

NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 2 – 6, 2023, and posted on the New York Appellate Digest on Monday, January 9, 2023, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter. Copyright 2023 New York Appellate Digest, LLC

Weekly Reversal
Newsletter
January 2 – 6, 2023

Contents

CIVIL PROCEDURE, CONSUMER LAW, JURISDICTION OVER FOREIGN ELECTRONIC-CIGARETTE MANUFACTURER.....	2
NEW YORK HAS JURISDICTION OVER OUT-OF-STATE DEFENDANT JUUL LABS, THE MANUFACTURER OF ELECTRONIC CIGARETTES, AND TWO CORPORATE OFFICERS IN AN ACTION ALLEGING DECEPTIVE BUSINESS PRACTICES, FRAUD AND PUBLIC NUISANCE (FIRST DEPT).	2
CIVIL PROCEDURE, NEGLIGENCE TO PROSECUTE, SIX-MONTH RECOMMENCEMENT OPTION (CPLR 205(A)). .	2
TO DEPRIVE A PLAINTIFF OF THE SIX-MONTH RECOMMENCEMENT BENEFIT OF CPLR 205(A) THERE MUST HAVE BEEN A PATTERN OF NEGLIGENCE, NOT, AS HERE, A SINGLE INSTANCE OF NEGLIGENCE (PLAINTIFF WAS NOT READY FOR TRIAL); THERE WAS A DISSENT (FIRST DEPT).	2
CORPORATION LAW, PIERCE-THE-CORPORATE-VEIL ALLEGATIONS INSUFFICIENT.	3
THE ALLEGATIONS IN THE COMPLAINT WERE NOT SUFFICIENT TO SUPPORT LIABILITY ON A PIERCING-THE-CORPORATE-VEIL THEORY AND THE HOPE THAT DISCOVERY WOULD REVEAL SOMETHING WAS NOT A BASIS FOR DENIAL OF THE MOTION TO DISMISS (FIRST DEPT).	3
CRIMINAL LAW, FAMILY LAW, FAMILY OFFENSES, DISORDERLY CONDUCT.	4
THE MAJORITY HELD THE EVIDENCE DID NOT ESTABLISH DISORDERLY CONDUCT AS A FAMILY OFFENSE, FINDING THE CONDUCT WAS NOT “PUBLIC;” THE DISSENT ARGUED THE CONDUCT WAS “PUBLIC” IN THAT IT TOOK PLACE IN THE PRESENCE OF ADULTS AND CHILDREN OUTSIDE A DAYCARE CENTER (THIRD DEPT).	4
MEDICAID, PUBLIC HEALTH LAW, TAX LAW, HEALTH CARE FACILITIES.....	4
NONPUBLIC RESIDENTIAL HEALTH CARE FACILITIES NEED PERMISSION TO WITHDRAW EQUITY OR TRANSFER ASSETS IN EXCESS OF 3% OF THE FACILITIES’ REVENUE; CORPORATE OWNERS NEED NOT INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION; FACILITIES OWNED BY PASS-THROUGH ENTITIES (I.E., LIMITED LIABILITY COMPANIES) MUST INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION (THIRD DEPT).	4
TOXIC TORTS, ASBESTOS EXPOSURE, SUMMARY-JUDGMENT EVIDENCE REQUIREMENTS.	5
DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT PLAINTIFF’S EXPOSURE TO ASBESTOS WHEN MAINTAINING DEFENDANT’S PRODUCTS DID NOT CONTRIBUTE TO PLAINTIFF’S ASBESTOS-INJURIES; AT THE SUMMARY JUDGMENT STAGE, IT IS NOT ENOUGH FOR DEFENDANT TO ARGUE PLAINTIFF COULD NOT PROVE CAUSATION (THIRD DEPT).	5

CIVIL PROCEDURE, CONSUMER LAW, JURISDICTION OVER FOREIGN ELECTRONIC-CIGARETTE MANUFACTURER.

NEW YORK HAS JURISDICTION OVER OUT-OF-STATE DEFENDANT JUUL LABS, THE MANUFACTURER OF ELECTRONIC CIGARETTES, AND TWO CORPORATE OFFICERS IN AN ACTION ALLEGING DECEPTIVE BUSINESS PRACTICES, FRAUD AND PUBLIC NUISANCE (FIRST DEPT).

[People v JUUL Labs, Inc., 2023 NY Slip Op 00040, First Dept 1-5-22](#)

Practice Point: Here New York demonstrated it had personal jurisdiction over the out-of-state manufacturer of electronic cigarettes and two corporate officers involved in marketing the cigarettes in New York. The complaint alleged deceptive business practices, fraud and public nuisance.

JANUARY 5, 2023

CIVIL PROCEDURE, NEGLIGENCE TO PROSECUTE, SIX-MONTH RECOMMENCEMENT OPTION (CPLR 205(A)).

TO DEPRIVE A PLAINTIFF OF THE SIX-MONTH RECOMMENCEMENT BENEFIT OF CPLR 205(A) THERE MUST HAVE BEEN A PATTERN OF NEGLIGENCE, NOT, AS HERE, A SINGLE INSTANCE OF NEGLIGENCE (PLAINTIFF WAS NOT READY FOR TRIAL); THERE WAS A DISSENT (FIRST DEPT).

[U.S. Bank Natl. Assn. v Fox, 2023 NY Slip Op 00046, First Dept 1-5-23](#)

Practice Point: A plaintiff will not be deprived of the six-month recommencement benefit of CPLR 205(a) unless there has been more than a single instance of neglect (here plaintiff was not ready for trial). In addition, the judge must, in the

order dismissing the action, set forth the facts demonstrating a pattern of neglect before the plaintiff will be prohibited from recommencing the action.

JANUARY 5, 2023

CORPORATION LAW, PIERCE-THE-CORPORATE-VEIL ALLEGATIONS
INSUFFICIENT.

THE ALLEGATIONS IN THE COMPLAINT WERE NOT SUFFICIENT TO
SUPPORT LIABILITY ON A PIERCING-THE-CORPORATE-VEIL THEORY AND
THE HOPE THAT DISCOVERY WOULD REVEAL SOMETHING WAS NOT A
BASIS FOR DENIAL OF THE MOTION TO DISMISS (FIRST DEPT).

[Yovich v Montefiore Nyack Hosp., 2023 NY Slip Op 00047, First Dept 1-5-23](#)

Practice Point: If a complaint doesn't allege facts demonstrating complete domination and control or abuse of the privilege of doing business in the corporate form the cause of action relying on the piercing-the-corporate-veil theory will be dismissed. The hope that discovery will reveal something relevant is not enough to prevent dismissal.

JANUARY 5, 2023

[Table of Contents](#)

CRIMINAL LAW, FAMILY LAW, FAMILY OFFENSES, DISORDERLY CONDUCT.

THE MAJORITY HELD THE EVIDENCE DID NOT ESTABLISH DISORDERLY CONDUCT AS A FAMILY OFFENSE, FINDING THE CONDUCT WAS NOT “PUBLIC;” THE DISSENT ARGUED THE CONDUCT WAS “PUBLIC” IN THAT IT TOOK PLACE IN THE PRESENCE OF ADULTS AND CHILDREN OUTSIDE A DAYCARE CENTER (THIRD DEPT).

[Matter of Linda UU. v Dana VV., 2023 NY Slip Op 00013, Third Dept 1-5-22](#)

Practice Point: In order for conduct to amount to disorderly conduct it must have a “public” as opposed to an “individual” dimension. This case shows the distinction can be difficult to discern.

JANUARY 5, 2023

MEDICAID, PUBLIC HEALTH LAW, TAX LAW, HEALTH CARE FACILITIES.

NONPUBLIC RESIDENTIAL HEALTH CARE FACILITIES NEED PERMISSION TO WITHDRAW EQUITY OR TRANSFER ASSETS IN EXCESS OF 3% OF THE FACILITIES’ REVENUE; CORPORATE OWNERS NEED NOT INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION; FACILITIES OWNED BY PASS-THROUGH ENTITIES (I.E., LIMITED LIABILITY COMPANIES) MUST INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION (THIRD DEPT).

[Matter of Brightonian Nursing Home, Inc. v Zucker, 2023 NY Slip Op 00008, Third Dept 1-5-23](#)

Practice Point: Unlike nonpublic health care facilities owned by corporations, nonpublic health care facilities owned by pass-through entities (i.e., a limited liability company, S corporation, partnership or sole proprietorship) must include

federal and state income taxes in their calculation of withdrawals from equity. Withdrawal of equity or transfer of assets in excess of 3% of revenue requires the permission of the Commissioner of Health pursuant to Public Health Law 2802 (5).

JANUARY 5, 2023

TOXIC TORTS, ASBESTOS EXPOSURE, SUMMARY-JUDGMENT EVIDENCE REQUIREMENTS.

DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT PLAINTIFF'S EXPOSURE TO ASBESTOS WHEN MAINTAINING DEFENDANT'S PRODUCTS DID NOT CONTRIBUTE TO PLAINTIFF'S ASBESTOS-INJURIES; AT THE SUMMARY JUDGMENT STAGE, IT IS NOT ENOUGH FOR DEFENDANT TO ARGUE PLAINTIFF COULD NOT PROVE CAUSATION (THIRD DEPT).

[Howard v A.O. Smith Water Prods., 2023 NY Slip Op 00017, Third Dept 1-5-23](#)

Practice Point: In a toxic tort case, in order to prevail on a summary judgment motion, defendant must demonstrate as a matter of law that defendant's products did not cause plaintiff's injuries. The defendant will not win a summary judgment motion in this context by arguing plaintiff could not prove causation.

JANUARY 5, 2023

Copyright 2023 New York Appellate Digest, LLC