … . Furthermore, the cause of action alleging breach of the implied covenant of good faith and fair dealing was not duplicative of the breach of contract cause of action since it

alleged that the defendants engaged in additional conduct to realize gains from the plaintiffs, while depriving the plaintiffs of the benefits of the parties' agreements … . F&R Goldfish Corp. v Furleiter, 2022 NY Slip Op 06112. Second Dept 11-2-22

Practice Point: The facts alleged in the complaint supported piercing the corporate veil, criteria explained.

Practice Point: Because the existence of the agreements was in dispute, the unjust enrichment cause of action should not have been dismissed as duplicative of the breach of contract cause of action.

Practice Point: The facts alleged supported a cause of action for breach of the implied covenant of good faith and fair dealing.

NOVEMBER 2, 2022

CONTRACT LAW, FRAUDULENT INDUCEMENT, PAROL EVIDENCE.

ALTHOUGH THE BREACH OF CONTRACT CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE THE CONTRACT WAS NOT AMBIGUOUS AND PAROL EVIDENCE THEREFORE WAS NOT ADMISSIBLE; THE FRAUDULENT INDUCEMENT CAUSE OF ACTION, FOR WHICH PAROL EVIDENCE IS ADMISSIBLE, SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the fraudulent inducement cause of action should not have been dismissed as duplicative of the breach of contract causes of action, which were properly dismissed because the contract was not ambiguous and parol evidence was therefore not admissible:

Supreme Court erred in granting that branch of the defendants' motion which was for summary judgment dismissing the cause of action to recover damages for fraudulent inducement. The fraudulent inducement cause of action is not

duplicative of the breach of contract cause of action, as the fraudulent inducement cause of action is not based upon promised performance of an obligation of the defendants under the pledge agreement, and the plaintiffs sought separate and distinct damages for each cause of action … . Furthermore, the use of parol evidence is not precluded to establish the fraudulent inducement cause of action … . Goodale v Central Suffolk Hosp., 2022 NY Slip Op 06691, Second Dept 11-23-22

Practice Point: Here the fraudulent inducement cause of action was not duplicative of the dismissed breach of contract causes of action. Because the contract was not ambiguous, parol evidence was not admissible for the breach of contract causes of action. But parol evidence may be admitted in the fraudulent inducement action. The fraudulent inducement cause of action was not based on the performance of the contract and alleged separate and distinct damages.

NOVEMBER 23, 2022

CONTRACT LAW, QUANTUM MERUIT.

ALTHOUGH IT MAY BE PLED IN THE ALTERNATIVE, A QUANTUM MERUIT CAUSE OF ACTION MUST BE DISMISSED WHERE THE ISSUE IS ADDRESSED BY A VALID CONTRACT (SECOND DEPT).

The Second Department, reversing (modifying) the Court of Claims, determined the quantum meruit cause of action should have been dismissed because the action was based upon a valid contract:

Contrary to the conclusion of the Court of Claims, that branch of the State's motion which was for summary judgment dismissing the eleventh cause of action, which sought damages based upon a "total cost," or quantum meruit, method of recovery, should have been granted, on the ground that parties to a valid contract cannot seek damages in quantum meruit as an alternative to a breach of contract claim arising out of the same subject matter … . Quantum meruit may be pleaded in the alternative where there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue … . Here, there

clearly was a valid contract, and the amount in dispute was incurred pursuant to the contract. Further, the claims did not involve a qualitative change in the nature of the work which was outside the contemplation of the contract … . Tutor Perini Corp. v State of New York, 2022 NY Slip Op 05556, Second Dept 10-5-22

Practice Point: Although a quantum meruit cause of action may be pled as an alternative to a breach of contract cause of action, it must be dismissed if the underlying issues are addressed by a contract found to be valid.

OCTOBER 5, 2022

CORPORATION LAW, CORPORATE VERSUS INDIVIDUAL LIABILITY.

IN THIS BREACH OF CONTRACT SUIT CONCERNING SHARING ATTORNEY'S FEES, THE COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO STATE A CAUSE OF ACTION AGAINST AN INDIVIDUAL ATTORNEY, AS OPPOSED TO THE ATTORNEY'S FIRM (SECOND DEPT).

The Second Department, in this breach of contract action, determined the complaint did not allege sufficient facts to state a cause of action against an attorney (Lefft) as an individual, as opposed to against the attorney's law firm:

"As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and, consequently, will not impose liability upon shareholders for the acts of the corporation" (… Business Corporation Law § 1505). "In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, [the] plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice'" … .

Here, while the complaint alleged that Leftt had authority to make decisions on behalf of the firm, and that Leftt "ratified" both that the plaintiffs held an "of counsel" position with the firm, as well as the compensation arrangement … , the

complaint does not allege that Leftt exercised "complete dominion and control over" the firm, or otherwise "abused the privilege of doing business in the corporate form" that would form the basis for personal liability … . Hymowitz v Hoang Q. Nguyen, 2022 NY Slip Op 05997, Second Dept 10-26-22

Practice Point: To assert that a shareholder is personally liable for the conduct of the corporation (here a law firm), the complaint must allege the shareholder exercised complete dominion and control over the corporation.

OCTOBER 26, 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).

The Second Department, reversing the Court of Claims, determined claimant's motion for leave to file a late claim in this Labor Law 240(1) and 241(6) action should have been granted. Claimant was injured working on the Tappan Zee Bridge and served a notice of intention to file a claim on the attorney general but not, as required, on the New York State Thruway Authority (NYSTA). The absence of a valid excuse (ignorance of the law) was not determinative. The action had merit and the NYSTA had timely knowledge of the facts underlying the claim:

Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors set forth therein, to allow a claimant to file a late claim … . "In determining whether to permit the filing of a [late] claim . . . the court shall consider, among other factors, [1] whether the delay in filing the claim was

excusable; [2] whether the state had notice of the essential facts constituting the claim; [3] whether the state had an opportunity to investigate the circumstances underlying the claim; [4] whether the claim appears to be meritorious; [5] whether the failure to file or serve upon the attorney general a timely claim . . . resulted in substantial prejudice to the state; and [6] whether the claimant has any other available remedy" … .. "No one factor is deemed controlling, nor is the presence or absence of any one factor determinative" … . 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).

The Second Department, over a dissent, determined the claimant's failure to set forth the correct date of the alleged dental malpractice in the notice of intention to file a claim was a jurisdictional defect, notwithstanding the correct date set forth in the subsequently filed claim: Because the notice of intention was jurisdictionally defective it 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 claimant served the defendant with a notice of intention to file a claim dated January 9, 2017, which alleged that the claimant was injured when her mouth and lips were burned during the course of her treatment as a patient at a particular address where the defendant operated a school of dental medicine. The notice of intention to file a claim stated that "[t]he claim arose on or about October 15, 2016, the last date of continuous treatment and prior to said date."

In the subsequent claim, dated October 16, 2018, the claimant stated that she was injured on October 20, 2016, when hot wax was negligently spilled on her face and mouth while an employee of the defendant was attempting to make a wax mold for dentures. * * *

Section 10(3) of the Court of Claims Act sets forth time limitations for asserting "[a] claim to recover damages . . . for personal injuries caused by . . . negligence." Such a claim "shall be filed and served upon the attorney general within [90] days after the accrual of such claim" (id.). However, if the claimant serves "a written notice of intention to file a claim" within 90 days after the accrual of the claim, "the claim shall be filed and served upon the attorney general within two years after the accrual of such claim" … . * * * Since the claimant's notice of intention to file a claim was substantively deficient (see Court of Claims Act § 11[b]), it did not extend the claimant's time to file and serve a claim beyond the 90-day statutory period … . Under the circumstances, the claim was untimely (see Court of Claims Act § 10[3] …). "The claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction" … . Accordingly, the Court of Claims properly granted the defendant's motion pursuant to CPLR 3211(a)(2) to dismiss the claim for lack of subject matter jurisdiction. 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

CRIMINAL LAW, APPEALS, ATTORNEYS, PRESERVATION OF ERROR.

DEFENSE COUNSEL WAITED UNTIL AFTER THE PROSECUTOR MADE SEVERAL ARGUABLY IMPROPER REMARKS IN SUMMATION BEFORE OBJECTING "TO ALL OF THIS;" THE OBJECTION WAS DEEMED UNTIMELY, VAGUE, AMBIGUOUS, GENERAL AND NONSPECIFIC; THEREFORE THE ISSUES RAISED BY THE PROSECUTOR'S REMARKS WERE NOT PRESERVED FOR APPEAL (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive two-justice dissent, determined defense counsel did not make timely objections to remarks made by the prosecutor in summation. After several arguably improper comments by the prosecutor, defense counsel objected "to all of this." The judge struck the only last of the prosecutor's remarks. After the jury was charged and deliberating, defense counsel raised objections to several other remarks made by the prosecutor which were denied as untimely. The Second Department agreed the objections were not timely or specific and affirmed defendant's conviction:

The objection of defense counsel most relevant to this appeal was to "all of this," which was interposed only after the prosecutor likened a hypodermic needle to a dangerous instrument. The objection, as interposed, suffers from a number of problems in failing to preserve the issues now raised on appeal. First, the objection was vague and ambiguous. Second, it was untimely. Third, its language was general and nonspecific. The preservation rules … , requiring that objections be timely and specific rather than untimely and general, are basic, well-understood, and time-tested concepts, which should prompt no dispute in their application to this appellate record.

… The prosecutor had been speaking at some length, for a total of 28 uninterrupted sentences, before defense counsel interposed the objection at issue here. …

… As to [the] objection and its timing, the Supreme Court understandably treated it as applying to the last occurring statement of the prosecutor … . …

… For preservation, the defendant's objection was … general, as it did not identify to the Supreme Court any particular argument or remark by the prosecutor or any specific basis. The basis for the objection was not explained, rendering the entire objection general and insufficient for preservation purposes … . …

Defense counsel initiated further colloquy with the Supreme Court about the subject objection after the jury had been charged and after the jury had begun its deliberations. By then, counsel's objection was clearly untimely, as there was no longer an opportunity for the court to promptly make a curative ruling to the jury, had one even been indicated. People v Adorno, 2022 NY Slip Op 05856, Second Dept 10-19-22

Practice Point: The Second Department used this case to explain that, in order to preserve issues for appeal, objections must be timely and specific such that the trial court has the opportunity to address them. Here the prosecutor made several arguably improper remarks in summation before defense counsel objected "to all of this." Defense counsel didn't specify the nature of the objections until after the jury started deliberations. That was too late.

OCTOBER 19, 2022

CRIMINAL LAW, DWI, REVOCATION OF LICENSE.

DEFENDANT PLED GUILTY TO DWI AND THE JUDGE REVOKED HIS DRIVERS LICENSE FOR ONE YEAR; THE DMV SUBSEQUENTLY DENIED DEFENDANT'S APPLICATION TO REINSTATE HIS LICENSE; DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON THE GROUND HE WAS NOT AWARE HE COULD PERMANENTLY LOSE HIS LICENSE SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, in a comprehensive decision worth consulting, determined defendant's motion to vacate his DWI conviction

should not have been granted: Defendant pled guilty and Supreme Court revoked his driving license for one year. When defendant applied to reinstate his drivers license he was notified by the Department of Motor Vehicles (DMV) that, based on his prior DWI-related convictions or incidents, his application had been denied. Defendant brought a motion to vacate his conviction, arguing that his guilty plea was not knowing and voluntary because the plea was based on his understanding he75istrd lose his license for one year. Supreme Court granted the motion and the People appealed:

The Supreme Court erred in granting the defendant's motion to vacate the judgment of conviction on the ground that his plea of guilty was not entered knowingly, voluntarily, and intelligently. The subject regulation that led to the denial of the defendant's application for relicensing did not exist at the time he entered his plea of guilty, and it would have been impossible for the court to inform the defendant of consequences flowing therefrom … . "'The defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction'" … .

To the extent that the potentially permanent license revocation authorized under the subject regulation is a consequence of the defendant's instant plea of guilty at all (see People v Avital, 64 Misc 3d 483, 485 [Town of East Fishkill Just Ct, Dutchess County] [denial of relicensing under 15 NYCRR 136.5 results not from any particular conviction, but from the applicant's "complete driving history"]), it is, as the defendant acknowledges, a collateral consequence of his plea … . * * *

… [A] consequence of a conviction must represent an exceptionally severe liberty deprivation [i.e., deportation] in order to fall within the narrow category of collateral consequences of which a defendant must be advised at the time of entering the plea. … [W]e cannot conclude that the permanent loss of a driver license fits into that category. People v Maggio, 2022 NY Slip Op 06262, Second Dept 11-9-22

Practice Point: Defendant pled guilty to DWI knowing his license would be revoked by the court for one year. His application to reinstate his license was subsequently denied by the DMV. The fact that defendant's license could be revoked permanently by the DMV was a collateral consequence of the plea which did not affect the voluntariness of the plea. A defendant need not be aware of a

collateral consequence to render a plea voluntary. The rare exception is a collateral consequence which affects a liberty interest, deportation for example.

NOVEMBER 9, 2022

CRIMINAL LAW, MOTION TO SEAL CONVICTION RECORDS.

DEFENDANT'S OUT-OF-STATE CONVICTION DID NOT REQUIRE SUMMARY DENIAL OF DEFENDANT'S MOTION TO SEAL THE RECORDS OF HIS NEW YORK CONVICTION; HOWEVER, THE OUT-OF-STATE CONVICTION MUST BE PART OF THE ANALYSIS OF THE APPROPRIATENESS OF SEALING THE NEW YORK RECORDS; SUPREME COURT GRANTED THE MOTION WITHOUT CONSIDERING THE OUT-OF-STATE CONVICTION; MATTER REMITTED FOR A HEARING (SECOND DEPT).

The Second Department, In a full-fledged opinion by Justice Connolly, reversing Supreme Court, determined that an out-of-state conviction should be considered where defendant seeks to seal the records of a New York conviction. Here Supreme Court had granted the motion to seal, finding that only New York convictions need be considered. The matter was remitted for a hearing in which the out-of-state conviction would be part of the analysis:

This appeal presents the question of whether CPL 160.59(3)(f) requires a court to summarily deny a defendant's motion to seal an eligible offense where the defendant subsequently has been convicted of a crime under the laws of another state. We hold that CPL 160.59(3)(f) does not require summary denial under these circumstances. Instead, a defendant's subsequent conviction under the laws of another state is a factor that the motion court should consider in its discretionary determination as to whether to seal the eligible offense … . * * *

… [A] hearing is … appropriate in this case. Although the defendant's 2018 Virginia misdemeanor conviction was not a ground to summarily deny the defendant's motion to seal, at the hearing, the parties may provide additional

evidence related to that conviction, as well as any other evidence relevant to the determination of the defendant's motion. Further, assuming that the defendant was in fact convicted of a misdemeanor in Virginia, the Supreme Court should consider that conviction and the nature and circumstances of the underlying conduct in making its discretionary determination as to whether to grant the defendant's motion to seal. The court should also consider how the conviction reflects upon the defendant's character under CPL 160.59(7)(d). In particular, we note that the defendant's affidavit failed to disclose the existence of the 2018 Virginia misdemeanor conviction or explain the circumstances surrounding the conviction. Further, the affirmation of the defendant's attorney affirmatively stated that the defendant had no contact with the criminal justice system since his 1990 New York conviction, which does not appear to be accurate. Upon remittal, the court should consider all of these circumstances, as well as the nonexhaustive list of factors in CPL 160.59(7), in its new determination of the defendant's motion to seal. …

Although the Supreme Court properly determined that it was not required to summarily deny the defendant's motion to seal his 1990 conviction for attempted grand larceny in the third degree pursuant to CPL 160.59(3)(f), as the People opposed the defendant's motion to seal, the court was required to hold a hearing pursuant to CPL 160.59(6). People v Witherspoon, 2022 NY Slip Op 05866, Second Dept 10-19-22

Practice Point: A motion to seal the records of a New York conviction need not be summarily denied because of an out-of-state conviction. However, the out-of-state conviction must be considered as a factor in the analysis of the appropriateness of sealing the New York records.

OCTOBER 19, 2022

CRIMINAL LAW, SUPERIOR COURT INFORMATION.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE; THE SCI WAS THEREFORE JURISDICTIONALLY DEFECTIVE; THE ERROR NEED NOT BE PRESERVED FOR APPEAL (SECOND DEPT).

The Second Department, reversing defendant's conviction and vacating the plea, determined the superior court information (SCI) was jurisdictionally defective because it did not include an offense charged in the felony complaint or a lesser included offense of an offense charged in the felony complaint:

The defendant was charged, by felony complaint, with one count of course of sexual conduct against a child in the first degree under Penal Law § 130.75(1)(b), and one count of endangering the welfare of a child under Penal Law § 260.10(1). He waived indictment by a grand jury and entered a plea of guilty under a superior court information to one count of course of sexual conduct against a child in the second degree under Penal Law § 130.80(1)(a). …

The single count in the superior court information was not an "offense for which the defendant [had been] held for action of a grand jury" (CPL 195.20), in that it was not an offense charged in the felony complaint or a lesser included offense of an offense charged in the felony complaint … . Thus, the superior court information was jurisdictionally defective. This defect survives the defendant's failure to raise this claim in the Supreme Court, his plea of guilty, and his waiver of the right to appeal … . People v Mendoza, 2022 NY Slip Op 06499, Second Dept 11-16-22

Practice Point: A superior court information (SCI) which does not include an offense charged in the felony complaint or a lesser included offense is jurisdictionally defective and the error need not be preserved for appeal.

NOVEMBER 16, 2022

CRIMINAL LAW, JUDGES, COOPERATION AGREEMENTS.

THERE WERE DISPUTED FACTS CONCERNING WHETHER DEFENDANT BREACHED THE COOPERATION AGREEMENT; THE JUDGE SHOULD HAVE HELD A HEARING TO RESOLVE THE DISPUTED FACTS; DEFENDANT'S CONVICTION BY GUILTY PLEA REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction by guilty plea, determined the judge should not have determined defendant breached the cooperation agreement without a hearing. The prosecutor argued defendant breached the agreement by not providing information which defendant didn't reveal until he was about to testify against a codefendant in accordance with the agreement. The defendant argued the information did not relate to the codefendant and he did not believe it was relevant at the time the cooperation agreement was created:

"[S]entencing is a critical stage of the criminal proceeding and . . . 'the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause'" … . Generally, "a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored" … , but, where no promises are breached by the People and a defendant fails to abide by the terms of a cooperation agreement, a court is not obligated to permit a defendant to withdraw his plea … . Under the circumstances present here, these important issues have not been adequately resolved because the Supreme Court failed to hold a hearing or conduct a sufficient inquiry into whether the defendant violated the terms of the cooperation agreement … . …

This record reflects that the parties are sharply at odds as to whether there was a material breach of the cooperation agreement when the defendant provided additional information in response to new evidence shown to him during the codefendant's trial … . The determination of this issue rests on nuanced considerations, including the defendant's intent and the prosecutors' interactions with the defendant while preparing for the codefendant's trial. A hearing would have provided, among other things, an opportunity for the defendant to testify about the nature of the belatedly disclosed information, his reasons therefor, and his understanding of its importance to the case against the codefendant. People v Owensford, 2022 NY Slip Op 05716, Second Dept 10-12-22

Practice Point: Here there were nuanced disputed facts concerning whether defendant breached the cooperation agreement. The judge should have held a hearing to resolve the disputed facts. Conviction reversed and matter remitted.

OCTOBER 12, 2022

CRIMINAL LAW, PLEA AGREEMENTS.

A FINE NOT INCLUDED IN THE PLEA AGREEMENT SHOULD NOT HAVE BEEN IMPOSED (SECOND DEPT).

The Second Department, vacating the fine imposed at sentencing, determined the sentencing judge should not have imposed a fine that was not part of the plea agreement:

County Court improperly enhanced the defendant's sentence by imposing a fine that was not part of the negotiated plea agreement … . Under the circumstances of this case, we find it appropriate to vacate so much of his sentence as imposed a fine, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty … . People v Ruiz, 2022 NY Slip Op 06016, Second Dept 10-26-22

Practice Point: Here the imposition of a fine at sentencing which was not contemplated by the plea agreement was deemed an improper enhancement of the sentence.

OCTOBER 26, 2022

CRIMINAL LAW, RESTITUTION.

THE AMOUNT OF RESTITUTION IS PART OF THE SENTENCE AND MUST BE PRONOUNCED AT SENTENCING; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL AND SURVIVES A WAIVER OF APPEAL (SECOND DEPT).

The Second Department determined the judge's failure to pronounce the amount of restitution at sentencing required vacating the imposition of restitution and remitting the matter for further proceedings. The issue does not need to be preserved for appeal and is not precluded by a waiver of appeal:

"CPL 380.20 and 380.40(1) collectively require that courts 'must pronounce sentence in every case where a conviction is entered' and that—subject to limited exceptions not relevant here—'[t]he defendant must be personally present at the time sentence is pronounced'" … . "Restitution is a component of the sentence to which CPL 380.20 and 380.40(1) apply" … . A violation of CPL 380.20 or 380.40(1) "may be addressed on direct appeal notwithstanding a valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review" … .

Here, it is undisputed that the precise dollar amount of restitution was not pronounced by the County Court at the time of sentencing, or at any other point on the record. "The County Court should have, but failed to, fix the amount and terms of restitution at the time it pronounced the sentence[s] of which restitution was to be a part" … . People v Long, 2022 NY Slip Op 05545, Second Dept 10-5-22

Practice Point: Restitution is part of the sentence and must be pronounced at sentencing. The issue need not be preserved for appeal and survives a waiver of appeal.

OCTOBER 5, 2022

CRIMINAL LAW, SEARCH AND SEIZURE, PLAIN VIEW.

PROBABLE CAUSE FOR SEARCH OF DEFENDANT'S VEHICLE UNDER THE AUTOMOBILE EXCEPTION WAS PROVIDED BY THE ODOR AND OBSERVATION OF MARIJUANA; SEIZURE OF A TRANSPARENT BAG OF PILLS WAS NOT JUSTIFIED BY THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT BECAUSE IT WAS NOT IMMEDIATELY APPARENT THE PILLS WERE CONTRABAND AND THERE WAS NO MARIJUANA IN THE BAG (SECOND DEPT).

The Second Department, reversing defendant's conviction stemming from a transparent plastic bag of pills seized from defendant's vehicle after a traffic stop. Determined the seizure of the pills was not justified by the plain view exception to the warrant requirement. The court noted that the Penal Law statute prohibiting a probable-cause finding based solely on the odor of marijuana is not applied retroactively and therefore the marijuana odor and the observation of the marijuana provided probable cause for a search pursuant to the automobile exception to the warrant requirement here:

The plain view 82istribue is not applicable where the object must be moved or manipulated before its illegality can be determined … . The movement or manipulation of an object from its original state in a manner that goes beyond the objectives of the original search constitutes an independent search or seizure … . Such a search or seizure may not be upheld without proof that the officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or manipulated … .

Here, Cruz [the officer] testified that he did not know what the pills in the ziploc bag were when he seized them. * * *

Since it was obvious that the transparent 82istri bag seized by Cruz did not contain marihuana, and since it was not immediately apparent that the 82istri bag contained any other type of contraband, there was no justification for seizing the bag … . People v Rodriguez, 2022 NY Slip Op 07080, Second Dept 12-14-22

Practice Point: The Penal Law statute prohibiting a probable-cause finding based solely on the odor of marijuana is not applied retroactively.

Practice Point: If an object, i.e., a transparent plastic bag of pills, must be manipulated before it can be determined to be contraband, seizure under the plain view exception is not justified. Here the odor and observation of marijuana provided probable cause for the search of the vehicle, and containers within the vehicle, for marijuana. Because the transparent bag of pills did not contain marijuana, the plain view exception did not apply.

DECEMBER 14, 2022

CRIMINAL LAW, SENTENCING.

THE SENTENCING JUDGE IMPROPERLY SPECULATED AND CONSIDERED UNCHARGED CRIMES; SENTENCE VACATED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the sentencing judge improperly speculated and considered uncharged crimes:

… [C]ertain remarks made by the County Court demonstrate that, in imposing sentence, it improperly speculated and considered that the defendant had committed additional similar crimes for which she had not been apprehended. Consequently, the defendant must be resentenced … . People v Jeffriesel, 2022 NY Slip Op 06012, Second Dept 10-2622

Practice Point: Here the judge's remarks at sentencing revealed improper speculation and consideration of uncharged crimes. The sentence was vacated and resentencing ordered.

OCTOBER 26, 2022

CRIMINAL LAW, SUPPRESSION HEARING, PEOPLE'S BURDEN.

ALTHOUGH THE PEOPLE PRESENTED EVIDENCE OF THE SHOWUP IDENTIFICATION AT THE SUPPRESSION HEARING, THEY DID NOT PRESENT ANY EVIDENCE OF THE INITIAL STOP OF THE DEFENDANT; THE PEOPLE DID NOT MEET THEIR BURDEN TO SHOW THE LEGALITY OF THE POLICE CONDUCT; SUPPRESSION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction by guilty plea, determined the People did not present sufficient evidence at the suppression hearing and suppression of the seized evidence and statements should have been granted. Defendant was accused of a knifepoint robbery of a gas station and was identified in a showup procedure. At the suppression hearing, the People did not present any evidence of the initial stop of the defendant and therefore did not establish the legality of the police conduct:

"On a motion to suppress, the People bear the burden of going forward to establish the legality of police conduct in the first instance" … . "Where a police encounter is not justified in its inception, it cannot be validated by a subsequently acquired suspicion" … . Here, at the suppression hearing, the People failed to present any evidence establishing the basis for the police to have made the initial stop of the defendant. Thus, the People failed to carry their burden of establishing the legality of police conduct in the first instance, and all evidence recovered as a result of the unlawful stop must be suppressed … . People v Vazquez, 2022 NY Slip Op 07461, Second Dept 12-28-22

Practice Point: If, at the suppression hearing, the People do not present any evidence of the initial contact between the police and the defendant, they do not meet their burden to show the legality of the police conduct and suppression is required.

DECEMBER 28, 2022

CRIMINAL LAW, TESTIMONIAL HEARSAY.

THE POLICE OFFICER'S TESTIMONY ABOUT HOW THE DEFENDANT'S DAUGHTER, WHO DID NOT TESTIFY AT THE TRIAL, DESCRIBED THE ALLEGED STABBING WAS INADMISSBILE TESTIMONIAL HEARSAY; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's assault conviction, over a dissent, determined the police officer's (Costello's) testimony about the defendant's daughter's explanation of the alleged stabbing, which included a reinactment, was testimonial hearsay and should not have been admitted. The defendant's daughter did not testify at the trial. In addition, the defendant's son's statement to the defendant at the scene (Why, why, why? Why did you stab my mom?") should not have been admitted as an excited utterance because the son did not witness the alleged stabbing:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" … . To determine which of these categories an out-of-court statement falls into, a court should focus on "the purpose that the statement was intended to serve" … , and to ascertain "the 'primary purpose' of an interrogation," a court should "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties" … .

… [T]he daughter's statements to Costello regarding the circumstances under which the defendant had stabbed the victim were testimonial in nature. Viewing the record objectively, at the time the statements were made, there was no ongoing emergency. The victim had been removed from the scene and taken to a hospital. The defendant had been taken into custody and transported to a police station. Indeed, Costello testified that a detective was never even assigned to the case, precisely because the police already "had the alleged perpetrator in custody." Although the daughter was still deeply upset as a result of the stabbing, she was not in need of police assistance, and it is clear that Costello's questions were not

asked for the purpose of facilitating such assistance. Rather, the primary purpose of Costello's questioning of the daughter "was to investigate a possible crime" … . Costello "was not seeking to determine . . . what is happening, but rather what happened" … . Indeed, Costello expressly asked the daughter to "indicate to [him] what happened." Moreover, Costello went beyond simply asking what happened and requested that the daughter describe and illustrate exactly how it happened using simple words and gestures. While the People argue that Costello requested the use of gestures merely to overcome a language barrier, the fact remains that he asked the daughter to convey information about past events. The daughter's detailed account of those events, complete with a physical re-enactment of the crime, did "precisely what a witness does on direct examination," and thus was "inherently testimonial" … . People v Vargas, 2022 NY Slip Op 07460, Second Dept 12-28-22

Practice Point: Here a police officer was allowed to testify about how defendant's daughter described the alleged stabbing. The daughter did not testify at the trial. Because the officer was trying to ascertain what happened in the past (the defendant was already in custody), as opposed to "what is happening" during an emergency, what the daughter told the officer was testimonial hearsay which should not have been admitted. The decision includes a good explanation of the difference between testimonial and nontestimonial hearsay.

DECEMBER 28, 2022

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, POST-REVOCATION RELICENSING.

DEFENDANT MOVED TO VACATE HIS CONVICTION BY GUILTY PLEA ON THE GROUND HE WAS NOT AWARE HE COULD PERMANENTLY LOSE HIS DRIVER LICENSE BASED ON THE PLEA; THE MOTION SHOULD NOT HAVE BEEN GRANTED; POST-REVOCATION RELICENSING IS OUTSIDE OF THE COURTS' CONTROL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction by guilty plea should not have been granted. Defendant

argued he would not have pled guilty had he realized he could permanently lose his driver license. The regulation which allowed permanent revocation of defendant's license did not exist at the time of the plea:

The subject regulations that led to the denial of the defendant's application to restore his driver license did not exist at the time he pleaded guilty, and the defendant failed to identify any conduct that occurred during the plea proceedings that constituted a violation of his due process rights … . "The defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction" … .

… [T]he loss of a driver license is a collateral consequence of a plea of guilty and is not a consequence within the control of the court system … . The Supreme Court had no duty to inform the defendant of this consequence during the plea colloquy … . As the Court of Appeals stated in Matter of Acevedo v New York State Dept. of Motor Vehs. (29 NY3d at 220), "the Commissioner [of the DMV] will have exclusive authority over post-revocation relicensing, and . . . those relicensing determinations will be discretionary." People v DiTore, 2022 NY Slip Op 05541, Second Dept 10-5-22

Practice Point: Courts have no control over post-revocation relicensing. The Department of Motor Vehicles has exclusive jurisdiction over relicensing. Here defendant's motion to vacate his conviction by guilty plea on the ground he was not aware he could permanently lose his driver license should not have been granted.

OCTOBER 5, 2022

DEFAMATION, PRIVILEGE.

THE ALLEGEDLY DEFAMATORY STATEMENTS MADE IN A KOREAN-LANGUAGE CHAT ROOM WERE PROTECTED BY QUALIFIED PRIVILEGE, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statements alleged to be defamatory were protected by qualified privilege. Plaintiff is an

organization established to act as a liaison between the Korean-American community and the NYC Police Department. The statements were made in a Korean language chat group where the management of the organization was discussed:

The defendant established, prima facie, that his alleged statements are subject to a qualified privilege. Qualified privilege applies to a statement "when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned" … . Application of the privilege depends on whether "the relation of the parties [Is] such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others" … . Here, the alleged statements were made in a password-controlled, members-only chat group, and involved the management of the members' organization. Such circumstances fall within the scope of the qualified privilege … .

A plaintiff may defeat the qualified privilege with a showing of either common-law malice (spite or ill will), or actual malice (knowledge of the falsity of the statement or reckless disregard for the truth) … . Here, the plaintiffs failed to submit any evidence that the defendant was motivated by malice alone in making the alleged statements … . They similarly failed to submit any evidence that the defendant knew the alleged statements were false or acted with a reckless disregard for their truth … . Joo Tae Yoo v Choi, 2022 NY Slip Op 06791, Second Dept 11-30-22

Practice Point: Qualified privilege applies to an allegedly defamatory statement "when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned" … . Qualified privilege will be defeated if is demonstrated the statements were made with "common law malice" (ill will or spite) or "actual malice (knowledge of the falsity of the statement or reckless disregard for the truth).

NOVEMBER 30, 2022

DISCIPLINARY HEARINGS (INMATES).

THE DISORDERLY CONDUCT AND VIOLENT CONDUCT MISBEHAVIOR DETERMINATIONS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (SECOND DEPT).

The Second Department, reversing (modifying) the superintendent's determination, held that the disorderly conduct and violent conduct determinations were not supported by substantial evidence:

… [T]he determination that the petitioner was guilty of violating rule 100.15, which provides that an incarcerated individual shall not engage in unauthorized sparring, wrestling, body-punching, or other forms of disorderly conduct, was not supported by substantial evidence. The misbehavior report does not state that the petitioner engaged in any particular act of disorderly conduct set forth in the rule, or any other similar act that could be defined as disorderly conduct within the meaning of the rule, which contemplates some form of physical contact by an inmate with another individual. Nor does the misbehavior report constitute substantial evidence to establish that the petitioner was guilty of violating rule 104.11, prohibiting violent conduct. The report does not indicate that the petitioner committed any particular violent act, merely stating that "[f]orce became necessary," without indicating what the petitioner did to necessitate the use of such force. Furthermore, there is no evidence outside the report to support the determination that the petitioner was guilty of disorderly conduct or violent conduct … . Matter of White v LaManna, 2022 NY Slip Op 06010, Second Dept 10-26-22

Practice Point: Here in these prison disciplinary proceedings there was no proof of violence on the part of the inmate. Therefore the disorderly conduct and violent conduct determinations were not supported by substantial evidence. The allegation that "force became necessary," referring to the actions of the guards, was not enough.

OCTOBER 26, 2022

EDUCATION-SCHOOL LAW, NEGLIGENCE, ASSUMPTION OF THE RISK.

THE PLAINTIFF-STUDENT FOOTBALL PLAYER DID NOT ASSUME THE RISK OF INJURY IN A FOOTBALL-RELATED WEIGHT-LIFTING SESSION; THE RISK OF A WEIGHT-LIFTING INJURY IS NOT INHERENT IN THE GAME OF FOOTBALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-student, a high school sophomore varsity football player, did not assume the risk of injury during a weight-lifting training-session when he voluntarily agreed to play football. The decision includes a good explanation of the assumption-of-the-risk doctrine:

Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sport or recreational activity is deemed to consent to the risks inherent in that sport, thereby negating any duty on a defendant's part to safeguard the plaintiff from those risks … . While the absolute defense of implied assumption of risk, which was abolished by the enactment of CPLR 1411 in 1975, barred recovery by a plaintiff who was aware of the risks of engaging in a specific act and engaged in that specific act nonetheless …, the separate and distinct doctrine of primary assumption of risk posits that the risk is assumed by virtue of the plaintiff's voluntary participation in a sporting event, which indicates the plaintiff's consent to the risks that are inherent in that sport. Although a plaintiff's knowledge of the risk involved in the particular act that results in injury remains relevant, under CPLR 1411, in assessing his or her comparative fault, in the context of primary assumption of risk, "knowledge plays a role but inherency is the sine qua non" … . * * *

Unlike a plaintiff subject to the pre-1975 defense of implied assumption of risk, the infant plaintiff in this case did not assume a risk at the moment he attempted to lift the 295-pound bar. Rather, his assumption of risk occurred when he joined the football team …, and the risks he assumed were limited to those that are inherent in the sport of football. The risk of losing control of a 295-pound bar is not a risk inherent in the sport of football … . Annitto v Smithtown Cent. Sch. Dist., 2022 NY Slip Op 06098, Second Dept 11-2-22

Practice Point: This decision clarifies the boundaries of the assumption-of-the-risk as it applies to school sports. When the plaintiff-student joined the football team,

he assumed the risks inherent in the game of football. Here, those risks were not deemed to extend to weight-training, even though the weight-training was football-related. The student's negligent supervision action stemming from his weight-training injury was not precluded by the assumption-of-risk doctrine.

NOVEMBER 2, 2022

ELECTION LAW.

THE DEFECT IN THE ABSENTEE BALLOTS, I.E., AN UNSEALED ENVELOPE INSIDE A SEALED ENVELOPE, WAS CURABLE PURSUANT TO THE ELECTION LAW; THEREFORE THE ABSENTEE BALLOTS SHOULD NOT HAVE BEEN DEEMED INVALID; THE VOTERS SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO CURE THE DEFECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 94 absentee ballots suffered from a curable defect. Therefore the absentee ballots should not have been deemed invalid. Rather, the voters should have been notified of the defect and given an opportunity to correct it. The defect concerned unsealed envelopes which were inside sealed envelopes:

Here, each of the 94 absentee ballots was received by the Board with an unsealed ballot affirmation envelope inside a completely sealed outer mailing envelope. Therefore, the defects were curable under Election Law § 9-209(3)(b)-I (see 9 NYCRR 6210.21[g][2]). Matter of Amato v Sullivan, 2022 NY Slip Op 07039, Second Dept 12-14-22

Practice Point: Here the absentee ballots were deemed invalid because envelopes were not sealed. However, pursuant to the Election Law, unsealed envelopes inside sealed envelopes constitute a curable defect. The voters should have been given the opportunity to cure the defect.

DECEMBER 14, 2022

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, INSURANCE LAW, HEALTH BENEFITS.

REDUCTION OF PETITIONER-SCHOOL-DISTRICT EMPLOYEE'S RETIREMENT HEALTH BENEFITS BELOW THE LEVEL AFFORDED ACTIVE EMPLOYEES VIOLATES INSURANCE LAW 4235 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school district's reduction of petitioner-employee's (Perrotta's) retirement health benefits below the level afforded active employees violated the Insurance Law:

The moratorium law [Insurance Law 4235] sets "'a minimum baseline or "floor" for retiree health benefits'" which is "'measured by the health insurance benefits received by active employees . . . In other words, the moratorium [law] does not permit an employer to whom the statute applies to provide retirees with lesser health insurance benefits than active employees'" … . Thus, a school district may not diminish retirees' health insurance benefits unless it makes "a corresponding diminution in the health insurance benefits or contributions of active employees" … . The purpose of the moratorium law is to protect the rights of retirees who "'are not represented in the collective bargaining process, [and] are powerless to stop unilateral depreciation or even elimination of health insurance benefits once the contract under which they retired has expired'" … .

Here, since Perrotta submitted evidence establishing that the district diminished the health insurance contribution rate for certain retirees, and the district failed to proffer evidence that it made a corresponding diminution in the health insurance benefits or contributions for active employees, its determination violated the moratorium law. … Supreme Court should have granted the petition and annulled the district's determination … . Matter of Perrotta v Syosset Cent. Sch. Dist., 2022 NY Slip Op 06704, Second Dept 11-23-22

Practice Point: Here the petitioner, a retired school district employee, successfully contested the reduction of her retirement health benefits below the level afforded active employees as a violation of Insurance Law 4235.

NOVEMBER 23, 2022

FAMILY LAW, CHILD SUPPORT.

ALTHOUGH FATHER DEMONSTRATED HIS FAILURE TO PAY CHILD SUPPORT WAS NOT WILLFUL, FAMILY COURT SHOULD HAVE ENTERED A MONEY JUDGMENT BASED ON HIS FAILURE TO OBEY THE LAWFUL ORDER OF CHILD SUPPORT (SECOND DEPT).

The Second Department, modifying Family Court, determined that although father demonstrated his failure to pay child support was not willful, a money judgment for father's failure to obey a lawful order of child support should have been entered:

"Proof of failure to pay child support as ordered constitutes prima facie evidence of willful violation of an order of support" … . Here, the mother presented evidence at the hearing of the father's failure to pay child support as ordered. Specifically, the mother presented evidence that the father had made only one child support payment during the relevant period, and that he owed basic child support in the sum of $19,591.43. Therefore, the mother met her prima facie burden … .

The burden then shifted to the father to offer some competent, credible evidence that his failure to pay child support in accordance with the order was not willful … . The father testified, and presented proof, that he intended to pay, but his employer and/or the Support Collection Unit had not properly followed through with the wage garnishment procedure. The Support Magistrate found the father's testimony credible. "Great deference should be given to the credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses" … .. Under the circumstances of this case, the father's showing was sufficient to establish that his failure to pay was not willful.

Nevertheless, as there was competent proof at the hearing that the father failed to obey a lawful order of child support (see Family Ct Act § 454[1]), a money judgment should be entered in favor of the mother for the amount of child support

arrears that accrued during the relevant period … . Matter of Santman v Schonfeldt, 2022 NY Slip Op 05693, Second Dept 10-12-22

Practice Point: Here father demonstrated his failure to pay child support was not willful. But the court still should have entered a money judgment against father based upon his failure to obey a lawful order of child support.

OCTOBER 12, 2022

FAMILY LAW, DIVORCE, INTERIM ATTORNEY'S FEES.

IN THIS DIVORCE PROCEEDING, IT WAS AN ABUSE OF DISCRETION TO DENY INTERIM ATTORNEY'S FEES TO THE NONMONIED SPOUSE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined interim attorney's fees should have been awarded to the nonmonied spouse:

Supreme Court improperly referred to the trial court that branch of the plaintiff's cross motion which was for an award of interim counsel fees (see Domestic Relations Law § 237[a] …). "Because of the importance of such awards to the fundamental fairness of the proceedings, . . . an application for interim counsel fees by the nonmonied spouse in a divorce action should not be denied—or deferred until after the trial, which functions as a denial—without good cause, articulated by the court in a written decision" … . Here, the court erred in summarily referring that branch of the plaintiff's cross motion which was for an award of interim counsel fees to the trial court, which functioned as a denial of that relief, and failed to articulate any reasons, much less good cause, for that determination. The evidence submitted by the plaintiff demonstrates that she is the nonmonied spouse, as the defendant earned five to seven times more income than the plaintiff in recent years … . While the defendant argues that the plaintiff has funds available to her, the plaintiff "cannot be expected to exhaust all, or a large portion, of the finite resources available to her in order to pay her attorneys, particularly when the [defendant] is able to pay his own legal fees without any substantial impact upon his lifestyle" … . Fugazy v Fugazy, 2022 NY Slip Op 06115, Second Dept 11-2-22

Practice Point: Here in this divorce action it was deemed an abuse of discretion to, without explanation, deny interim attorney's fees to the nonmonied spouse.

NOVEMBER 2, 2022

FAMILY LAW, NEGLECT, MARIJUANA USE AS NEGLECT.

THE AMENDMENT TO THE FAMILY COURT ACT WHICH PRECLUDES A FINDING OF NEGLECT BASED SOLELY ON MARIJUANA USE SHOULD BE APPLIED RETROACTIVELY; HOWEVER HERE THERE WAS SUFFICIENT EVIDENCE OF MOTHER'S NEGLECT OF THE CHILD BASED UPON HER "ABUSE" (AS OPPOSED TO "USE") OF MARIJUANA (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Zayas, determined (1) the amendment to the Family Court act precluding a finding of neglect based solely on marijuana use should be applied retroactively, and (2) the evidence mother neglected the child based upon abuse of marijuana was sufficient:

The 2021 amendment should not be interpreted as preventing any reliance on the misuse of marihuana, no matter how extensive or debilitating, to establish a prima facie case of neglect. After all, the statute still encompasses the misuse of other legal substances, such as alcoholic beverages and prescription drugs. Based on the plain language of the statute, the 2021 amendment does not prevent a court from finding that there has been a prima facie showing of neglect where the evidence establishes that the subject parent has, in fact, repeatedly misused marihuana in a manner that "has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" … . Such a finding is not based on "the sole fact" that the parent "consumes cannabis" … .

… In its order, the Family Court expressly determined that the mother had misused marihuana and "clearly had a substantial impairment of judgment, and/or substantial manifestation of irrationality and was disoriented and/or incompetent." Since this finding was not based on "the sole fact" that the mother "consumes

cannabis" (Family Ct Act § 1046[a][iii]), it provided a sufficient basis on which to apply the presumption of neglect arising from repeated misuse of drugs that is articulated in the statute, as amended … . Matter of Mia S. (Michelle C.), 2022 NY Slip Op 06932, Second Dept 12-7-22

Practice Point: The amendment of the Family Court Act to preclude a finding of neglect based solely on use of marijuana should be applied retroactively. But the amendment does not preclude a finding of neglect based on the "abuse," as opposed to "use," of marijuana.

DECEMBER 7, 2022

FAMILY LAW, NEGLECT.

THE EVIDENCE DID NOT SUPPORT THE FINDING MOTHER NEGLECTED HER TWO-MONTH OLD CHILD BY EXPOSING THE CHILD TO DOMESTIC VIOLENCE; THAT THE CHILD MAY HAVE HEARD LOUD ARGUING BEFORE GRANDMOTHER TOOK THE CHILD TO HER APARTMENT WAS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support finding mother abused her two-month old child. The child, who was removed from the scene by the grandmother before the acts of domestic violence took place:

"'[A] finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" … . "However, 'exposing a child to domestic violence is not presumptively neglectful,'" and "'[n]ot every child exposed to domestic violence is at risk of impairment'" . "The Legislature's requirement of actual or imminent danger of impairment prevents st… ate intrusion into private family life in the absence of 'serious harm or potential harm to the child, not just . . . what might be deemed undesirable parental behavior'" … .

While testimony was elicited from the paternal grandmother that the subject child, then under two months old, was somewhere in an apartment with the mother and the father while they yelled at each other, the grandmother testified that she removed the child from that apartment prior to any acts of domestic violence. The evidence that the mother and the father engaged in a loud verbal argument in the presence of their infant child was insufficient to establish that the child's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired … . Matter of Kingston T. (Diamond T.), 2022 NY Slip Op 05694, Second Dept 10-12-22

Practice Point: Mother's two-month-old child may have heard loud arguing before grandmother removed the child from the scene. The evidence did not support a finding mother neglected the child by exposing the child to domestic violence.

OCTOBER 12, 2022

FAMILY LAW, NEGLECT.

THE EVIDENCE FATHER NEGLECTED THREE OF THE CHILDREN BY THROWING AN OBJECT AT MOTHER AND YELLING AT MOTHER WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence father neglected three of the children by throwing an object at mother and yelling at mother was insufficient:

Family Court providently exercised its discretion in determining that the out-of-court statements of Tawdrea G., Terel R., and Micah M. G. to an ACS caseworker that the father threw an object at the mother cross-corroborated each other, and that the record as a whole demonstrated by a preponderance of the evidence that the physical, mental, or emotional condition of Tawdrea G., Terel R., and Micah M. G. was impaired or was in danger of becoming impaired when the father threw an object at the mother in their presence … .

However, the Family Court erred in determining that a preponderance of the evidence established that the father neglected Tyresse M., Makai G., Tamera P.-C.

M., or Divine K. M., based on the father throwing an object at the mother. There was no evidence that Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M. witnessed that event. Moreover, there was insufficient evidence to establish that the physical, emotional, or mental condition of Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., was impaired or placed in imminent danger of impairment based on that incident … .

The Family Court also erred in determining that a preponderance of the evidence established that the father neglected any of the children by verbally abusing the mother in the presence of the children. While it was inappropriate for the father to yell at the mother in the presence of the children, the evidence concerning those arguments was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired … . Matter of Divine K. M. (Andre G.), 2022 NY Slip Op 06929, Second Dept 12-7-22

Practice Point: There was no evidence three of the children were present when father threw an object at mother and there was no evidence the children's physical, mental, or emotional condition was impaired by father's yelling at mother. The relevant neglect findings were reversed.

DECEMBER 7, 2022

FAMILY LAW, NEGLECT.

THE EVIDENCE SUPPORTED THE FINDING OF A SINGLE INSTANCE OF NEGLECT OF FATHER'S 14-YEAR-OLD DAUGHTER; BUT THAT EVIDENCE DID NOT SUPPORT A FINDING OF DERIVATIVE NEGLECT RE: FATHER'S YOUNGER DAUGHTER (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined the evidence supporting the finding that father abused his 14-year-old daughter, Heymi M., on one occasion on a camping trip, but that evidence did not support the finding of derivative neglect re: the younger child, Katherine L.:

… [T]here was a nine-year age difference between Heymi M., the child found to have been abused, and the other child, Katherine L. Moreover, the evidence adduced at the hearing shows that the children had different mothers, different living situations, and markedly different relationships with the father. Among other things, the younger child, Katherine L., lived with the father for her entire life but the older child, Heymi M., only started having contact with the father approximately one year before the incident of abuse. Additionally, the record reflects that the abuse occurred on one occasion outside the home, Katherine L. was not in the room when it occurred, and there is no evidence that Katherine L. was aware of the abuse…. . Matter of Katherine L. (Adrian L.), 2022 NY Slip Op 05691, Second Dept 10-12-22

Practice Point: The finding that father abused his 14-year-old daughter on one occasion on a camping trip did not support the finding of derivative neglect re: father's younger daughter.

OCTOBER 12, 2022

FAMILY LAW, CUSTODY.

EVEN THOUGH FATHER REFUSED TO COOPERATE WITH AN INVESTIGATION RELATED TO HIS PETITION FOR CUSTODY, THE JUDGE SHOULD NOT HAVE AWARDED CUSTODY TO MOTHER WITHOUT FIRST HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have awarded mother sole custody of the child without first holding a hearing:

Supreme Court directed that the Administration for Children's Services (hereinafter ACS) conduct an investigation and directed supervised visits between the father and the child. The father failed to comply with the investigation, including refusing to provide his address to ACS, and he failed to complete the intake process for arranging the supervised visits. * * *

"[C]ustody determinations should generally be made only after a full and plenary hearing and inquiry" … . "This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child" … . "[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … .

Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the child … . Matter of Jones v Rodriguez, 2022 NY Slip Op 05529, Second Dept 10-5-22

Practice Point: Despite father's failure to cooperate with an investigation stemming from his petition for custody, the judge should have held a hearing before awarding custody to mother.

OCTOBER 5, 2022

FAMILY LAW, JUDGES,

PRECLUSION OF FURTHER PETITIONS. THE JUDGE SHOULD NOT HAVE PRECLUDED MOTHER FROM BRINGING FURTHER PETITIONS WITHOUT COURT APPROVAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have precluded mother from filing petitions for custody of a family offense without the court's permission:

… [T]he provisions of the order … directing the mother to seek permission from the court before filing any additional petitions, whether for custody or alleging a family offense, constituted an improvident exercise of discretion. Here, the mother filed one family offense petition, ultimately determined to be unfounded, and filed one related petition to modify the parties' custody arrangement. On this record, it cannot be said that the mother engaged in vexatious litigation or that her petitions were filed in bad faith … . Matter of McDowell v Marshall, 2022 NY Slip Op 06248, Second Dept 11-9-22

Practice Point: Mother should not have been precluded from bringing further custody of family offense petitions without court permission. She had not filed petitions in bad faith.

NOVEMBER 9, 2022

FAMILY LAW, MAINTENANCE ARREARS, ATTORNEY'S FEES, EXPERT WITNESS FEES.

ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS MAINTENANCE-ARREARS ACTION SHOULD NOT HAVE BEEN AWARDED WITHOUT AN EVIDENTIARY HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the award of attorney's fees and expert witness fees to defendant-wife who sued for and was awarded maintenance arrears:

… Supreme Court erred in awarding attorneys' fees and expert witness fees requested by the defendant without evaluating the defendant's claims concerning the extent and value of those services at an evidentiary hearing … . Accordingly, the matter must be remitted to the Supreme Court, Westchester County, for a hearing on those issues and a new determination thereafter of those branches of the defendant's motions which were for an award of attorneys' fees and expert fees. Leung v Gose, 2022 NY Slip Op 06476, Second Dept 11-16-22

Practice Point: Here the wife was awarded maintenance arrears but the judge should have held an evidentiary hearing before awarding attorney's fees and expert witness fees to the wife.

NOVEMBER 16, 2022

FAMILY LAW, PARENTING TIME.

A DECISION TO RETURN TO THE REGULAR ACCESS SCHEDULE OF PARENTING TIME AFTER A PERIOD OF SUPERVISED PARENTAL VISITS MUST BE BASED UPON ADMISSIBLE EVIDENCE; WHERE FACTS REMAIN IN DISPUTE, A HEARING IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a hearing should have been held before granting defendant's motion to return to the regular access schedule of parenting time because some facts were still in dispute:

… Supreme Court should have conducted an evidentiary hearing prior to directing that the regular access schedule as set forth in the parties' stipulation of settlement be implemented immediately. Although the court based its determination on information contained in the parties' applications, reports from Kids in Common, and statements from counsel for the parties and the attorney for the child during multiple conferences, Kids in Common had not yet advised that the child was ready for a fully normalized access schedule, and a decision regarding child custody and/or parental access should be based on admissible evidence … . Where, as here, facts material to a determination of what parental access is in the best interests of the child remain in dispute, a hearing is required … . Stolzenberg v Stolzenberg, 2022 NY Slip Op 05554, Second Dept 10-5-22

Practice Point: At the time defendant made a motion to return to the regular access schedule of parenting time after a period of supervised visitation facts remained in dispute. The motion should not have been granted without first holding a hearing where only admissible evidence is considered.

OCTOBER 5, 2022

FAMILY LAW, VIOLATION OF ORDER OF PROTECTION, COUNSEL FEES.

ALTHOUGH THE JUDGE CAN PROPERLY AWARD COUNSEL FEES TO PETITIONER BASED UPON RESPONDENT'S VIOLATION OF AN ORDER OF PROTECTION, A HEARING IS NECESSARY TO DETERMINE THE AMOUNT OF THE FEE (SECOND DEPT).

The Second Department determined that the judge properly exercised discretion in awarding counsel fees to petitioner based upon appellant's (Gorish's) violation of an order of protection. However, the amount of counsel fees should have been determined by a hearing:

Under Family Court Act § 846-a, the court "may order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful." "The award of counsel fees is committed to the discretion of the Family Court" … . "[T]he reasonable amount and nature of the claimed services must be established at an adversarial hearing" … . Here, while the Family Court providently exercised its discretion in awarding counsel fees to the petitioner, the court erred in determining the amount of the counsel fees without a hearing. Matter of Sicina v Gorish, 2022 NY Slip Op 05535, Second Dept 10-5-22

Practice Point: The violation of an order of protection is a proper ground for awarding counsel fees to the petitioner, but the amount must be determined by a hearing.

OCTOBER 5, 2022

FORECLOSURE, BUSINESS RECORDS.

FAILURE TO SUBMIT THE BUSINESS RECORDS NECESSARY TO DEMONSTRATE DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION REQUIRED DENIAL OF THE BANK'S SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's failure to submit the business records necessary to establish the defendants' default in this foreclosure action precluded summary judgment in favor of the bank:

In support of the motion, the plaintiff submitted an affidavit from Helen Fraser, a vice president of document control of CitiMorgage, Inc. (hereinafter CitiMortgage), the plaintiff's loan servicer. Fraser stated that she was familiar with the records and record-keeping practices of both CitiMortgage and the plaintiff. Fraser stated that the defendants "have defaulted under the terms and conditions of the above stated Note by failing to make the July 12, 2016 payment and all successive payments thereafter." She did not attach any business records to her affidavit. * * *

… [I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . Here, Fraser's assertion in her affidavit regarding the defendants' default, without attaching the business records upon which she relied in making that assertion, constituted inadmissible hearsay … . Citibank, N.A. v Potente, 2022 NY Slip Op 06464, Second Dept 11-16-22

Similar issues and result in Wells Fargo Bank, N.A. v Pane, 2022 NY Slip Op 06516, Second Dept 11-16-22

Practice Point: Yet again: An affidavit which is not supported by the attachment of the business records referenced in the affidavit is considered hearsay which cannot be the basis for summary judgment in favor of the bank in a foreclosure action.

NOVEMBER 16, 2022

FORECLOSURE, BUSINESS RECORDS.

THE CALCULATIONS IN THE REFEREE'S REPORT WERE NOT SUPPORTED BY THE RELEVANT BUSINESS RECORDS; THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the calculations in the referee's report were not supported by the relevant business records and the report, therefore, should not have been confirmed:

… [T]he affidavit of Tiffany Bluford, an employee of the plaintiff's servicing agent, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, "constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records [she] purportedly relied upon in making [her] calculations" … . Moreover, the affidavit of Andrea Kruse, another employee of the plaintiff's servicing agent, did not contain any averment as to the amount due and owing under the subject mortgage loan. Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . HSBC Bank USA, N.A. v Delgado, 2022 NY Slip Op 07223, Second Dept 12-21-22

Similar issue and result in Wilmington Sav. Fund Socy., FSB v Helal, 2022 NY Slip Op 07259, Second Dept 12-21-22

Practice Point: In a foreclosure action, if the calculations in the referee's report are not supported by the submission of the relevant business records, the report is based on hearsay and should not be confirmed.

DECEMBER 21, 2022

FORECLOSURE, EVIDENCE.

THE AFFIDAVIT RELIED UPON BY PLAINTIFF IN THIS FORECLOSURE ACTION TO PROVE DEFENDANT'S DEFAULT DID NOT IDENTIFY OR ATTACH THE RELEVANT BUSINESS RECORDS AND THEREFORE THE AFFIDAVIT HAD NO PROBATIVE VALUE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The affidavit attesting to defendant's default did not identify or attach the business records relied upon:

… [A] plaintiff can establish a default by submission of an affidavit from a person having personal knowledge of the facts, or other evidence in admissible form" … . Here, in support of its motion, the plaintiff submitted an affidavit from Elizabeth A. Ostermann, a vice president of the plaintiff's loan servicer, who attested to the borrower's default in payment. However, Ostermann's knowledge was based upon her review of unidentified business records, which she failed to attach to her affidavit, and therefore, her assertions regarding the borrower's alleged default constituted inadmissible hearsay and lacked probative value … . Deutsche Bank Natl. Trust Co. v Unlimited Assets, 2022 NY Slip Op 06907, Second Dept 12-7-22

Practice Point: Here the affidavit submitted by plaintiff in this foreclosure action to prove defendant's default did not identify or attach the relevant business records. Therefore the affidavit had no probative value.

DECEMBER 7, 2022

FORECLOSURE, REFEREE'S REPORT, EVIDENCE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION DID NOT IDENTIFY THE RECORDS RELIED UPON FOR THE CALCULATIONS AND DID NOT ATTACH THE RELEVANT BUSINESS RECORDS; IN ADDITION THE HEARING ON NOTICE REQUIRED BY CPLR 4313 WAS NOT HELD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action was deficient because the business records used for the calculations were not identified or attached. In addition, the referee did not hold the evidentiary hearing required by CPLR 4313:

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . Here, with respect to the amount due on the mortgage loan, the referee based his findings on the affidavit of William Randolph, an employee of Seterus, Inc., the purported servicer of the mortgage loan, who asserted the total amount then due on the mortgage loan. Randolph, however, failed to identify the basis for his calculations, stating generally that the information in his affidavit was taken from the "business activities" of Seterus, Inc. Nor did Randolph attach any business records to his affidavit. Accordingly, Randolph's assertions regarding the date of the defendant's default in making his mortgage payments and the total sum due and owing under the mortgage loan constituted inadmissible hearsay and lacked probative value … . Thus, the referee's findings with respect to the total amount due upon the mortgage loan, as well as payments for taxes, insurance, and other advances, were not substantially supported by the record … .

Further, the referee should not have computed the amount due on the mortgage loan without holding a hearing on notice to the defendant. CPLR 4313 provides in relevant part that "[u]nless the order of reference otherwise provides, the referee shall forthwith notify the parties of a time and a place for the first hearing to be held." Here, there was no language in the order of reference indicating that a hearing was unnecessary. [plaintiff's] contention that the defendant waived his right to a hearing is without merit … . Thus, the defendant was entitled to notice

pursuant to CPLR 4313 … . Onewest Bank, FSB v Feffer, 2022 NY Slip Op 06707, Second Dept 11-23-22

Practice Point: In a foreclosure action, if the referee's report does not identify the records relied upon for the calculations and does not attach those records, the report should not be confirmed. In addition, absent language in the order indication a hearing is not necessary, the calculations should not be made unless a hearing on notice pursuant to CPLR 4313 has been held.

NOVEMBER 23, 2022

FORECLOSURE, REFEREE'S REPORT.

THE BUSINESS RECORDS UPON WHICH THE CALCULATIONS IN THE REFEREE'S REPORT WERE BASED WERE NOT SUBMITTED; THE REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because the business records upon which the referee's calculations were based were not submitted:

Supreme Court erred in granting the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale. "The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . However, computations based on the "review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value" … . Although the plaintiff contends that the referee's report was supported by the affidavit of an employee of its loan servicer, the plaintiff did not submit the business records upon which that employee purportedly relied in computing the total amount due on the mortgage. Consequently, the referee's findings in that regard were not substantially supported by the record … . Bank of N.Y. Mellon v Conforti, 2022 NY Slip Op 05973, Second Dept 10-26-22

Practice Point: Here the calculations in the referee's report were based upon business records which were not submitted. Therefore the report was not supported by the record and should not have been confirmed.

OCTOBER 26, 2022

FORECLOSURE, REVERSE MORTGAGE, CONTRACT LAW.

IN THIS REVERSE MORTGAGE FORECLOSURE ACTION, DEFENDANT WAS NAMED AS A BORROWER IN THE MORTGAGE (WHICH SHE SIGNED) BUT NOT IN THE NOTE; THE NOTE AND MORTGAGE MUST BE READ AS A SINGLE AGREEMENT, RAISING A QUESTION OF FACT WHETHER DEFENDANT WAS A "SURVIVING BORROWER" THEREBY PRECLUDING FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant raised a question of fact in this reverse-mortgage foreclosure action. The mortgage allowed foreclosure upon the death of a borrower (Goldman) as long as the property is not occupied by a "surviving borrower." Although the defendant was not named as a borrower in the note, she was names as a borrower in the mortgage, which she signed:

… [T]he defendant raised a triable issue of fact as to whether she was a "surviving Borrower" under the note and mortgage, which would preclude the plaintiff from requiring payment in full upon Goldman's death … . Although the defendant was not named as a borrower in the note, she signed the mortgage in which she was named as a borrower. "Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement" … . Here, the note and mortgage, construed together, were ambiguous as to whether the defendant was intended to be a borrower … . Where, as here, contract language is "reasonably susceptible of more than one interpretation, . . . extrinsic or parol evidence may be . . . permitted to determine the parties' intent as to the meaning of that language" … Here, the extrinsic evidence submitted by the parties raised a triable issue of fact as to whether the defendant was a borrower under the subject loan. Although Goldman, and not the

defendant, was named as the borrower on various documents, including the loan application, both Goldman and the defendant signed a copy of a Truth-in-Lending Act disclosure. Moreover, in her affidavit, the defendant averred that when she and Goldman applied for the reverse mortgage, they were "assured that when [Goldman] passed away, that I would get the house and that I could continue to live there." Nationstar Mtge., LLC v Hoar, 2022 NY Slip Op 05853, Second Dept 10-19-22

Practice Point: Here the mortgage and the note must be read as a single agreement. The fact that defendant was named in the mortgage, which she signed, but not named in the note, raised a question of fact whether she was a "surviving borrower," precluding the reverse-mortgage foreclosure.

OCTOBER 19, 2022

FORECLOSURE, NOTICE OF DEFAULT.

THE BANK DID NOT DEMONSTRATE THE NOTICE OF DEFAULT COMPLIED WITH THE REQUIREMENTS IN THE MORTGAGE AGREEMENT BECAUSE THE NOTICE OF DEFAULT WAS NOT ATTACHED TO THE PAPERS; THE JUDGE SHOULD NOT HAVE DENIED DEFENDANT'S CROSS MOTION FOR A HEARING ON WHETHER PLAINTIFF NEGOTIATED IN GOOD FAITH AS REQUIRED BY CPLR 3408 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank did not demonstrate compliance with the provision in the mortgage agreement requiring certain advisements in the notice of default. The affidavit purporting to demonstrate compliance did not have the notice of default attached. In addition, Supreme Court should not have denied defendant's cross motion for a hearing on whether plaintiff bank met its obligation to negotiate in good faith (CPLR 3408):

… [T]he plaintiff failed to demonstrate, prima facie, that it complied with the provision in the mortgage agreement requiring the plaintiff to send to the defendant a notice of default containing certain advisements and setting forth a 30-day cure period. The affidavit of its employee, Lindsay Hodges, was insufficient for this

purpose inasmuch as Hodges failed to attach business records upon which she relied—specifically, the notice of default itself—in averring that notice was provided in compliance with the mortgage agreement. … Hodges's averment was therefore hearsay lacking in probative value … . …

Supreme Court improperly denied the defendant's cross motion for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f). "The purpose of the good-faith requirement in CPLR 3408 is to ensure that both the plaintiff and the defendant are prepared to participate in a meaningful effort at the settlement conference to reach a resolution" … . To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" … .

… [T]he defendant's submissions in support of her cross motion raised a factual issue as to whether the plaintiff failed to negotiate in good faith and deprived her of a meaningful opportunity to resolve the action through loan modification or other potential workout options … . Citimortgage, Inc. v Rose, 2022 NY Slip Op 05516, Second Dept 10-5-22

Practice Point: Here the mortgage agreement required that the notice of default include certain information. The affidavit submitted to prove the contents of the notice of default was hearsay because the notice was not attached.

OCTOBER 5, 2022

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

THE BANK IN THIS FORECLOSURE ACTION FAILED TO LAY A FOUNDATION FOR THE BUSINESS RECORDS REQUIRED TO SHOW STANDING TO BRING THE ACTION AND DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE-OF-DEFAULT MAILING REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure did not demonstrate standing the bring the action and compliance with the notice-of-default mailing requirement of RPAPL 1304:

A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced … . Here, in support of its motion, the plaintiff submitted the affidavit of Shamona Marisa Truesdale, a vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's loan servicer. Truesdale stated that she was familiar with Wells Fargo's records and record-keeping practices. She further stated that the plaintiff was in possession of the note on October 8, 2009, the date this action was commenced. Truesdale's statement that the plaintiff had possession of the note at the time this action was commenced was inadmissible hearsay. Although Truesdale stated that she was familiar with the records and record-keeping practices of Wells Fargo, the plaintiff's loan servicer, she failed to state that she was familiar with the records and record-keeping practices of the plaintiff itself. Thus, Truesdale failed to lay a proper foundation for the admission of any of the plaintiff's business records … . * * *

The plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened … .

Here, the plaintiff relied on the affidavit of Jack Whitmarsh, a vice president of loan documentation for Wells Fargo, who averred that, based on his review of

Wells Fargo's records, the required notice was sent by both certified mail and first-class mail. The plaintiff also submitted a copy of the RPAPL 1304 notice, which was sent to the defendants at the mortgaged premises, and which was stamped with a certified mailing number, as well as a printout of a record purportedly evidencing certified mailing of the notice. However, these documents were insufficient to prove the mailing of the notice by certified mail actually occurred … . Moreover, the plaintiff failed to submit any evidence that the notice was mailed by first-class mail … . Further, Whitmarsh did not aver that he had personal knowledge of the mailing and did not describe any standard office procedure designed to ensure that the notices are mailed … . HSBC Bank USA, N.A. v Gordon, 2022 NY Slip Op 06473, Second Dept 11-16-22

Practice Point: Here the bank apparently submitted the business records necessary to demonstrate the bank's standing to bring the foreclosure action but the accompanying affidavit did not lay a proper foundation for admitting them. In addition the bank failed to demonstrate compliance with the notice-of-default mailing requirements of RPAPL 1304.

NOVEMBER 16, 2022

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CANCELLATION AND DISCHARGE OF MORTGAGE.

CANCELLATION AND DISCHARGE OF A MORTGAGE AND VACATION OF A NOTICE OF PENDENCY MUST BE SOUGHT BY AN ACTION OR A COUNTERCLAIM PURSUANT TO RPAPL 1501, NOT, AS HERE, BY A CROSS-MOTION; THE ISSUE WAS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's cross-motion to cancel and discharge the mortgage pursuant to RPAPL 1501(4) should not have been granted because that relief must be sought in an action or counterclaim, not by motion. The issue was properly raised for the first time on appeal:

Supreme Court should not have granted that branch of the cross motion which was pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage and vacate the notice of pendency, since relief pursuant to RPAPL 1501(4) must be sought in an action or counterclaim and not by motion … . Although the plaintiff raises this issue for the first time on appeal, it involves a question of law that appears on the face of the record and could not have been avoided if brought to the attention of the Supreme Court … . U.S. Bank N.A. v O'Rourke, 2022 NY Slip Op 05558, Second Dept 10-5-22

Practice Point: Cancellation and discharge of a mortgage and vacation of a notice of pendency pursuant to RPAPL 1501(4) must be sought by an action or a counterclaim, not, as in this case, by a cross-motion. The issue may be raised for the first time on appeal because it is a matter of law and could not have been avoided had it been raised in Supreme Court.

OCTOBER 5, 2022

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

IN THIS FORECLOSURE DEFICIENCY-JUDGMENT CASE, THE FAIR VALUE OF THE PROPERTY WAS CONSIDERABLY HIGHER THAN THE LIQUIDATION VALUE USED BY THE COURT TO CALCULATE THE DEFICIENCY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the fair market value of the property in this foreclosure-deficiency-judgment proceeding was considerably greater than the liquidation valued used by the court:

"RPAPL 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher" … . "It is the lender who bears the initial burden of demonstrating, prima facie, the property's fair market value as of the date of the auction sale" … . "When a lender moves to

secure a deficiency judgment against a borrower, 'the court . . . shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid [o]n at auction or such nearest earlier date as there shall have been any market value thereof'" … .

Here, the record does not support a finding that the estimated liquidation 'alue of $620,000 constituted the fair and reasonable market value of the property at the time of the foreclosure sale … . Rather, the record supports a determination that the higher estimated value of $1,060,000 presented by the plaintiff's appraiser constituted the fair and reasonable market value of the property at the time of the foreclosure sale. Rhinebeck Bank v WA 319 Main, LLC, 2022 NY Slip Op 06507, Second Dept 11-16-22

Practice Point: Here the court should have used plaintiff's appraiser's determination of the fair market value of the foreclosed property to calculate the amount of the deficiency judgment pursuant to RPAPL 1371(2). The court used a much lower "liquidation value."

NOVEMBER 16, 2022

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

THE AFFIDAVIT SUBMITTED BY THE BANK IN THIS FORECLOSURE ACTION DID NOT PRESENT SUFFICIENT EVIDENCE TO DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, in this foreclosure action, determined plaintiff bank did not not submit sufficient proof of compliance with the notice-of-default provisions of RPAPL 1304. Among other deficiencies, the documents necessary to prove the notice was mailed were not attached to the affidavit stating the mailing requirements were met:

… [P]laintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Crystal Jean McClelland, a vice president of loan documentation for the plaintiff, stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. The plaintiff failed to provide any documentation from the United States Post Office demonstrating that the notice was sent by registered or certified mail. Further, while McClelland attested that she was familiar with the business records maintained by the plaintiff, had personal knowledge of the operation of and the circumstances surrounding the preparation, maintenance, distribution, and retrieval of records in the plaintiff's record-keeping system, and had knowledge of how the plaintiff drafted, generated, triggered, sent, and stored letters in the servicing process, she did not present proof of a standard office mailing procedure by the plaintiff designed to ensure that items are properly addressed and mailed. Since the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 … . Wells Fargo Bank, N.A. v Kowalski, 2022 NY Slip Op 05887, Second Dept 10-19-22

Practice Point: Another example of what the banks get wrong when trying to prove strict compliance with the foreclosure notice-of-default provisions of RPAPL 1304 at the summary judgment stage.

OCTOBER 19, 2022

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

PLAINTIFF IN THIS STRICT FORECLOSURE ACTION SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR REFORECLOSURE UNDER RPAPL 1503; REFORECLOSURE IS AN OPTION WHEN THE ORIGINAL FORECLOSURE MAY BE VOID OR VOIDABLE AS AGAINST ANY PERSON (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the complaint in this strict foreclosure action to add a cause of action for reforeclosure under RPAPL 1503:

Section 1503 of the Real Property Actions and Proceedings Law establishes an action in reforeclosure where an original foreclosure judgment, sale, or conveyance may be void or voidable as against any person. The statute grants a purchaser the right to maintain an action "to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage" (id.). "Such action may be maintained even though an action against the defendant to foreclose the mortgage under which the judgment, sale or conveyance was made, or to extinguish a right of redemption, would be barred by the statutes of limitation" … . Bank of N.Y. v Karistina Enters., LLC, 2022 NY Slip Op 05828, Second Dept 10-19-22

Practice Point: Reforeclosure under RPAPL 1503 may be available when the original mortgage is void or voidable as against any person.

OCTOBER 19, 2022

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

IN THIS FORECLOSURE ACTION, THE WRONG TYPEFACE IN THE RPAPL 1303 NOTICE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate compliance with the typeface requirements for the RPAPL 1303 notice. Therefore plaintiff's motion for summary judgment should have been denied:

RPAPL 1303 "requires the foreclosing party to deliver, along with the summons and complaint, a notice titled 'Help for Homeowners in Foreclosure' in residential foreclosure actions involving owner-occupied, one-to-four family dwellings. The statute mandates that the notice include specific language relating to the summons and complaint, sources of information and assistance, rights and obligations, and foreclosure rescue scams. It also mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type" … . "Proper service of the notice required by RPAPL 1303 . . . is a condition precedent to the commencement of a foreclosure action, and it is the plaintiff's burden to show compliance with that statute" … .

Here, the plaintiff failed to meet its prima facie burden since it is not apparent upon review of the copy of the RPAPL 1303 notice served upon the defendant that the correct typeface was utilized. In addition, the process server's affidavit of service did not indicate that the notice served upon the defendant complied with all of the requirements of RPAPL 1303, including the proper typeface … . MTGLQ Invs., L.P. v Assim, 2022 NY Slip Op 06000, Second Dept 10-26-22

Practice Point: In a foreclosure action, the plaintiff must strictly comply with the notice requirements in RPAPL 1303, including the size of the typeface. The use of the wrong typeface precludes the commencement of the action.

OCTOBER 26, 2022

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

IN THIS FORECLOSURE ACTION, THE BANK FAILED TO PROVE DEFENDANT'S DEFAULT (EVIDENCE SUBMITTED IN REPLY NOT CONSIDERED) AND THE BANK FAILED TO DEMONSTRATE IT NOTIFIED A TENANT OF THE FORECLOSURE AS REQUIRED BY RPAPL 1303 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank (Merrill Lynch) in this foreclosure action failed to prove defendant's default and failed to notify a tenant on the property of the foreclosure. The bank's attempt to prove the default in reply papers was rejected:

Merrill Lynch failed to submit admissible evidence establishing the defendant's default. In support of its motion, Merrill Lynch submitted, inter alia, the affidavit of Theresia Ang, the vice president of its loan servicer and attorney-in-fact. However, Ang failed to attach the business records on which she relied, and thus, her averment to the defendant's default was hearsay lacking in probative value … . Although Merrill Lynch attempted to submit evidence of the defendant's default in reply, a moving party "cannot meet its prima facie burden by submitting evidence for the first time in reply" … .

… RPAPL 1303 requires, inter alia, the party foreclosing a mortgage on residential property to provide the notice prescribed by the statute to any tenant of the property by certified mail, if the identity of the tenant is known to the foreclosing party (see id. § 1303[1][b]; [4]). Proper service of an RPAPL 1303 notice is a condition precedent to commencing a foreclosure action, and the "'foreclosing party has the burden of showing compliance therewith'" … .

Here, Merrill Lynch failed to submit any evidence that it served any tenant of the subject property with the notices required by RPAPL 1303 by certified mail, or that it was not aware of any tenant's identity. In contrast, the defendant's affidavit and the affidavit of Richard Nicholson, submitted in opposition to Merrill Lynch's motion, established that Richard Nicholson resided at the subject property, that he paid rent, and that the mortgage loan servicer was aware that he resided at the

subject property. Merrill Lynch Credit Corp. v Nicholson, 2022 NY Slip Op 06239, Second Dept 11-9-22

Practice Point: The bank in this foreclosure action failed to submit sufficient evidence of defendant's default and was not allowed to cure the defect in reply papers.

Practice Point: The bank in this foreclosure action did not demonstrate it notified a tenant of the foreclosure as required by RPAPL 1303.

NOVEMBER 9, 2022

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

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE FIVE HOUSING COUNSELING AGENCIES LISTED IN THE RPAPL 1304 WERE DESIGNATED BY THE NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) AND THEREFORE DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the five housing counseling agencies listed on the 90-day notice were designated by the NYS Division of Housing and Community Renewal (DHCR) at the time the notice was sent:

"It is the plaintiff's burden, on its motion for summary judgment, to demonstrate its strict compliance with the applicable provisions of RPAPL 1304" … . As relevant here, RPAPL 1304(2) … required that the 90-day notice sent to the borrower "contain a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides," and that the lists of designated agencies published on the websites of the New York State Department of Financial Services (hereinafter DFS) and the DHCR be used by the lender, assignee, or mortgage loan servicer to meet these requirements … .

… [P]laintiff failed to establish … its strict compliance with RPAPL 1304(2), as it failed to demonstrate that the five entities listed on the 90-day notices sent to the defendant were designated by the DHCR as of when the notices were sent … . Bank of N.Y. Mellon v Maldonado, 2022 NY Slip Op 05974, Second Dept 10-26-22

Practice Point: If the bank in a foreclosure action does not demonstrate strict compliance with the notice requirements in RPAPL 1304 it is not entitled to summary judgment. At time of this action, RPAPL 1304 required that five housing counseling agencies be listed in the RPAPL 1304 notice and that the agencies be designated by the Division of Housing and Community Renewal (DHCR). Here the bank didn't demonstrate the five agencies were so designated so its motion for summary judgment shouldn't have been granted.

OCTOBER 26, 2022

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

PLAINTIFF IN THIS NON-JURY TRIAL DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1303; JUDGMENT OF FORECLOSURE AND SALE REVERSED (SECOND DEPT).

The Second Department, reversing the judgment (after a non-jury trial) of foreclosure and sale, determined plaintiff did not demonstrate compliance with RPAPL 1303:

RPAPL 1303 requires that a notice titled "Help for Homeowners in Foreclosure" be delivered to the mortgagor along with the summons and complaint in residential foreclosure actions involving owner-occupied, one- to four-family dwellings … . "The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type" … . "Proper service of an RPAPL 1303 notice is a condition precedent to the commencement of a foreclosure action,

and noncompliance mandates dismissal of the complaint" … . The foreclosing party bears the burden of establishing compliance with RPAPL 1303 … .

Here, it is undisputed that the plaintiff did not offer any evidence at trial establishing that it complied with the specific requirements of RPAPL 1303, or that it delivered such notice to Nodumehlezi [defendant] at all. Contrary to the plaintiff's contention, the Supreme Court's reliance, in a posttrial decision, on documents that had been previously e-filed to establish the plaintiff's compliance with RPAPL 1303 was improper, since Nodumehlezi had no opportunity to rebut the previously filed affidavit of service and the related documents … . 21st Mtge. Corp. v Nodumehlezi, 2022 NY Slip Op 07212, Second Dept 12-21-22

Practice Point: Here there was a non-jury trial and plaintiff did not prove compliance with RPAPL 1303. The judgment of foreclosure and sale was reversed.

DECEMBER 21, 2022

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

THE AFFIDAVITS SUBMITTED BY PLAINTIFF BANK IN THIS FORECLOSURE ACTION FAILED TO DEMONSTRATE DEFENDANTS' DEFAULT AND PLAINTIFF'S COMPLIANCE WITH THE NOTICE-OF-DEFAULT PROVISIONS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-bank in this foreclosure action did not present sufficient proof of defendants' default and plaintiff's compliance with the notice-of-default requirements of RPAPL 1304:

… [T]he plaintiff failed to establish, prima facie, the defendants' default in payment by submitting the affidavit of Brian Nwabaka, an employee of its loan servicer, Bayview Loan Servicing, LLC (hereinafter Bayview). Nwabaka averred that, based upon his review of unspecified business records, the defendants defaulted in making monthly payments in October 2008. However, Nwabaka did not aver that he had personal knowledge of the defendants' alleged default in

payment. Moreover, Nwabaka failed to identify which records he relied on to assert a default in payment, and the notice of default annexed to Nwabaka's affidavit was insufficient to establish the alleged default in payment … .

… [T]he plaintiff submitted, inter alia, the affidavits of Nwabaka and Rosalind Carroll, document coordinator for Bayview, each of whom averred that the 90-day notices were sent by certified and first-class mail. However, neither Nwabaka nor Carroll attached any documents showing proof of mailing by first-class mail, nor did they aver that they had personal knowledge of the purported mailings or were familiar with the mailing practices and procedures of Bayview … . Although Nwabaka attested to his familiarity with the mailing practices and procedures of Countrywide Home Loan, the prior loan servicer, he did not aver to familiarity with the mailing practices and procedures of Bayview, which purportedly sent the 90-day notices. Bank of N.Y. Mellon v Mannino, 2022 NY Slip Op 05675, Second Dept 10-12-22

Practice Point: Yet again the affidavits offered by plaintiff-bank in a foreclosure action were not sufficient to demonstrate defendants' default or plaintiff's compliance with the notice-of-default requirements of RPAPL 1304.

OCTOBER 12, 2022

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

THE BANK IN THIS FORECLOSURE ACTION FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE-OF-DEFAULT MAILING REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate compliance with the notice-of-default mailing requirements of RPAPL 1304:

"RPAPL 1304(1) provides that, 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer

shall give notice to the borrower.' The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower" (… see RPAPL 1304[2]). "Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" … . …

… [T]he plaintiff failed to demonstrate, prima facie, that it strictly complied with the mailing requirements of RPAPL 1304. The affidavit of Daniel Delpesche, a contract management coordinator for the plaintiff's attorney-in-fact, Ocwen Loan Servicing, LLC …, did not make the requisite showing that Delpesche was familiar with Ocwen's mailing practices and procedures, and "therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . HSBC Bank USA, N.A. v Martin, 2022 NY Slip Op 06471, Second Dept 11-16-22

Practice Point: If the affidavit submitted by the bank in a foreclosure action to prove the notice of default was mailed in accordance with RPAPL 1304 does not state that affiant is familiar with the relevant entity's mailing procedures the bank's motion for summary judgment must be denied.

NOVEMBER 16, 2022

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 OR THE NOTICE REQUIREMENTS OF RPAPL 1303 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this foreclosure action did not demonstrate compliance with the notice (mailing) requirements of RPAPL 1304 or the notice requirements of RPAPL 1303:

… [T]he letter log submitted by the plaintiff and relied upon by the employee of the plaintiff's alleged loan servicer in his affidavit failed to establish that the 90-day notice was actually mailed to the defendant by both certified mail and first-class mail … . "'[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'" … . None of the other documents submitted by the plaintiff, considered individually or together, including the copies of the 90-day notice letters themselves, provided any information as to whether the notice was sent to the defendant by regular first-class mail … . …

… [T]he plaintiff's submissions did not demonstrate that the notice served upon the defendant complied with the type-size requirements in RPAPL 1303 … .Federal Natl. Mtge. Assn. v Raja, 2022 NY Slip Op 06912, Second Dept 12-7-22

Practice Point: Once again, the bank in this foreclosure action did not submit sufficient proof of strict compliance with the notice and mailing requirements of RPAPL 1303 or 1304.

DECEMBER 7, 2022

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

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

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304:

… [P]laintiff failed to establish its strict compliance with RPAPL 1304. The plaintiff relied upon the affidavit of Summer Young, a vice president of the plaintiff's purported loan servicer. The affidavit was based upon Young's review of her employer's records, which were attached thereto. Young did not aver that she had personal knowledge of the mailing, and her affidavit did not contain proof

of the standard office mailing procedure at the time the RPAPL 1304 notice allegedly was sent … . Nor did the annexed records demonstrate, prima facie, that the requisite RPAPL 1304 mailings were completed … . Because the plaintiff "failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304," and therefore failed to establish, prima facie, its entitlement to judgment as a matter of law … The plaintiff also failed to establish, prima facie, that it complied with the notice of default requirement of the mortgage agreement … . HSBC Bank USA, N.A. v Michalczyk, 2022 NY Slip Op 07222, Second Dept 12-21-22

Practice Point: the bank in this foreclosure action did not present sufficient evidence of compliance with the notice and mailing requirements of RPAPL 1304.

DECEMBER 21, 2022

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

THE BANK INCLUDED OTHER NOTICES WITH THE NOTICE OF DEFAULT, A VIOLATION OF THE SEPARATE ENVELOPE RULE (RPAPL 1304) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank included other notice with the notice of default, a violation of RPAPL 1304 (the separate envelope rule):

"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action" … . Here, the defendants established, prima facie, that the plaintiff did not comply with RPAPL 1304, since additional notices were sent in the same envelope as the 90-day notice required by RPAPL 1304, and a single notice was jointly addressed to both of the defendants … . HSBC Bank USA, N.A. v Schneps, 2022 NY Slip Op 06234, Second Dept 11-9-22

Practice Point: The separate envelope rule (RPAPL 1304) which requires that nothing else be included with the notice of default is a condition precedent to a foreclosure action.

NOVEMBER 9, 2022

FORECLOSURE, STANDING, UNIFORM COMMERCIAL CODE.

THE BANK DID NOT DEMONSTRATE THE ALLONGE, A SEPARATE PAPER, WAS FIRMLY ATTACHED TO THE NOTE, AS REQUIRED BY THE UCC; THEREFORE THE BANK DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing to bring the foreclosure action:

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence the action based on its annexation of the note to the summons and complaint, since the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202(2) … . Hudson City Sav. Bank v Ellia, 2022 NY Slip Op 06235, Second Dept 11-9-22

Practice Point: When a defendant contests the bank's standing to bring a foreclosure action, the bank must prove the allonge (a separate paper) was "firmly attached" to the note as required by UCC 3-202(2).

NOVEMBER 9, 2022

FORECLOSURE, UNIFORM COMMERCIAL CODE, STANDING.

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE IT WAS THE HOLDER OF THE NOTE AND DID NOT DEMONSTRATE POSSESSION OF THE NOTE AT THE TIME THE ACTION WAS BROUGHT BECAUSE THE NOTE ITSELF WAS NOT ATTACHED TO THE LOAN SERVICER'S AFFIDAVIT; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank should not have been awarded summary judgment in this foreclosure action because it did not demonstrate standing to foreclose:

… [T]here was no evidence that the plaintiff is the assignee of the note, and a triable issue of fact exists as to whether the plaintiff was the holder of the note at the time this action was commenced. A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (see UCC 3-104[2][d] …) "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1-201[b] [21][A] …). In the present case, there is a triable issue of fact as to whether the note was properly specially endorsed by an allonge "so firmly affixed thereto as to become a part thereof" when it came into the possession of the plaintiff (UCC 3-202[2] …).

Further, the affidavit of Verdooren [loan servicer employee] and the accompanying business records were insufficient to establish the plaintiff's standing … . Although the foundation for the admission of a business record may be provided by the testimony of the custodian, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (… see CPLR 4518[a]). Here, although Verdooren stated that Wells Fargo had possession of the note on the plaintiff's behalf at the time the action was commenced, the documents attached to Verdooren's affidavit failed to establish this fact. Bank of N.Y. Mellon Trust Co., N.A. v Andersen, 2022 NY Slip Op 05827, Second Dept 10-19-22

Practice Point: If the defendant raises the lack-of-standing defense in a foreclosure action, the bank must demonstrate the plaintiff was the assignee of the note and the note was in its possession when the action was brought. Here the plaintiff did not

show the note was properly endorsed by an attached allonge when it came into plaintiff's possession and the note was not attached to the loan servicer's affidavit, rendering the affidavit hearsay.

OCTOBER 19, 2022

FORECLOSURE.

DEFENDANTS IN THIS FORECLOSURE ACTION WERE ENTITLED TO A HEARING PURSUANT TO CPLR 3408 RE: WHETHER THE BANK ENGAGED IN SETTLEMENT NEGOTIATIONS IN GOOD FAITH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action were entitled to a hearing on whether plaintiff bank engaged in settlement negotiations in good faith:

… Supreme Court should have granted the defendants' cross motion for a hearing to determine whether the plaintiff negotiated in good faith pursuant to CPLR 3408(f). CPLR 3408 requires the parties in a residential foreclosure action to attend settlement conferences at an early stage of the litigation, at which they must "negotiate in good faith to reach a mutually agreeable resolution" … . … [T]he circumstances surrounding its servicer's handling of the first two loan modification applications are "relevant in the overall context of the parties' relationship and the negotiations between them," and thus, are relevant to the good faith inquiry … . …[D]efendants submitted evidence that the plaintiff "engaged in dilatory conduct by making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided"… . Investors Bank v Brooks, 2022 NY Slip Op 07224, Second Dept 12-21-22

Practice Point: Defendants submitted evidence the bank in this foreclosure action did not engage in settlement negotiations pursuant to CPLR 3408 in good faith. Supreme Court should have held a hearing.

DECEMBER 21, 2022

FRAUDULENT INDUCEMENT, RELIANCE ON MISPRESENTATION.

IN AN ACTION ALLEGING FRAUDULENT INDUCEMENT, WHETHER THE PLAINTIFF REASONABLY RELIED ON THE ALLEGED MISREPRESENTATION IS USUALLY A QUESTION OF FACT WHICH CANNOT BE RESOLVED IN A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint stated a cause of action for fraudulent inducement. Plaintiff radiologist alleged defendant induced him to open a radiology practice which, plaintiff said, already had a patient-referral system in place. Plaintiff alleged that, after expending funds to open the practice, he learned he would have to pay for the referrals and he shut the practice down. The appellate court held that whether plaintiff reasonably relied on the alleged misrepresentation usually is a question of fact for the jury:

Regarding reasonable reliance on a misrepresentation of a material fact, the "plaintiff is expected to exercise ordinary diligence and may not claim to have reasonably relied on a defendant's representations [or silence] where he [or she] has means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" … .

The130istribun of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" … The resolution of the issue of whether a plaintiff reasonably relied on a defendant's misrepresentation in support of a cause of action alleging fraud in the inducement is ordinarily relegated to the finder of fact … . … [P]laintiffs adequately stated a cause of action to recover damages for fraudulent inducement insofar as the determination of the reasonableness of [plaintiff-radiologist's] reliance on [defendant's] alleged misrepresentations concerning, among other things, the source of the … patient referrals itself entailed a question of fact not appropriate for summary disposition as a matter of law. Feldman v Byrne, 2022 NY Slip Op 06113, Second Dept 11-2-22

Practice Point: In an action for fraudulent inducement, whether the plaintiff's reliance on the alleged misrepresentation was reasonable is a difficult issue which

usually raises a question of fact for the jury and therefore cannot be summarily resolved in a motion to dismiss for failure to state a cause of action.

NOVEMBER 2, 2022

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

THE ALLEGED INTENTIONAL ACT OF THROWING A HAND TRUCK AT A BUS INJURING PLAINTIFF-PASSENGER DID NOT SUPPORT NEGLIGENCE OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSES OF ACTION, BUT DID SUPPORT AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the allegation plaintiff was injured when defendant (McGregor) threw a hand truck at the bus in which plaintiff was a passenger did not support causes of action for negligence or negligent infliction of emotional distress, but did support a cause of action for intentional infliction of emotional distress:

… [T]he only inference that may be drawn from the plaintiff's allegations is that the plaintiff's alleged injuries resulted solely from McGregor's intentional acts. Contrary to the plaintiff's contention, even if McGregor "lacked any intent to make physical contact with, or otherwise injure, the plaintiff, the conduct attributed to [McGregor] in the amended complaint . . . constituted intentional, rather than negligent, conduct" … . …

"A negligent infliction of emotional distress cause of action must fail where, as here, no allegations of negligence appear in the pleadings" … . …

[Re; intentional infliction of emotional distress:] … [T]he complaint sufficiently alleged that McGregor engaged in conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" … . Besides the alleged throwing of the hand truck that is the basis of the plaintiff's assault and battery causes of action, the plaintiff also alleges that McGregor threw

other objects at the bus, attempted to board the bus, prevented the bus from moving, kicked the bus, and yelled threats and expletives. Chiesa v McGregor, 2022 NY Slip Op 05982, Second Dept 10-26-22

Practice Point: Here the alleged intentional act of throwing a hand truck at a bus injuring plaintiff-passenger did not support negligence and negligent infliction of emotional distress causes of action, even though the injuries to plaintiff may not have been intended. The allegation did support an intentional infliction of emotional distress cause of action.

OCTOBER 26, 2022

LABOR LAW-CONSTRUCTION LAW, COVERED ACTIVITIES.

INSTALLING A TV ON A WALL IS NOT AN ACTIVITY COVERED BY LABOR LAW 240(1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing the Labor law 240(1) cause of action should have been granted. Plaintiff fell from an A-frame ladder while attempting to install a television on a wall in a doctor's office:

Labor Law § 240(1) states that all contractors, owners, and their agents must supply protective equipment to laborers who are engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building" … . As such, "[t]o successfully assert a cause of action under Labor Law § 240(1), a plaintiff must establish that he or she was injured during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" … . "[T]he term 'altering' in section 240(1) 'requires making a significant physical change to the configuration or composition of the building or structure'" … . This definition excludes "'routine maintenance'" and "'decorative modifications'" … ,

The defendants established that the plaintiff was not engaged in any of the enumerated activities under Labor Law § 240(1). Contrary to the plaintiff's contention, affixing a bracket to a wall so that a television might be mounted on it did not make a "significant physical change to the configuration or composition of

the building or structure" … . Saitta v Marsah Props., LLC, 2022 NY Slip Op 07467, Second Dept 12-28-22

Practice Point: Installing a TV on a wall is not one of the activities covered by Labor Law 240(1).

DECEMBER 28, 2022

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT CITY DEMONSTRATED IT DID NOT EXERCISE ANY SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK IN THIS LABOR LAW 200 ACTION; THEREFORE THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the city's motion for summary judgment on the Labor Law 200 cause of action in this construction accident case should have been granted. The city did not exercise any control over the manner of plainitiff's work:

"Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work" … . "Where, as here, the plaintiff's injuries arise from the manner in which the work is performed, to be held liable under Labor Law § 200, 'a defendant must have the authority to exercise supervision and control over the work'" … . Evidence of mere general supervisory authority to oversee the progress of the work, to inspect the work product, or to make aesthetic decisions is insufficient to impose liability under Labor Law § 200 … . Here, the City established, prima facie, that it did not exercise any supervision or control over the method or manner in which the plaintiff's work was performed … . Jarnutowski v City of Long Beach, 2022 NY Slip Op 06474, Second Dept 11-16-22

Practice Point: In order to be liable under Labor Law 200, where the construction-related injury was caused by the manner in which the work was done, the defendant must exercise supervisory control over the work.

NOVEMBER 16, 2022

LIEN LAW.

FAILURE TO INCLUDE ALL THE INFORMATION REQUIRED BY LIEN LAW 201 IN THE NOTICE OF SALE DID NOT WARRANT CANCELLATION OF THE LIENS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the deficiencies in the notice of sale did not warrant cancellation of the liens:

Pursuant to Lien Law § 201-a, within 10 days after service of a notice of sale, the owner or any person entitled to notice may commence a special proceeding to determine the validity of a lien. Here, while service upon the petitioners of the notices of sale was in accordance with the proprietary lease and the cooperative by-laws, the notices of sale did not contain a statement setting forth "[t]he nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due," as required under Lien Law § 201. Nevertheless, the deficiencies in the notices of sale did not provide a basis for cancellation of the liens … . Matter of Ger v Saxony Towers Realty Corp., 2022 NY Slip Op 06243, Second Dept 11-9-22

Practice Point: Lien law 201 requires the notice sale to state "[t]he nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due." The failure to include that information, however, does not warrant cancellation of the lien.

NOVEMBER 9, 2022

MEDICAID, CIVIL PROCEDURE.

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).

The Second Department, reversing Supreme Court, held plaintiff nursing home can bring a plenary action in its own right to determined the Medicaid eligibility of a resident. The nursing home is not bound by the resident's failure to request an administrative appeal and is not constrained the the four-month statute of limitations in CPLR 217:

The plaintiff, an operator of a nursing home facility, commenced this action seeking a judgment declaring that one of its residents was entitled to Medicaid coverage for the period February 7, 2013, through August 31, 2014, with an appropriate transfer penalty. The defendant moved to dismiss the complaint on the grounds, inter alia, that the plaintiff failed to exhaust its administrative remedies, the statute of limitations had expired, and the plaintiff failed to join a necessary party. In an order dated November 26, 2019, the Supreme Court granted the motion. The plaintiff appeals.

The Supreme Court erred in granting the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint. "It is well established that a nursing home may, as here, bring a plenary action in its own right against the agency designated to determine Medicaid eligibility" … . In such a plenary action, the nursing home is "not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance" or "by the four-month Statute of Limitations contained in CPLR 217" … . Moreover, authorizations executed by the resident allowing designated employees of the plaintiff to represent him "during the Medicaid eligibility process" and during "any Fair Hearings" did not impair the plaintiff's right to commence its own plenary action … . 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 MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE, INFORMED CONSENT.

THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS MEDICAL MALPRACTICE ACTION; ALTHOUGH THE PLAINTIFFS' EXPERT'S AFFIDAVIT WAS UNSWORN, IT SHOULD HAVE BEEN CONSIDERED BECAUSE DEFENDANTS DID NOT OBJECT; DESPITE PLAINTFF'S SIGNING A GENERIC CONSENT FORM, THERE WERE QUESTIONS OF FACT WHETHER THERE WAS A LACK OF INFORMED CONSENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice action, determined: (1) the continuous treatment doctrine tolled the statute of limitations for some of the causes of action; (2) the plaintiffs' expert's unsworn affidavit raised questions of fact about a departure from the requisite standard of care (although the unsworn affidavit was not in admissible form, defendants did not object); and (3) the lack of informed consent cause of action should not have been dismissed:

… [C]ontinuous treatment may be found when a plaintiff "returns to the doctor because of continued pain in that area for which medical attention was first sought" … . Here, the plaintiffs demonstrated that, continuing until at least October 23, 2014, the injured plaintiff repeatedly sought treatment … for ongoing and sometimes increasing symptoms relating to her original complaints … . * * *

Although the unsworn affidavit of the plaintiffs' expert does not constitute competent evidence to oppose a motion for summary judgment (see CPLR 2106 …), the defendants failed to object to the unsworn affidavit on this ground in the

Supreme Court and, therefore, any deficiency in the submission has been waived … . * * *

"[T]he fact that the [injured] plaintiff signed a [generic] consent form does not establish [the defendants'] prima facie entitlement to judgment as a matter of law" dismissing this cause of action insofar as asserted against the North Shore defendants … . … [T]he transcripts of the deposition testimony of the injured plaintiff and of the physicians … , submitted by the defendants in support of their motion, did not establish that the injured plaintiff was given sufficient information on the risks and alternatives regarding the materials used and the procedures performed. … [D]efendants failed to establish that a reasonably prudent person in the injured plaintiff's position would not have declined to undergo the procedures if she or he had been fully informed of the risks and alternatives regarding the materials used and the procedures performed (see Public Health Law § 2805-d[3] …). Hall v Bolognese, 2022 NY Slip Op 06692, Second Dept 11-23-22

Practice Point: Here in this medical malpractice action the appellate court held: (1) the continuous treatment doctrine applied to toll the statute of limitations; (2) the unsworn affidavit from plaintiffs' expert should have been considered because defendants did not object to it; (3) plaintiff's signing a consent form did not preclude causes of action alleging a lack of informed consent.

NOVEMBER 23, 2022

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS CONCLUSORY AND SPECULATIVE; THE AFFIDAVIT, THEREFORE, DID NOT RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert affidavit in this medical malpractice action was conclusory and speculative, and therefore did not raise a question of fact:

The plaintiff submitted the affidavit of her expert, a physician board certified in vascular surgery, who agreed with [defendant} Mansouri's plan to perform right

femoral popliteal bypass surgery. The plaintiff's expert further opined, however, that Mansouri departed from the accepted standard of care by not choosing a different vessel once he found the popliteal artery to be diseased with plaque. The expert's affidavit was conclusory and speculative. While the expert opined that Mansouri should have used a different vessel, he failed to specify which vessel should have been used … . For that same reason, the assertion by the plaintiff's expert that "the vessel should have been bypassed more distally" was conclusory and speculative. Moreover, the opinion of the plaintiff's expert that Mansouri deviated from good and accepted medical practice by failing to verify that the plaintiff had sufficient perfusion after the surgery is unsupported by competent evidence … . Coffey v Mansouri, 2022 NY Slip Op 05678, Second Dept 10-12-22

Practice Point: The plaintiff's expert's affidavit in this medical malpractice case was deemed speculative, conclusory and unsupported by competent evidence. Defendants' motion for summary judgment should have been granted.

OCTOBER 12, 2022

MEDICAL MALPRACTICE, EXPERT EVIDENCE, VICARIOUS LIABILITY.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT CONCLUSORY AND THE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND; A HOSPITAL WILL NOT BE VICARIOUSLY LIABLE FOR SURGERY COMPETENTLY PERFORMED BY HOSPITAL STAFF AT THE DIRECTION OF THE PRIVATE PHYSICIANS WHO DID THE PRIMARY SURGERY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the defendant surgeons should not have been dismissed on the ground plaintiff's expert's affidavit was conclusory. The affidavit raised questions of fact about whether defendant surgeon deviated from the requisite standard of care. The court noted that the plaintiff's expert did not review the pleadings and all the evidence was irrelevant. The court also noted that the action against the hospital based upon the surgical procedures performed by hospital staff was properly dismissed. A hospital will not be vicariously liable

where hospital staff competently carry out the orders of the private physicians who did the primary surgery:

… [T]he plaintiffs' expert's opinion did not consist of merely general and conclusory allegations unsupported by competent evidence. The plaintiffs' expert made specific allegations based upon the operative reports and CT scan which were part of the medical records, and addressed specific assertions made [defendants'] expert. …

Although the plaintiffs' expert did not review the pleadings, and all the evidence, that failure went to the weight, not the admissibility of his opinion . The operative report regarding the hysterectomy was part of the injured plaintiff's hospital records, was electronically signed by Germain [defendant surgeon], and was relied upon by [defendants'] expert … . Therefore, the plaintiffs' expert properly relied upon that report in reaching his conclusions. * * *

At the conclusion of the surgery, the physician assisting Germain was replaced by an employee of the hospital. However, by that time, the surgery was over, and the doctors were closing up the injured plaintiff. There is no allegation or evidence that the hospital physician committed malpractice or could have had any influence on the course of the surgery at that juncture.

"Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders," except when the hospital staff follows orders knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, the hospital's employees have committed independent acts of negligence, or the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital … . Bhuiyan v Germain, 2022 NY Slip Op 06901, Second Dept 12-7-22

Practice Point: Here, in this medical malpractice case, the fact that plaintiff's expert did not review the pleadings and all the evidence was not a legitimate reason for rejecting the expert's affidavit. The expert relied on relevant evidence and the affidavit was not conclusory.

Practice Point: A hospital will not be vicariously liable for surgery competently done by hospital staff at the direction of the private physicians who did the primary surgery.

DECEMBER 7, 2022

MEDICAL MALPRACTICE, NEGLIGENCE, EXPERT DISCLOSURE.

THE EXPERT DISCLOSURE COMBINED WITH THE BILL OF PARTICULARS GAVE SUFFICIENT NOTICE OF THE NATURE OF THE PLAINTIFF'S EXPERT'S OPINION; THE TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert in this medical malpractice action should not have been precluded from testifying on the ground the expert disclosure did not provide notice of topic the expert was prepared to testify about. The notice, in combination, with the pleadings was deemed to have provided sufficient notice. The essence of the complaint was defendant doctor's (Ascencio's) alleged failure to diagnose and treat a surgery-related infection. Plaintiff's expert was going to testify the infection originated internally:

… [T]he Supreme Court precluded the plaintiff's expert from testifying regarding his opinion that the plaintiff's infection originated internally during the surgery on the ground that the expert disclosure referenced only the alleged failure to timely diagnose and appropriately treat a postoperative wound infection. However, in light of the other allegations in the expert disclosure and the incorporated bills of particulars, including those that addressed the alleged failure to discover a "festering infection" and/or a "surgical site infection" prior to the plaintiff's discharge, "'the expert witness [disclosure] statement was not so inadequate or inconsistent with the expert's [proposed] testimony as to have been misleading, or to have resulted in prejudice or surprise'" … . Moreover, in this "prototypical battle of the experts" … , the preclusion of expert testimony concerning the origin of the plaintiff's infection, and its effect on Ascencio's alleged ability to discover the infection prior to the plaintiff's discharge, prejudiced the plaintiff in presenting

her case, such that the error cannot be deemed harmless … . Owens v Ascencio, 2022 NY Slip Op 06133, Second Dept 11-2-22

Practice Point: In this medical malpractice case, the plaintiff's expert's disclosure notice, in combination with the bill of particulars, sufficiently alerted defendants to the nature of the expert's opinion. The preclusion of the expert's testimony was reversible error.

NOVEMBER 2, 2022

MEDICAL MALPRACTICE, WRONGFUL DEATH.

ALTHOUGH THE MEDICAL MALPRACTICE ACTIONS WERE TIME-BARRED, THE RELATED WRONGFUL DEATH ACTION, BROUGHT WITHIN TWO YEARS OF DEATH, WAS NOT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that, although the medical malpractice actions were time-barred, the related wrongful death action, brought within two years of death, was not:

Although the plaintiff denominated the second cause of action as one for "loss of services," she alleged all the elements necessary to plead a cause of action for wrongful death, including "(1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of 141istributes who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent" … . … [T]he wrongful death cause of action was timely. EPTL 5-4.1 provides that an action for wrongful death "must be commenced within two years after the decedent's death." Here, the decedent died on November 9, 2013, and this action was commenced on November 9, 2015. Thus, "the cause of action alleging wrongful death was timely commenced within two years of the decedent's death, since, at the time of [his] death, [the] cause of action sounding in medical malpractice was not time-barred" … .Proano v Gutman, 2022 NY Slip Op 07253, Second Dept 12-21-22

Practice Point: Here the medical malpractice actions were time-barred, but the related wrongful death actions, brought within two years of death, were not.

DECEMBER 21, 2022

MUNICIPAL LAW, EMPLOYMENT LAW, ARBITRATION, COVID.

WHETHER THE VILLAGE POLICE WERE ENTITLED TO ADDITIONAL COMPENSATION FOR WORK DURING THE EARLY DAYS OF THE COVID-19 PANDEMIC IS ARBITRABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the issue whether the village police were entitled to additional compensation for work during the early days of the COVID-19 pandemic is arbitrable:

Where the relevant arbitration provision is broad, a court "should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA [collective bargaining agreement]" … . If such a relationship exists, "the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" … .

… [T]he Village's petition was grounded on its contention that the dispute in this case is not arbitrable because article V, § 4 of the CBA provides for additional compensation when the mayor of the Village declares "a holiday for Village employees due to an emergency," and no such declaration was made by the mayor here. The petition further asserted that arbitration would be against public policy because the "members of the PBA are seeking to extract a benefit to which they clearly are not entitled and which is not contained in their contract." These contentions are without merit, since the applicability of article V, § 4 of the CBA does not affect the arbitrability of the dispute, but only the merits of the dispute, and the merits are to be determined by the arbitrator and not by the courts … . Matter of Incorporated Vil. Of Floral Park v Floral Park Police Benevolent Assn., 2022 NY Slip Op 06481, Second Dept 11-16-22

Practice Point: Whether a matter is arbitrable is separate and distinct from whether the dispute has merit, which is determined by the arbitrator.

NOVEMBER 16, 2022

MUNICIPAL LAW, PUBLIC NUISANCE, SELLING UNTAXED CIGARETTES.

THE CITY'S COMPLAINT ALLEGED A CAUSE OF ACTION FOR PUBLIC NUISANCE BASED UPON DEFENDANT'S SALE OF UNSTAMPED, UNTAXED CIGARETTES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff-city's complaint stated a cause of action for public nuisance against defendant City Tobacco House for selling unstamped, untaxed cigarettes:

… [T]he complaint alleged that City Tobacco House was a commercial establishment where several violations of Tax Law § 1814(b) and Administrative Code § 11-4012(b) had occurred during the six-month period preceding the commencement of this action. On one occasion, law enforcement officers allegedly recovered 8.4 cartons of untaxed cigarettes at the subject premises, and one person was arrested and charged with violating Tax Law § 1814. On another occasion, 28 packs of untaxed cigarettes allegedly were recovered from the subject premises, and one person was arrested and charged with violating Tax Law § 1814. On two other occasions, an undercover police officer allegedly purchased one pack of untaxed cigarettes from an employee in the subject premises. On another occasion, the execution of a search warrant at the subject premises allegedly resulted in the seizure of 64 packs of untaxed cigarettes and the arrest of one person. * * *

The allegations of unlawful conduct … , along with the allegation in the complaint that City Tobacco House knowingly conducted or maintained the subject premises as a place where persons gathered for purposes of engaging in conduct that violated Tax Law § 1814 and Administrative Code § 11-4012(b), were sufficient to allege the commission of criminal nuisance in the second degree, as defined in Penal Law § 240.45. Thus, having alleged facts supporting the proposition that City Tobacco House was a place "wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law" (Administrative Code § 7-703[l]), the

complaint validly alleged the existence of a public nuisance at the subject premises. City of New York v Land & Bldg. Known as 4802 4th Ave., 2022 NY Slip Op 05988, Second Dept 10-26-22

Practice Point: Here the city's allegation defendant sold unstamped, untaxed cigarettes stated a cause of action for public nuisance.

OCTOBER 26, 2022

MUNICIPAL LAW, NOTICE OF CLAIM, MEDICAL MALPRACTICE.

THE PETITION FOR LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN DISMISSED BASED ON THE WRONG VENUE BECAUSE RESPONDENTS DID NOT OBJECT TO THE VENUE; IN THIS MEDICAL MALPRACTICE CASE BASED UPON A STILLBIRTH, MOTHER'S AND FATHER'S PETITIONS MUST BE CONSIDERED SEPARATELY; ALTHOUGH PETITIONERS DID NOT SHOW RESPONDENTS HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT, MOTHER DEMONSTRATED AN ADEQUATE EXCUSE AND RESPONDENTS' LACK OF PREJUDICE; MOTHER'S PETITION WAS GRANTED AND FATHER'S WAS DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined mother's (but not father's) petition for leave to serve a late notice of claim should have been granted in this medical malpractice action stemming from a stillbirth. Supreme Court had dismissed the petition because it was brought in the wrong county. But, because the respondents did not object to the venue, the judge did not have the authority to dismiss the petition on that ground. Even though mother did not demonstrate the respondents had timely knowledge of the potential malpractice action, her petition should have been granted because she had an adequate excuse (mental health issues triggered by the stillbirth) and demonstrated respondents were not prejudiced by the delay. Father's petition must be considered separately from mother's and was denied (mother's excuse did not apply to father):

… Supreme Court … erred when it raised the issue of improper venue sua sponte and dismissed this proceeding on that ground. The court should have instead decided the merits of the petition. * * *

Where leave is sought in one proceeding to pursue both a direct claim by an injured person and a derivative claim by his or her spouse, the spouse's request for leave to serve a late notice of claim will not automatically be granted even if leave is granted to the injured person. Instead, the spouse's request must be analyzed separately … . .* * *

While the actual knowledge factor [i.e., knowledge of the potential lawsuit] generally should be given "great weight" in the analysis … , the petitioners' failure to satisfy that factor is not fatal to their petition for leave to serve a late notice of claim … . * * *

… [T]he petitioners met their initial minimal burden of providing a plausible argument supporting a finding of no substantial prejudice based on their contention that the respondents could defend themselves by reviewing the relevant medical records, interviewing witnesses, and consulting with experts. * * *

… [Mother] demonstrated a reasonable excuse for her delay due to her emotional and psychological injuries and the accompanying preoccupation with her well-being, as well as her attorney's prompt investigation into the claim … . Matter of Balbuenas v New York City Health & Hosps. Corp., 2022 NY Slip Op 05526, Second Dept 10-5-22

Practice Point: The petition for leave to file a late notice of claim should not have been dismissed based on improper venue because respondents didn't object to the venue.

Practice Point: The fact that petitioners did not demonstrate the respondents in this medical malpractice case had timely knowledge of the potential lawsuit was not fatal to the petition.

Practice Point: Here the potential medical malpractice action was based upon a stillbirth. Mother's and father's petitions must be considered separately.

Practice Point: Mother's mental health issues stemming from the stillbirth constituted an adequate excuse for failing to timely serve a notice of claim.

Practice Point: Petitioners demonstrated the respondents were not prejudiced by the delay because of the medical records and the ability to interview witnesses.

Practice Point: Mother's petition was granted, but father's was denied because the only factor available to father was the absence of prejudice to the respondents.

OCTOBER 5, 2022

NEGLIFENCE, TRAFFIC ACCIDENTS, IMMUNITY, MUNICIPAL LAW, HIGHWAY DESIGN.

THE CITY WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THIS "UNSAFE INTERSECTION DESIGN" CASE BECAUSE NO STUDIES OF THE INTERSECTON HAD BEEN UNDERTAKEN AND NO HIGHWAY-PLANNING DECISIONS HAD BEEN MADE; THE FACTS THAT THE CITY HAD NO NOTICE OF THE CONDITION AND NO PRIOR ACCIDENTS HAD BEEN REPORTED DID NOT WARRANT SUMMARY JUDGMENT ON WHETHER THE CITY HAD CREATED A DANGEROUS CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "unsafe intersection design" cause of action against the city in this traffic accident case should not have been dismissed. The city was not entitled to qualified immunity because there was no evidence any studies of the intersection had been undertaken or any highway-planning decision concerning the intersection had been made. The court noted the fact that the city had no notice the intersection was unsafe and no accidents had been reported did not warrant summary judgment on whether the city had created a dangerous condition:

… [W]here the initial traffic design is challenged, the municipality must show that there was a reasonable basis for the traffic plan in the first instance … . As the City defendants failed to establish that the original design of the subject intersection was based on a deliberative decision-making process which entertained and passed

on the very same question of risk that the plaintiff would put to a jury, the City defendants did not sustain their prima facie burden on the issue of qualified immunity … .

… [T]he lack of prior similar accidents or notice did not establish the City defendants' prima facie entitlement to judgment as a matter of law under ordinary negligence principles. Since the City defendants created the alleged dangerous condition with their design of the intersection, "the 'usual questions of notice of the condition are irrelevant'" … . … [T]he lack of prior similar accidents within the five years preceding the plaintiff's accident did not establish, by itself, that the intersection was reasonably safe. Whether a dangerous or defective condition exists "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" … . A lack of prior accidents "is some evidence that a condition is not dangerous or unsafe" … . However, it is only a factor to be considered and does not negate the possibility of negligence … . Petronic v City of New York, 2022 NY Slip Op 07085, Second Dept 12-14-22

Practice Point: In an "unsafe intersection design" case, the municipality is not entitled to qualified immunity unless a study of the intersection had been undertaken and a highway-planning decision concerning the intersection had been made.

Practice Point: Because it was alleged the city created the dangerous intersection, the lack of notice and prior accidents did not warrant summary judgment dismissing the negligent-design cause of action.

DECEMBER 14, 2022

NEGLIGENCE MUNICIPAL LAW, LATE NOTICE OF CLAIM.

PETITIONER SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE COUNTY IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner in this slip and fall case should not have been allowed file a late notice of claim. The fact

that county personnel responded to the scene of her injuries did not demonstrate the county had timely knowledge of the potential lawsuit. The late notice was served 50 days after the expiration of the 90 time-limit and therefore did not provide notice within a reasonable time. The petitioner's injuries did not constitute an adequate excuse. And the petitioner did not provide any evidence the county would not be prejudiced by the late notice:

… [T]he fact that members of the Nassau County Police Department and a County ambulance responded to the scene and tended to her injuries, without more, cannot be considered actual knowledge of the essential facts constituting the claim against the County … . The petitioner failed to present any evidence to demonstrate that the County had knowledge of the circumstances of the accident from which it could "readily infer" that a "potentially actionable wrong had been committed" by it … . Moreover, the late notice of claim, served upon the County without leave of court 50 days after the 90-day statutory period had expired, was served too late to provide the County with actual knowledge of the essential facts constituting the claim within a reasonable time after the 90-day statutory period expired … .

The petitioner also failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim. The petitioner's conclusory assertion that her injuries prevented her from making timely service, without any supporting medical documentation or evidence, was insufficient to constitute a reasonable excuse … .

… [T]he petitioner failed to come forward with "some evidence or plausible argument" that the County will not be substantially prejudiced in maintaining a defense on the merits as a result of the delay in commencing this proceeding and the lack of timely, actual knowledge of the essential facts constituting the claim … . Matter of Lang v County of Nassau, 2022 NY Slip Op 06245, Second Dept 11-9-22

Practice Point: In this slip and fall case: (1) the fact that county personnel responded to the scene when petitioner slipped and fall did not demonstrate the county had timely knowledge of the potential lawsuit; (2) the late notice served 50 days after the 90-day time-limit did not provide notice within a reasonable time; (3) the petitioner's injuries did not constitute an excuse; and (4) the petitioner did not present evidence the county would not be prejudiced by the delay.

NOVEMBER 9, 2022

NEGLIGENCE, LIMITED LIABILITY COMPANY LAW.

THE CRITERIA FOR PIERCING THE CORPORATE VEIL IN THIS PERSONAL INJURY ACTION AGAINST A BAR OWNED AND OPERATED BY A LIMITED LIABILITY COMPANY WERE NOT MET; THE OVER $2,000,000 JUDGMENT AGAINST THE SOLE MEMBER OF THE LLC REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court after a non-jury trial awarding plaintiff over $2,000,000, determined plaintiff was not entitled to pierce the corporate veil to hold defendant Traina, the sole member of defendant limited liability company (LLC), personally liable. Plaintiff brought a personal injury action against the bar owned and operated by the LLC and was awarded a default judgment:

Generally, a member of a limited liability company cannot personally be held liable for any debts, obligations or liabilities of the limited liability company, "whether arising in tort, contract or otherwise" (Limited Liability Company Law § 609[a]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on members for the obligations of the limited liability company … . " … [G]enerally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation [or LLC] in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [the party's] injury" … . * * *

… [A]lthough Traina did not observe all corporate formalities, the evidence established that he ran a real business, with employees, customers, and vendors, and the petitioner presented no evidence that the LLC was undercapitalized or that Traina commingled the assets of the LLC with his own or used corporate funds for personal use … . … w[W]ile the petitioner demonstrated that Traina exercised complete domination and control over the LLC, he failed to show that Traina's actions, including abandoning certain fixtures and equipment to his landlord, were for the purpose of leaving the LLC judgment proof or to perpetrate a wrong against the petitioner … . … [P]etitioner did not meet his burden of proof to establish that

there was a basis to pierce the corporate veil … . Matter of DePetris v Traina, 2022 NY Slip Op 07232, Second Dept 12-21-22

Practice Point: The criteria for piercing the corporate veil in this personal injury action against a bar owned and operated by a limited liability company were not met. The over $2,000,000 judgment against the sole member was reversed.

DECEMBER 21, 2022

NEGLIGENCE, MUNICIPAL LAW, SLIP AND FALL, FEIGNED ISSUE OF FACT.

IN THIS SLIP AND FALL CASE, PLAINTIFF'S 50-H EXAMINATION TESTIMONY DIRECTLY CONTRADICTED HIS AFFIDAVIT OPPOSING THE CITY'S SUMMARY JUDGMENT MOTION; THE "FEIGNED ISSUE OF FACT" DID NOT RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should have been granted. Plaintiff's affidavit in opposition directly contradicted his testimony at the General Municipal Law 50-h examination:

"[A] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing, inter alia, that it did not create the alleged hazardous condition" … . Here, the defendant made a prima facie showing that it did not engage in any snow removal activity within the subject triangular area, and therefore was not responsible for creating the icy condition that caused the plaintiff to fall. In opposition to the defendant's motion, the plaintiff submitted an affidavit in which he averred that, in the afternoon of the day before his accident, he "observed City personnel shoveling the snow from the [subject triangular area] and making piles of snow upon the perimeters." Yet, at his examination pursuant to General Municipal Law § 50-h, the plaintiff had been asked "At any point between the snowfall and the morning before the accident happened, had you seen anyone clearing snow from that [triangular area]," and he had responded "No, no." Since the assertion made for the first time in the plaintiff's affidavit directly contradicted the testimony he had given at his General

Municipal Law § 50-h examination, and he has not provided a plausible explanation for the inconsistency between the two statements, the assertion made in his affidavit must be viewed as presenting a feigned factual issue designed to avoid the consequences of his earlier testimony, and it is insufficient to raise a triable issue of fact … . Nass v City of New York, 2022 NY Slip Op 06132, Second Dept 11-2-22

Practice Point: Here the plaintiff's 50-h examination testimony directly contradicted his affidavit opposing defendant's motion for summary judgment. The "feigned issue of fact" did not raise a question of fact.

NOVEMBER 2, 2022

NEGLIGENCE, SLIP AND FALL, CONTRACT LAW, ESPINAL.

THE CONTRACT BETWEEN DEFENDANT AIRWAY CLEANERS AND DEFENDANT AMERICAN AIRLINES IN THIS AIRPORT SLIP AND FALL CASE DID NOT ENTIRELY DISPLACE AMERICAN AIRLINES' DUTY TO KEEP THE BATHROOM SAFE; THEREFORE THE CONTRACT COULD NOT SERVE AS THE BASIS FOR AIRWAY CLEANERS' LIABILTY TO PLAINTIFF UNDER ESPINAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Airway Cleaners' contract with American Airlines did not entirely displace defendant American Airlines' duty to maintain the bathroom where plaintiff slipped and fell. Therefore the contract between Airway Cleaners and American Airlines could not serve as the basis for Airway Cleaners' liability to third parties (plaintiff) under Espinal:

"Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" … . However, insofar as relevant here, an exception to this general rule applies where "the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v Melville Snow Contrs., 98 NY2d at 140).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Airway Cleaners, LLC, by demonstrating that a limited janitorial service agreement between Airway Cleaners, LLC, and American Airlines was not a comprehensive and exclusive agreement which entirely displaced American Airlines' duty to maintain the premises in a reasonably safe condition … . DaCruz v Airway Cleaners, LLC, 2022 NY Slip Op 06687, Second Dept 11-23-22

Practice Point: Here there was a contract between defendant Airway Cleaners and defendant American Airlines with respect to cleaning the premises at Kennedy Airport. The contract was not comprehensive enough to entirely displace American Airlines' duty to keep the bathroom on the premises, where plaintiff slipped and fell, safe. Therefore, the contractor, Airway Cleaners, under the Espinal criteria, could not be sued by plaintiff.

NOVEMBER 23, 2022

NEGLIGENCE, SLIP AND FALL, DISCOVERY.

IN THIS SLIP AND FALL CASE, THE DEFENDANTS DEMONSTRATED MEDICAL RECORDS PERTAINING TO PLAINTIFF'S PRIOR ANKLE INJURY WERE MATERIAL AND NECESSARY TO THE DEFENSE; DISCOVERY OF THOSE RECORDS SHOULD HAVE BEEN ALLOWED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants were entitled to discovery of the medical records for plaintiff's prior injuries in this slip and fall case. Although the facts are not explained, the appellate court deemed he medical records relevant to whether plaintiff was negligent:

The plaintiff Shadia Hamed allegedly sustained personal injuries when she slipped and fell in a building owned and operated by the defendants. The plaintiff commenced this action alleging, inter alia, that the defendants negligently maintained their premises in an unsafe condition.

The defendants moved pursuant to CPLR 3124 to compel the plaintiff to provide certain discovery, including authorizations to obtain medical records related to the plaintiff's treatment for pre-existing injuries to her right ankle. The defendants argued that these medical records were material and necessary to their defense of this action because these records were necessary to establish the plaintiff's negligence. …

… Supreme Court improvidently exercised its discretion in only conditionally granting that branch of the defendants' motion which was to compel the plaintiff to provide medical records pertaining to her pre-existing injury to her right ankle only in the event that the plaintiff 'claims any effects on her gait or mobility as a result of this incident.' The defendants established that these records are material and necessary to the defense of this action (see CPLR 3101[a][1]). Hamed v Alas Realty Corp., 2022 NY Slip Op 05518, Second Dept 10-5-22

Practice Point: In this slip and fall case, the medical records pertaining to plaintiff's prior ankle injury were deemed material and necessary to the the defense, i.e., necessary to demonstrate plaintiff's negligence. Therefore discovery of those records should not have been restricted.

NEGLIGENCE, SLIP AND FALL, LANDLORD-TENANT, MUNICIPAL LAW.

IN THIS SLIP AND FALL CASE, THE LESSEE OF THE PROPERTY ABUTTING THE ALLEGEDLY DEFECTIVE SIDEWALK WAS NOT LIABLE FOR PLAINTIFF'S SLIP AND FALL; THERE WAS NO EVIDENCE THE CONDITION WAS CREATED BY THE LESSEE AND NO EVIDENCE OF AN AGREEMENT CREATING A DUTY ON THE PART OF THE LESSEE TO MAINTAIN THE SIDEWALK (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this slip and fall case, determined 7-Eleven. The lessee of the property abutting the sidewalk where plaintiff allegedly fell, could not be held liable for the allegedly dangerous condition of the sidewalk:

Administrative Code of the City of New York § 7-210(a) imposes a duty upon "the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition." "[A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty" … . Additionally, "[a]s a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party" … . Only "where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, [may] the tenant . . . be liable to a third party" … . Here, the plaintiff failed to establish, prima facie, that 7-Eleven had any duty to maintain the sidewalk abutting the property it leased. Brady v 2247 Utica Ave. Realty Corp., 2022 NY Slip Op 06100, Second Dept 11-2-22

Practice Point: Under the NYC Administrative Code, the lessee of property abutting a sidewalk is not liable for a slip and fall caused by the condition of the sidewalk if the lessee did not create the condition and did not agree to maintain the sidewalk.

NOVEMBER 2, 2022

NEGLIGENCE, SLIP AND FALL, LANDLORD-TENANT.

BY THE TERMS OF HIS LEASE, PLAINTIFF WAS RESPONSIBLE FOR SNOW AND ICE REMOVAL IN THIS SLIP AND FALL CASE; THE OUT–OF-POSSESSION LANDLORDS WERE NOT RESPONSIBLE AND THEIR MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants-out-of-possession landlords were not responsible for snow and ice removal in the area

where plaintiff slipped and fell, In fact, plaintiff, by the terms of his lease, was responsible for the snow and ice removal:

… [T]he defendants demonstrated, prima facie, that they were out-of-possession landlords who were not contractually obligated to remove snow and ice from the subject driveway, that they did not assume such a duty through a course of conduct, and that they did not violate any relevant statute or regulation … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants had a duty to remove snow or ice under statute or regulation, the terms of the lease, or a course of conduct … . Sweeney v Hoey, 2022 NY Slip Op 07471, Second Dept 12-28-22

Practice Point: Here the out-of-possession landlords were not responsible for snow and ice removal in the are where plaintiff-tenant fell. In fact, plaintiff, by the terms of his lease was himself responsible for the snow and ice removal.

DECEMBER 28, 2022

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE RAISED PORTION OF THE SIDEWALK FLAG OVER WHICH PLAINTIFF TRIPPED DID NOT ABUT DEFENDANTS' PROPERTY SEVERAL FEET OF THE FLAG EXTENDED IN FRONT OF DEFENDANTS' PROPERTY; THE VILLAGE CODE MANDATES THAT ABUTTING PROPERTY OWNER'S MAINTAIN SIDEWALKS IN A SAFE CONDITION; DEFENDANTS DID NOT SUBMIT ANY EVIDENCE THAT THEY MAINTAINED THE ABUTTING PORTION OF THE SIDEWALK IN A SAFE CONDITION OR THAT ANY FAILURE TO DO SO WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant homeowners were not entitled to summary judgment in this sidewalk slip and fall case. Apparently the raised part of a sidewalk flag over which plaintiff tripped was not in front of defendants' property, but much of that same flag abutted

defendants' property. Because the village code placed responsibility on the homeowners to keep the sidewalk in a safe condition, in order to warrant summary judgment, the defendants were required to demonstrate they maintained the portion of the sidewalk in front of their property in a reasonable safe condition or that the failure to do so was not a proximate cause of plaintiff's fall. Defendants offered no evidence on that issue:

While the homeowners demonstrated that the section of the sidewalk containing the defect on which the plaintiff allegedly tripped did not abut their property, their submissions in support of their motion also included evidence that the sidewalk flag on one side of the defect—which was not level with the adjacent flag, resulting in the height differential on which the plaintiff tripped—extended several feet onto their side of the property line. To meet their prima facie burden, the homeowners were "required to do more than simply demonstrate that the alleged defect was on another landowner's property" … . They were required to make a prima facie showing that they maintained the portion of the sidewalk abutting their own property in a reasonably safe condition, or that any failure to do so was not a proximate cause of the plaintiff's injuries … . Kuritsky v Meshenberg, 2022 NY Slip Op 07066, Second Dept 12-14-22

Practice Point: Here the village code placed responsibility for maintaining sidewalks in a reasonably safe condition on the abutting property owners. The raised portion of a sidewalk flag over which plaintiff tripped was not in front of defendants' property. But several feet of that same sidewalk flag extended in front of defendants' property. To warrant summary the defendants were required to show either that they maintained the portion of the sidewalk which abutted their property in a reasonably safe condition, or that the failure to do so was not the proximate cause of plaintiff's fall. The defendants presented no evidence on the issue.

DECEMBER 14, 2022

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

IN THIS SIDEWALK SLIP AND FALL CASE, THE TOWN DID NOT HAVE WRITTEN NOTICE OF THE DEFECT AND THE TOWN DEMONSTRATED THE "CREATION OF THE DEFECT" EXCEPTION TO THE WRITTEN-NOTICE REQUIREMENT DID NOT APPLY; THE DEFECT WAS THE RESULT OF DETERIORATION OF THE REPAIRED AREA OVER A 10-YEAR PERIOD (SECOND DEPT).

The second Department, reversing Supreme Court, determined the town demonstrated it did not create the sidewalk condition which allegedly caused plaintiff's slip and fall. Rather the sidewalk repair was done by the town 10 years ago and the current deteriorated condition had developed over time:

The Court of Appeals "has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" Only the affirmative negligence exception is implicated in this case, and it "'is limited to work [done] by [a municipality] that immediately results in the existence of a dangerous condition'" … . The defendant was not required to eliminate all triable issues of fact with respect to the affirmative negligence exception to the prior written notice rule in order to satisfy its prima facie burden … . Nevertheless, the defendant did eliminate all triable issues of fact with respect to that exception. In particular, the defendant submitted an affidavit of its employee, John Carroll, who averred that the asphalt patch would have been "rolled smooth and level to remove any existing tripping hazard between the two existing concrete slabs," but now, "the tar was eroded from the patch" and "[p]ortions of the asphalt patch . . . appear to be missing." Based on Carroll's "observation of the asphalt repair as it exist[ed] in 2019," he believed that the repaIr was "[more than] 10 years old" and that its separation from the concrete slabs "would be caused by natural erosion, wear and tear over time, and/or in this case tree roots causing the concrete slabs to uplift, not by the method of its installation." Parthesius v Town of Huntington, 2022 NY Slip Op 06254, Second Dept 11-9-22

Practice Point: A municipality will be responsible for a sidewalk slip and fall only when the town was notified of the defect in writing. There are two exceptions. Plaintiff argued the negligent-repair exception applied here. But that exception only applies to defects immediately resulting from a repair. Here the town demonstrated the repair was not properly 10 years ago and the defect developed over time.

NOVEMBER 9, 2022

NEGLIGENCE, SLIP AND FALL, SPECIAL USE.

ALTHOUGH TRADER JOE'S APPARENTLY DID NOT OWN THE PARKING LOT WHERE PLAINTIFF FELL, IT FAILED TO DEMONSTRATE IT DID NOT OCCUPY, CONTROL OR MAKE SPECIAL USE OF THE PARKING LOT; TRADER JOE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant Trader Joe's motion for summary judgment in this parking lot slip and fall case should not have been granted. Although the parking lot was apparently owned by the town, Trader Joe's did not demonstrate it did not occupy, control, or make special use of the parking lot:

"'Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property'" … . "'In the absence of ownership, occupancy, control, or special use, a party generally cannot be held liable for injuries caused by the dangerous or defective condition of the property'" … . * * *

Trader Joe's failed to submit evidence sufficient to establish, prima facie, that it did not occupy, control, or make special use of the parking lot where the accident occurred, and that it cannot be held liable for Toner's alleged injuries … . Toner v Trader Joe's E., Inc., 2022 NY Slip Op 05555, Second Dept 10-5-22

Practice Point: Even though the defendant did not own the parking lot where plaintiff slipped and fell, to be entitled the summary judgment the defendant must show it did not occupy, control or make special use of the parking lot. The failure to do so here required denial of defendant's motion.

OCTOBER 5, 2022

NEGLIGENCE, SLIP AND FALL, STORM IN PROGRESS.

SIX TO TWELVE INCHES OF SNOW FELL OVERNIGHT AND PLAINTIFF SLIPPED AND FELL AT AROUND 6:00 AM; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE STORM-IN-PROGRESS DEFENSE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this slip and fall case should have been granted on the ground that the storm-in-progress defense applied:

On March 15, 2017, at approximately 5:55 a.m., the plaintiff … allegedly was injured when he slipped and fell on snow and ice on premises owned by the defendants. …

"Under the storm-in-progress rule, a property owner, tenant in possession, or, where relevant, a snow removal contractor will not be held responsible for accidents caused by snow or ice that accumulates during a storm until an adequate period of time has passed following the cessation of the storm to allow . . . an opportunity to ameliorate the hazards caused by the storm" … . However, once a landowner or a tenant in possession elects to engage in snow removal during a storm in progress, "it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" … . "The mere failure of a defendant to remove all of the snow and ice, without more, does not establish that the defendant increased the risk of harm" … .

Here, in support of their motion, the defendants submitted … [plaintiff's] deposition testimony, which established … that snow began to fall the day before the incident and continued to fall into the overnight hours, producing 6 to 12 inches

of snow, and that the defendants did not have a reasonably sufficient time to ameliorate the hazards caused by the storm … . Henenlotter v Union Free Sch. Dist. No. 23, 2022 NY Slip Op 06116, Second Dept 11-2-22

Practice Point: Here six to twelve inches of snow fell overnight and plaintiff slipped and fell around 6 in the morning. The appellate court determined the storm-in-progress defense applied and defendants' motion for summary judgment should have been granted.

NOVEMBER 2, 2022

NEGLIGENCE, SLIP AND FALL, TRIVIAL DEFECT.

IN THIS SLIP AND FALL CASE, DEFENDANT DID NOT DEMONSTRATE THE FOUR-AND-ONE-HALF-INCH RISER AT THE ENTRANCE TO A SHOWER WAS OPEN AND OBVIOUS AS A MATTER OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 4 ½ inch riser at the entrance to a shower, over which plaintiff tripped and fell, was open and obvious as a matter of law:

… [T]he plaintiff allegedly tripped and fell on a tiled single-step riser while entering a shower stall in the locker room at the defendant's fitness club. The single-step riser was approximately 4½ inches high and was tiled in the same color and pattern as the floor tiles which bordered the top and bottom of the step. * * *

"[T]he issue of '[w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances'" … . In addition, "whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for the jury" … .

Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that the single-step riser was open and obvious and not inherently dangerous under the surrounding circumstances, including the lighting conditions at the time of the accident … . Lore v Fitness Intl., LLC, 2022 NY Slip Op 06922, Second Dept 12-7-22

Practice Point: Here in this slip and fall case, defendant did not demonstrate a 4 ½ riser at the entrance to a shower was open and obvious as a matter of law.

DECEMBER 7, 2022

NEGLIGENCE, SLIP AND FALL, TRIVIAL DEFECT.

WHETHER THE SIDEWALK DEFECT WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS NONACTIONABLE AS "TRIVIAL" IS A QUESTION OF FACT FOR THE JURY; IN OTHER WORDS, DEFENDANT DID NOT DEMONSTRATE THE DEFECT WAS TRIVIAL AS A MATTER OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment asserting the sidewalk defect which caused plaintiff's slip and fall was trivial should not have been granted:

… [P]laintiff allegedly was injured when she tripped and fell due to a height differential between two sidewalk slabs abutting premises owned by the defendant … . …

"Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury" … . "A defendant seeking dismissal of a complaint on the basis that [an] alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" … . In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" … . There is no "minimal dimension test" or "per se rule" that the condition must be of a certain height or depth in order to be actionable … . Butera v Brookhaven Mem. Hosp. Med. Ctr., Inc., 2022 NY Slip Op 06783, Second Dept 11-30-22

Practice Point: Here the defendant did not demonstrate the sidewalk defect which caused plaintiff's slip and fall was trivial as a matter of law, criteria explained.

NOVEMBER 30, 2022

NEGLIGENCE, SLIP AND FALL.

A DRAINAGE GRATE WHICH DOES NOT VIOLATE ANY CODE AND WHICH IS NOT DEFECTIVE IS NOT A DANGEROUS CONDITION SIMPLY BECAUSE IT WAS WET FROM RAIN AT THE TIME OF THE SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the drainage grate on which plaintiff slipped and fell was not a dangerous or defective condition. The grate did not violate any code and was not defective. The fact that the grate was wet from falling rain did not demonstrate a dangerous condition:

A property owner has a duty to maintain his or her premises in a reasonably safe condition … . "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of a dangerous or defective condition upon the landowner's property, the plaintiff must establish, among other things, that a dangerous or defective condition actually existed" … . Here, the defendant established its entitlement to judgment as a matter of law by demonstrating, prima facie, that the metal drainage grate, which was not in violation of any applicable code, was not in a defective or hazardous condition and that it maintained its premises in a reasonably safe condition … . The mere fact that the grate was wet from the falling rain was insufficient to establish the existence of a dangerous condition … . Shuttleworth v Saint Margaret's R.C. Church in Middle Vil., 2022 NY Slip Op 05730, Second Dept 10-12-22

Practice Point: Here a drainage grate which did not violate any code and which was not defective was not a dangerous condition simply because it was wet with rain at the time of the slip and fall.

OCTOBER 12, 2022

NEGLIGENCE, SLIP AND FALL.

DEFENDANT'S GENERAL AWARENESS THAT PUDDLES FORMED IN THE AREA OF PLAINTIFF'S SLIP AND FALL AND THAT WATER TURNS TO ICE WAS NOT ENOUGH TO DEMONSTRATE DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE ICY CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant had constructive notice of the icy condition where she slipped and fell. The fact that defendant may have been aware that puddles of water formed in that area was not enough:

The plaintiff's submissions demonstrated that the defendant had a general awareness that puddles of water formed on the portion of the sidewalk or pathway where the plaintiff fell. However, the defendant's general awareness that puddles of water formed in the precise location of the plaintiff's fall is not sufficient to impute actual or constructive notice of the specific ice condition that caused her to fall … . The plaintiff submitted no evidence to show that the defendant was aware that ice formed in the area of the puddled water where the plaintiff fell … . General awareness that water can turn to ice is legally insufficient to constitute constructive notice of the particular ice condition that caused the plaintiff to fall … . The plaintiff's submissions also failed to establish, prima facie, that the ice condition was otherwise visible and apparent, and had formed a sufficient period of time before the accident for the defendant to have discovered and remedied the condition … . McDonnell v Our Lady of Mercy R.C. Church, 2022 NY Slip Op 05686, Second Dept 10-12-22

Practice Point: Defendant's general awareness that puddles form in the area where plaintiff slipped and fell and that water turns to ice did not demonstrate defendant had constructive notice of the icy condition.

OCTOBER 12, 2022

NEGLIGENCE, STATUTE OF LIMITATIONS, INDEMNITY, CONTRIBUTION.

THE CAUSES OF ACTION FOR INDEMNITY AND CONTRIBUTION IN THIS SLIP AND FALL CASE DO NOT ACCRUE UNTIL THE UNDERLYING CLAIM IS PAID, WHICH HAS NOT HAPPENED YET; THEREFORE THE STATUTE OF LIMITATIONS ON THOSE CAUSES OF ACTION HAS NOT YET STARTED TO RUN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the indemnity and contribution causes of action in the slip and fall case should not have been dismissed as time-barred. The statute of limitations starts to run on these causes action when the underlying claim has been paid, which had not yet occurred:

"The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim" … . Here, it is undisputed that the plaintiff has yet to recover any judgment against the defendants. Thus, since the sixth and seventh causes of action in the third-party complaint … are predicated upon [the] alleged obligation to indemnify the defendants, those causes of action have yet to accrue. Sibrian v 244 Madison Realty Corp., 2022 NY Slip Op 06732, Second Dept 11-23-22

Practice Point: The causes of action for indemnity and contribution in this slip and fall case accrue when the underlying claim is paid, not when the slip and fall occurred. Here the underlying claim had not yet been paid and the statute never started running.

NOVEMBER 23, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, AFFIRMATIVE DEFENSES.

IN THIS REAR-END TRAFFIC ACCIDENT CASE, WHERE PLAINTIFF WAS AN INNOCENT PASSENGER, DEFENDANTS' FAILURE-TO-STATE-A-CAUSE-OF-ACTION AFFIRMATIVE DEFENSE SHOULD NOT HAVE BEEN STRUCK BECAUSE THE MOTION TO STRIKE AMOUNTED TO TESTING THE SUFFICIENCY OF PLAINTIFF'S OWN CLAIM (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the "failure to state a cause of action" affirmative defense in this traffic accident case should not have been struck. Plaintiff was a passenger in a car rear-ended by defendants. The court noted that any comparative negligence among defendant-drivers does not preclude summary judgment on liability in favor of a non-negligent passenger:

The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] …). …

Supreme Court should have denied that branch of the plaintiff's motion which was, in effect, pursuant to CPLR 3211(b) to dismiss the defendants' first affirmative defense, alleging that the complaint fails to state a cause of action. "[N]o motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" … . Ochoa v Townsend, 2022 NY Slip Op 05854, Second Dept 10-19-22

Practice Point: The plaintiff's motion to strike defendants' failure-to-state-a-cause-of-action affirmative defense should not have been granted because the motion amounts to plaintiff's testing the sufficiency of his or her claim.

Practice Point: In a traffic-accident case, comparative negligence among defendant drivers does not preclude summary judgment on liability in favor of an innocent passenger.

OCTOBER 19, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, PROXIMATE CAUSE.

DEFENDANTS' CAR WAS STOPPED IN THE SHOULDER LANE FOR A NON-EMERGENCY REASON WHEN THE CAR IN WHICH PLAINTIFF WAS A PASSENGER STRUCK IT FROM BEHIND; THERE WERE QUESTIONS OF FACT WHETHER STOPPING THE CAR IN THE SHOULDER LANE FOR A NON-EMERGENCY REASON WAS A PROXIMATE CAUSE OF THE ACCIDENT (AS OPPOSED TO MERELY FURNISHING THE OCCASION FOR THE ACCIDENT?) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the Feder defendants were not entitled to summary judgment dismissing the complaint in this rear-end collision traffic-accident case. Plaintiff was a passenger in a car when the driver pulled into the shoulder lane because a speeding car crossed his lane. The Feder defendants' car was stopped in the shoulder lane and the car in which plaintiff was a passenger struck it. The Feder defendants were not entitled to summary judgment because there were questions of fact whether stopping in the shoulder lane for a non-emergency reason constituted a proximate cause of the accident (as opposed to merely furnishing the occasion for the accident?):

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" … . However, "[t]he mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury" … .. "Generally, it is for the trier of fact to determine the issue of proximate cause" … .

Here, the Feder defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against them. The Feder defendants' own submissions raised triable issues of fact as to whether Abraham Feder's conduct in stopping on the shoulder of the highway for a non-emergency purpose imposed upon them a duty of reasonable care to warn other drivers of the hazard posed by their stopped vehicle,

and whether their failure to exercise reasonable care was a proximate cause of the accident … . Georgiadis v Feder, 2022 NY Slip Op 06690, Second Dept 11-23-22

Practice Point: Here defendants' car was stopped in the shoulder lane for a nonemergency reason when the car in which plaintiff was a passenger struck it from behind. The Second Department held there were questions of fact about whether the car stopped in the shoulder lane was a proximate cause of the accident. The case illustrates the fine line between "furnishing the occasion for an accident," which is not actionable, and a "proximate cause" of an accident, which is.

NOVEMBER 23, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

IN THIS REAR-END COLLISION CASE, THE DEFENDANT'S ALLEGATION HE DID NOT SEE PLAINTIFF'S BRAKE LIGHTS DID NOT RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that allegation defendant did not see plaintiff's brake lights in this rear-end collision case did not raise a question of fact about whether brake lights were not functioning:

… [T]he defendant failed to raise a triable issue of fact. Contrary to the defendant's contention, his claim that he did not see brake lights on the plaintiffs' vehicle prior to the collision, standing alone, was insufficient to raise a triable issue of fact as to whether an alleged malfunction of the brake lights on the plaintiffs' vehicle proximately caused the accident … . Quintanilla v Mark, 2022 NY Slip Op 06151, Second Dept 11-2-22

Practice Point: In this rear-end collision case, the defendant's allegation he did not see plaintiff's brake lights did not raise a question of fact about whether the brake lights were functioning properly.

NOVEMBER 2, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, SET ASIDE VERDICT.

ALTHOUGH DEFENDANTS' MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW IN THIS TRAFFIC ACCIDENT CASE WAS PROPERLY DENIED, THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new trial, determined defendants' motion to set aside the verdict in this traffic accident case as against the weight of the evidence should have been granted. The evidence, including video evidence, demonstrated defendant's bus had a green left-turn arrow when the bus collided with plaintiff's oncoming vehicle as the bus was turning. The court also found the damages for future pain and suffering excessive:

… [V]iewing the evidence in the light most favorable to the plaintiff, there was a "valid line of reasoning" that could lead a rational person to the liability verdict in this case … . Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability and for judgment as a matter of law.

However, the jury verdict on the issue of liability was contrary to the weight of the evidence, as "the evidence preponderate[d] so heavily in the [defendants'] favor that it could not have been reached on any fair interpretation of the evidence" … . * * * … [W]e remit the matter to the Supreme Court … for a new trial on the issue of liability. Blair v Coleman, 2022 NY Slip Op 06902, Second Dept 12-7-22

Practice Point: In this traffic accident case, defendants' motion to set aside the verdict as a matter of law was properly denied. But the motion to set aside the verdict as against the weight of the evidence should have been granted. The appellate court ordered a new trial on liability.

DECEMBER 7, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS.

PLAINTIFF BICYCLIST STRUCK THE DOOR OF DEFENDANT'S VAN AFTER DEFENDANT HAD OPENED THE DOOR; DEFENDANT RAISED QUESTIONS OF FACT ABOUT WHETHER HE HAD OPENED THE DOOR SAFELY AND WHETHER PLAINTIFF WAS COMPARATIVELY NEGLIGENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED AND DEFENDANT'S COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-bicyclist's motion for summary judgment in this traffic accident case should not have been granted. Plaintiff alleged defendant, Stewart, opened the door of his van and plaintiff could not avoid striking the door. Stewart raised questions of fact about whether he was negligent and whether plaintiff was comparatively negligent:

The assertions made in Stewart's affidavit, if credited, would support a finding that the plaintiff was riding his bicycle close to the parked vehicles, at a relatively high rate of speed, and possibly under the influence of alcohol, and he failed to perceive and avoid the van door, which had been open for as long as five seconds … .

… Stewart averred that, before opening the van door, he looked in his side-view mirror, where he was able to see the entire northbound lane for approximately 200 feet behind him, and he saw nothing approaching. Approximately five seconds later, the plaintiff's bicycle collided with the van door. These averments were sufficient to raise a triable issue of fact as to whether Stewart failed to see what, by the reasonable use of his senses, he should have seen, and whether he opened the van door when it was not reasonably safe to do so … . Tucubal v National Express Tr. Corp., 2022 NY Slip Op 05731, Second Dept 10-12-22

Practice Point: In a traffic accident case, at the summary judgment stage, if defendant raises questions of fact about whether he/she was negligent and whether plaintiff was negligent, summary judgment should not be granted to plaintiff and the comparative negligence affirmative defense should not be dismissed.

OCTOBER 12, 2022

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW, RECKLESS DISREGARD.

THERE IS A QUESTION OF FACT WHETHER DEFENDANT POLICE OFFICER VIOLATED THE RECKLESS-DISREGARD-FOR-THE-SAFETY-OF-OTHERS STANDARD OF CARE FOR POLICE VEHICLES IN PURSUIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant police officer, Benbow, violated the reckless disregard standard of care in this traffic accident case. Plaintiff was the driver's partner in the police car which collided with another car in an intersection when the driver was pursuing a car with excessively tinted windows:

… [There is] a triable issue of fact as to whether Benbow acted with reckless disregard for the safety of others. In contrast to Benbow's deposition testimony that he stopped at the red light and looked in both directions before slowly proceeding into the intersection against the red light, the plaintiff testified at her deposition that she and Benbow were responding to a call of a security alarm at a school, that Benbow did not stop before entering the intersection, that he was going to turn right and looked only to the left, that after he had entered the intersection he said that he "saw something" and suddenly accelerated and turned to the left, without ever looking to the right, that the plaintiff saw Ilyaich's vehicle and said "watch out," and that in response, Benbow then looked to the right, but did not attempt to move the police vehicle away from the collision … . Thompson v City of New York, 2022 NY Slip Op 06733, Second Dept 11-23-22

Practice Point: In this case there was no dispute that the reckless disregard standard applied to the police officer driving the police car in which plaintiff, his partner, was a passenger. There was a question of fact whether the driver violated the reckless disregard standard leading to a collision in an intersection.

NOVEMBER 23, 2022

NEGLIGENCE, PRODUCTS LIABILITY, LONG-ARM JURISDICTION.

DRIVER PURCHASED A GOODYEAR TIRE FOR HIS FORD FROM US TIRES, A NEW YORK CORPORATION; THE TIRE ALLEGEDLY FAILED LEADING TO A SERIOUS ACCIDENT IN VIRGINIA; DRIVER SUED US TIRES; US TIRES SUED GOODYEAR AND FORD, BOTH OUT-OF-STATE CORPORATIONS, SEEKING INDEMNIFICATION; NEW YORK HAS LONG-ARM JURISDICTION OVER GOODYEAR AND FORD IN THE US TIRES SUIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Genovesi, determined New York has long-arm jurisdiction over third-party defendants Ford and Goodyear in this suit by a New York corporation, US Tires. US Tires installed a Goodyear tire on a Ford. The tire allegedly failed in Virginia and three passengers died. The plaintiffs, including the driver, sued US Tires. US Tires sued Ford and Goodyear, both out-of-state corporation, seeking indemnification. The issue on appeal was whether Ford and Goodyear had sufficient contacts with New York to support long-arm jurisdiction:

Ford and Goodyear concede that they conducted sufficient activities to have transacted business in New York, thus satisfying the first prong of CPLR 302(a)(1). As to the second prong of CPLR 302(a)(1), US Tires demonstrated that Goodyear's and Ford's activities in New York have a sufficient connection with the claims herein. * * *

When all the requirements of CPLR 302 are met, the exercise of personal jurisdiction still must comport with constitutional due process requirements … . * * *

Based on the record before us, the exercise of specific jurisdiction over Ford and Goodyear comports with due process … . … Ford and Goodyear concede that they had sufficient "minimum contacts" with New York. … [T]he only remaining question is whether Ford and Goodyear have met their burden of presenting "a compelling case that the presence of some other considerations would render jurisdiction unreasonable" … . We conclude that Ford and Goodyear have failed to meet this burden. Aybar v US Tires & Wheels of Queens, LLC, 2022 NY Slip Op 06099, Second Dept 11-2-11

Practice Point: This decision includes a comprehensive discussion of general and specific jurisdiction which is worth consulting. In this suit by a New York corporation, US Tires, seeking indemnification from two out-of-state corporations, Ford and Goodyear, the court determined Ford and Goodyear had sufficient contacts with New York to support long-arm jurisdiction. US Tires installed a Goodyear tire on driver's Ford. The tire allegedly failed in Virginia, causing a serious accident. The driver sued US Tires. US Tires sued Ford and Goodyear.

NOVEMBER 2, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, FAILURE TO KEEP PROPER LOOKOUT.

ALTHOUGH DEFENDANT DRIVER HAD THE RIGHT-OF-WAY AND PLAINTIFF APPARENTLY PULLED OUT OF A DRIVEWAY IN FRONT OF DEFENDANT, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT KEPT A PROPER LOOKOUT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact in this traffic accident case, even though defendant driver had the right-of-way and plaintiff pulled out of a driveway in front of defendant. The facts are not described:

The defendants' evidence established, prima facie, that the defendant driver had the right-of-way, that the plaintiff was at fault in the happening of the accident, and that the defendant driver was not at fault in the happening of the accident (see Vehicle and Traffic Law § 1143 …). In opposition, the plaintiff submitted, among other things, his own affidavit, in which he gave a completely different version of the events preceding the accident. The plaintiff's evidence raised a triable issue of fact as to whether the defendant driver, who was obligated to keep a proper lookout, see what was there to be seen through the reasonable use of his senses, and avoid colliding with other vehicles … , was indeed at fault in the happening of the accident. Hassan v Brauns Express, Inc., 2022 NY Slip Op 05520, Second Dept 10-5-22

Practice Point: Defendant driver had the right-of-way and plaintiff apparently pulled out of a driveway in front of defendant. However, plaintiff raised a question of fact about whether defendant kept a proper lookout which was sufficient to avoid summary judgment.

OCTOBER 5, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW, GUILTY PLEA TO TRAFFIC OFFENSE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED; THAT PLAINTIFF PLED GUILTY TO A TRAFFIC OFFENSE DOES NOT PROVE SHE WAS NEGLIGENT; PLAINTIFF ALLEGED SHE PLED GUILTY BECAUSE SHE DID NOT HAVE THE MONEY TO DRIVE FROM HER HOME FOR COURT APPEARANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this bus-car traffic accident should not have been granted. The defendants submitted conflicting evidence about how the accident happened. The fact that plaintiff pled guilty to a traffic offense does not necessarily prove she was negligent. Plaintiff alleged she pled guilty to avoid traveling from her home in New Jersey for court appearances:

… [T]he defendants failed to establish, prima facie, that they were free from fault in the happening of the accident, because their submissions in support of the motion contained conflicting accounts of how the accident happened, and failed to eliminate triable issues of fact, including which vehicle entered the other vehicle's lane prior to the collision … .

Contrary to the defendants' contention, the fact that the plaintiff pleaded guilty to the traffic offense of driving or operating a motor vehicle in an unsafe manner does not conclusively establish that she was negligent … . "It is well settled that a person who pleads guilty to a traffic offense is permitted to explain the reasons for the plea, and it is for the jury to decide what weight, if any, to give to the

testimony" … . Here, the plaintiff contended that she pleaded guilty, inter alia, because she did not have the money to keep traveling to New Jersey for court appearances, and thus, it is for a jury to evaluate her explanation and determine what weight, if any, the plea is entitled to in determining if she was negligent … . Charles v American Dream Coaches, 2022 NY Slip Op 06685, Second Dept 11-23-22

Practice Point: In a traffic accident case, the fact that plaintiff pled guilty to a traffic offense is not proof of negligence as a matter of law because the reason for the guilty plea can be explained to the jury. Here plaintiff alleged she pled guilty because she did not have enough money to return to New York for court appearances. That raised a question of fact for the jury.

NOVEMBER 23, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT WAS PROCEEDING THROUGH AN INTERSECTION WHEN THE CAR IN WHICH PLAINTIFF WAS A PASSENGER ATTEMPTED A LEFT TURN, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; THE POLICE REPORT, PHOTOS AND DASHBOARD VIDEO WERE INADMISSIBLE AND DEFENDANT'S AFFIDAVIT DID NOT DEMONSTRATE HE WAS FREE FROM FAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant (Wen Xu) in this intersection traffic accident case should not have been granted summary judgment. The defendant was apparently proceeding through the intersection when the driver of the car in which plaintiff was a passenger was attempting to make a left turn. The uncertified police report, photos and dashboard video submitted by the defendant were inadmissible and his affidavit did not demonstrate he was free from fault:

Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn . . . left within an intersection . . . shall yield the right of way to any vehicle

approaching from the opposite direction which is within the intersection or so close [to it] as to constitute an immediate hazard." "The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield" … "However, a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way" … .

Here, Wen Xu failed to demonstrate his prima facie entitlement to judgment as a matter of law, as he failed to establish that he was free from fault in the happening of the accident. In support of his motion, Wen Xu submitted, inter alia, an uncertified police accident report, photographs, a dashboard video camera recording, and his own affidavit. However, the uncertified police accident report constitutes inadmissible hearsay evidence … The photographs and dashboard video camera recording are similarly inadmissible, as they were not properly authenticated … . Moreover, Wen Xu's affidavit was insufficient to establish his prima facie entitlement to judgment as a matter of law as it failed to eliminate triable issues of fact with regard to whether he was free from fault in the happening of the accident … . Wen Xu failed to establish that he "took reasonable care to avoid the collision" with the other vehicle … . Rosa v Gordils, 2022 NY Slip Op 07466, Second Dept 12-28-22

Practice Point: Even the driver of the car with the right-of-way in an intersection accident can be liable if reasonable care to avoid the collision is not taken.

Practice Point: The police report, photos and dashboard video submitted by defendant in support of summary judgment were not in admissible form (the police report was uncertified and the photos and video were not authenticated) and defendant's affidavit did not demonstrate he was free from fault. Therefore, even though defendant apparently had the right-of-way when the other driver attempted a left turn, defendant's summary judgment motion should not have been granted.

DECEMBER 28, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANTS' VAN FAILED TO YIELD TO APPELLANT'S VEHICLE, WHICH HAD THE RIGHT OF WAY, WHEN DEFENDANTS' VAN ATTEMPTED TO MERGE INTO APPELLANT'S LANE; THE DASH CAM VIDEO DEMONSTRATED DEFENDANT-DRIVER VIOLATED THE VEHICLE AND TRAFFIC LAW; APPELLANT WAS NOT NEGLIGENT AS A MATTER OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a dash cam video demonstrated that defendants' van failed to yield to appellant's vehicle. Therefore, appellant was not negligent as a matter of law:

"A driver has a duty not to merge into a lane of moving traffic until it is safe to do so, and a violation of this duty constitutes negligence as a matter of law" (… see Vehicle and Traffic Law § 1128[a]). Moreover, a driver of a vehicle with the right-of-way is entitled to anticipate that the driver in the lane next to him or her will obey the traffic laws requiring them to yield to a driver with the right-of-way … . "'[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision'" … .

Here, in support of her motion, the appellant submitted evidence Ih included, among other things, a dash cam video of the accident which demonstrated that the defendant van driver failed to yield the right-of-way to the appellant's vehicle in violation of Vehicle and Traffic Law § 1128(a). The video revealed that the defendant van driver suddenly moved into the appellant's lane of travel as that lane widened to become both a travel lane and an exit ramp lane and, within seconds, the right side of the vehicle of the defendant van driver collided with the driver's side of the appellant's vehicle as the appellant's vehicle was entering the exit ramp lane. Thus, the evidence submitted by the appellant established, prima facie, that the defendant van driver's failure to yield was the sole proximate cause of the collision and that the appellant was free from fault … . Vigdorchik v Vigdorchik, 2022 NY Slip Op 05886, Second Dept 10-19-22

Practice Point: Here defendant driver struck appellant's car while attempting to merge into appellant's lane, which violated the Vehicle and Traffic Law because

appellant had the right of way. The accident was captured in a dash cam video. Appellant was not negligent as a matter of law.

OCTOBER 19, 2022

NEGLLIGENCE, CIVIL PROCEDURE, DAMAGES REDUCTION.

IF A TRIAL JUDGE DECIDES THE DAMAGES AWARDED BY THE JURY ARE EXCESSIVE, THE PROPER PROCEDURE IS TO ORDER A NEW TRIAL UNLESS PLAINTIFF STIPULATES TO THE REDUCED AWARD (SECOND DEPT).

The Second Department agreed with the trial judge's reduction of damages awarded by the jury in this wrongful death case but noted that the judge should have ordered a new trial unless plaintiff stipulated to the lower damages amount:

… [W]hile the 21-year-old Bohdan [plaintiff's decedent], who worked in the family business, lived with his parents, and cared for his younger sibling, was described as a wonderful, loving son who was especially helpful around the home, based on the record, the Supreme Court properly concluded that the jury awards for past pecuniary loss and future pecuniary loss were excessive. … . … [I]t was procedurally improper for the court to reduce the awards of damages for past pecuniary loss and future pecuniary loss without granting a new trial on those issues unless the plaintiff stipulated to reduce the verdict … . Vitenko v City of New York, 2022 NY Slip Op 06515, Second Dept 11-16-22

Practice Point: If the trial judge decides the damages awarded by the jury are excessive, the proper procedure is to order a new trial unless the plaintiff stipulates to the reduced amount.

NOVEMBER 16, 2022

REAL ESTATE, BROKER'S COMMISSION, PROCURING CAUSE.

THE BROKER WAS THE PROCURING CAUSE OF THE SALE OF THE REAL PROPERTY AND THEREFORE WAS ENTITLED TO THE AGREED 4% COMMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive dissent, determined the broker in this sale of real property was the procuring cause of the sale and was therefore entitled to the agreed 4% commission:

"To prevail on a cause of action to recover a commission, the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale" … . Here, the issue disputed by the parties was whether the plaintiff was the procuring cause of the sale. "To establish that a broker was the procuring cause of a transaction, the broker must establish that there was 'a direct and proximate link, as distinguished from one that is indirect and remote'" between the bare introduction of the parties to the transaction and the consummation of the sale … . "[I]n order to qualify for a commission, a broker need not have been involved in the ensuing negotiations or in the completion of the sale," if such a direct and proximate causal link exists … . …

It was Minetree's [the broker's] introduction of the subject properties to, and work with, TNC [the nature conservancy] which brought the County and the defendants together on a bargain sale transaction. Saunders Ventures, Inc. v Catcove Group, Inc., 2022 NY Slip Op 05879, Second Dept 10-19-22

Practice Point: If a broker is the "procuring cause" of the sale of real property, the broker is entitled to the commission agreed to in the broker's contract.

OCTOBER 19, 2022

REAL PROPERTY LAW, GOOD-FAITH PURCHASER.

DEFENDANT WAS A GOOD-FAITH PURCHASER OF THE REAL PROPERTY AND WAS ENTITLED TO A DECLARATION OF SOLE OWNERSHIP; DEFENDANT PURCHASED THE PROPERTY FROM THE RECORD OWNER AND WAS UNAWARE OF THE UNRECORDED BENEFICIAL OWNERSHIP AGREEMENT BETWEEN THE RECORD OWNER AND PLAINTIFF WHO RESIDED ON THE PROPERTY; THE FACT THAT PLAINTIFF FILED A NOTICE OF PENDENCY BEFORE DEFENDANT RECORDED THE DEED HAD NO EFFECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (Vertex's) motion for summary judgment dismissing the complaint and declaring defendant was the sole owner of the real property should have been granted. Vertex purchased the property from the record owner. The fact that the record owner had entered into an unrecorded agreement acknowledging beneficial ownership by others who contributed to the purchase price, including plaintiff, who resided on the property, did not affect defendant's status as a good-faith purchaser, despite plaintiff's filing a notice of pendency prior to defendant's recording of the deed:

… [T]o establish itself as a bona fide purchaser for value, a party has the burden of proving that it purchased the property for valuable consideration and did not have "knowledge of facts that would lead a reasonably prudent purchaser to make inquiry" … .

… Vertex established … that it purchased the subject property for valuable consideration, without actual or constructive notice of the plaintiff's alleged interest … . Contrary to the plaintiff's contention, his filing of a notice of pendency against the property before Vertex filed its deed did not negate Vertex's status as a good-faith purchaser … . "[H]aving failed to avail itself of the protection of either Real Property Law §§ 291 or 294, the plaintiff may not successfully contend that its filing of a notice of pendency serves as a substitute for the recording of a conveyance or a contract" … . Vertex also established … that the plaintiff's occupancy at the property "was not inconsistent with the title of the apparent owner of record," and thus, did not defeat Vertex's status as a good-faith purchaser

… . In addition, Vertex established … that the 2008 agreement did not negate its status as a good-faith purchaser, as that agreement was insufficient to satisfy the statute of frauds (see General Obligations Law § 5-703 …). Bello v Ouellette, 2022 NY Slip Op 07043, Second Dept 12-14-22

Practice Point: Here plaintiff had entered an unrecorded written agreement with the record owner of the real property indicating plaintiff, who resided on the property, had a one-fourth beneficial interest in the property. Defendant was unaware of the agreement. Defendant's goof-faith-purchaser status was not affected by the fact that plaintiff filed a notice of pendency before defendant recorded the deed.

DECEMBER 14, 2022

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