

NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure Release by Our New York State Appellate Courts in January 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

Civil Procedure
Reversal Newsletter
January 2023

Contents

AMEND COMPLAINT.....	3
THE TEN-MONTH DELAY BEFORE SEEKING TO AMEND THE COMPLAINT AND DEFENDANT’S SPECULATIVE ALLEGATION OF PREJUDICE WERE NOT SUFFICIENT GROUNDS FOR DENYING THE MOTION TO AMEND (SECOND DEPT).	3
APPEALS, SUMMARY JUDGMENT, SEARCH THE RECORD.....	3
THE SECOND DEPARTMENT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO A NONAPPEALING PARTY IN THIS SLIP AND FALL CASE (SECOND DEPT).	3
CORPORATION LAW, PIERCE-THE-CORPORATE-VEIL ALLEGATIONS INSUFFICIENT.....	4
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).	4
DISCOVERY DISPUTE, ATTORNEYS, AFFIRMATION OF GOOD FAITH, NEGLIGENCE.	4
PLAINTIFFS’ COUNSEL’S GOOD-FAITH AFFIRMATION DID NOT INCLUDE DETAILS OF ANY EFFORTS TO RESOLVE THE DISCOVERY ISSUE AND WAS THEREFORE INADEQUATE; PLAINTIFFS’ MOTION TO COMPEL DEFENDANT TO SUBMIT TO A DEPOSITION UNDER THREAT OF PRECLUSION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).	4
EDUCATION-SCHOOL LAW, INFANCY TOLL, STATUTE OF LIMITATIONS, NEGLIGENCE.	5
THE ONE-YEAR-AND-NINETY-DAY TIME LIMIT FOR A SUIT AGAINST A SCHOOL DISTRICT IN GENERAL MUNICIPAL LAW 50-I(1) IS SUBJECT TO THE INFANCY TOLL IN CPLR 208 (SECOND DEPT).	5
FORECLOSURE, MOTION TO RENEW.....	5
IN THIS FORECLOSURE ACTION, THE BANK’S FAILURE TO EXPLAIN WHY AN AFFIDAVIT DEMONSTRATING THE NOTICE OF DEFAULT WAS PROPERLY MAILED WAS NOT SUBMITTED WITH THE INITIAL MOTION FOR SUMMARY JUDGMENT PRECLUDED A MOTION FOR LEAVE TO RENEW (SECOND DEPT).	5
JURISDICTION OVER FOREIGN ELECTRONIC-CIGARETTE MANUFACTURER, CONSUMER LAW.	6
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).	6

[Table of Contents](#)

JURISDICTION, TOXIC TORTS. 6

DEFENDANT MANUFACTURED VALVES CONTAINING ASBESTOS; ALTHOUGH DEFENDANT HAD A SMALL OFFICE IN NYC THE VALVES WERE MANUFACTURED AND SOLD IN CONNECTICUT, WHERE PLAINTIFF LIVED AND WORKED; THE RELATIONSHIP BETWEEN NEW YORK AND PLAINTIFF’S CLAIMS WAS NOT SUFFICIENT FOR NEW YORK JURISDICTION (FIRST DEPT). 6

MOTION TO DISMISS, DOCUMENTARY EVIDENCE. 7

THE EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT “DOCUMENTARY EVIDENCE” WITHIN THE MEANING OF CPLR 3211(A)(1); THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 7

NEGLECT TO PROSECUTE, SIX-MONTH RECOMMENCEMENT OPTION (CPLR 205(A)). 7

TO DEPRIVE A PLAINTIFF OF THE SIX-MONTH RECOMMENCEMENT BENEFIT OF CPLR 205(A) THERE MUST HAVE BEEN A PATTERN OF NEGLECT, NOT, AS HERE, A SINGLE INSTANCE OF NEGLECT (PLAINTIFF WAS NOT READY FOR TRIAL); THERE WAS A DISSENT (FIRST DEPT). 7

PRODUCTS LIABILITY, JURISDICTION, FOREIGN CORPORATIONS. NEW YORK DID NOT HAVE LONG-ARM OR PERSONAL JURISDICTION OVER THE ITALIAN MANUFACTURER OF A HOSE USED AS A COMPONENT IN A DISHWASHER MADE AND SOLD BY A NONPARTY (SECOND DEPT). 8

VENUE, CORPORATION LAW, NEGLIGENCE..... 8

EVEN THOUGH THE DEFENDANT CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY AND THE TRAFFIC ACCIDENT OCCURRED IN NASSAU COUNTY WHERE THE CORPORATION DID HAVE AN OFFICE, VENUE WAS APPROPRIATELY PLACED IN NEW YORK COUNTY BASED ON DEFENDANT’S CERTIFICATE OF INCORPORATION (FIRST DEPT). 8

VERDICT SHEETS, JUROR CONFUSION. 9

NO ONE OBJECTED TO THE VERDICT SHEET BEFORE THE VERDICT AND JUROR AFFIDAVITS ALLEGING CONFUSION ARE NOT TO BE CONSIDERED EXCEPT IN EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE; THE MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 9

AMEND COMPLAINT.

THE TEN-MONTH DELAY BEFORE SEEKING TO AMEND THE COMPLAINT AND DEFENDANT’S SPECULATIVE ALLEGATION OF PREJUDICE WERE NOT SUFFICIENT GROUNDS FOR DENYING THE MOTION TO AMEND (SECOND DEPT).

[Flowers v Mombrun, 2023 NY Slip Op 00206, Second Dept 1-18-23](#)

Practice Point: Here the ten-month delay before moving to amend the complaint was not a sufficient ground for denial of the motion. The defendant’s allegation of prejudice caused by the delay was speculative.

JANUARY 18, 2023

APPEALS, SUMMARY JUDGMENT, SEARCH THE RECORD.

THE SECOND DEPARTMENT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO A NONAPPEALING PARTY IN THIS SLIP AND FALL CASE (SECOND DEPT).

[Chiamulera v New Windsor Mall, 2023 NY Slip Op 00300, Second Dept 1-25-23](#)

Practice Point: The appellate division has the power to search the record and award summary judgment to a nonappealing party.

JANUARY 25, 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

DISCOVERY DISPUTE, ATTORNEYS, AFFIRMATION OF GOOD FAITH,
NEGLIGENCE.

PLAINTIFFS' COUNSEL'S GOOD-FAITH AFFIRMATION DID NOT INCLUDE DETAILS OF ANY EFFORTS TO RESOLVE THE DISCOVERY ISSUE AND WAS THEREFORE INADEQUATE; PLAINTIFFS' MOTION TO COMPEL DEFENDANT TO SUBMIT TO A DEPOSITION UNDER THREAT OF PRECLUSION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Muchnik v Mendez Trucking, Inc., 2023 NY Slip Op 00100, Second Dept 1-11-23](#)

Practice Point: Here the affidavit plaintiffs' counsel submitted did not detail the efforts made to resolve the discovery issue and was therefore inadequate. Therefore Supreme Court should not have granted plaintiffs' motion to compel defendant's deposition under threat of preclusion.

JANUARY 11, 2023

EDUCATION-SCHOOL LAW, INFANCY TOLL, STATUTE OF LIMITATIONS, NEGLIGENCE.

THE ONE-YEAR-AND-NINETY-DAY TIME LIMIT FOR A SUIT AGAINST A SCHOOL DISTRICT IN GENERAL MUNICIPAL LAW 50-I(1) IS SUBJECT TO THE INFANCY TOLL IN CPLR 208 (SECOND DEPT).

[M. S. v Rye Neck Union Free Sch. Dist., 2023 NY Slip Op 00343, Second Dept 1-25-23](#)

Practice Point: The infancy toll of the statute of limitations in CPLR 208 applies to the one-year-ninety-day time limit for a suit against a school district in General Municipal Law 50-i(1).

JANUARY 25, 2023

FORECLOSURE, MOTION TO RENEW.

IN THIS FORECLOSURE ACTION, THE BANK'S FAILURE TO EXPLAIN WHY AN AFFIDAVIT DEMONSTRATING THE NOTICE OF DEFAULT WAS PROPERLY MAILED WAS NOT SUBMITTED WITH THE INITIAL MOTION FOR SUMMARY JUDGMENT PRECLUDED A MOTION FOR LEAVE TO RENEW (SECOND DEPT).

[JPMorgan Chase Bank N.A. v EY Bay Ridge, LLC, 2023 NY Slip Op 00311, Second Dept 1-25-23](#)

Practice Point: Here in this foreclosure action, the bank's failure to explain why proof of proper mailing of the notice of default was not presented in the initial summary judgment motion required the denial of the bank's motion for leave to renew.

JANUARY 25, 2023

[Table of Contents](#)

JURISDICTION OVER FOREIGN ELECTRONIC-CIGARETTE MANUFACTURER, CONSUMER LAW.

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

JURISDICTION, TOXIC TORTS.

DEFENDANT MANUFACTURED VALVES CONTAINING ASBESTOS; ALTHOUGH DEFENDANT HAD A SMALL OFFICE IN NYC THE VALVES WERE MANUFACTURED AND SOLD IN CONNECTICUT, WHERE PLAINTIFF LIVED AND WORKED; THE RELATIONSHIP BETWEEN NEW YORK AND PLAINTIFF'S CLAIMS WAS NOT SUFFICIENT FOR NEW YORK JURISDICTION (FIRST DEPT).

[Matter of New York Asbestos Litig., 2023 NY Slip Op 00402, First Dept 1-31-23](#)

Practice Point: Plaintiff alleged exposure to asbestos in valves made by defendant caused his cancer. The valves were manufactured and sold in Connecticut where plaintiff lived and worked. Defendant's small office in New York was not sufficiently connected with plaintiff's claims to support New York jurisdiction.

JANUARY 31, 2023

MOTION TO DISMISS, DOCUMENTARY EVIDENCE.

THE EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT “DOCUMENTARY EVIDENCE” WITHIN THE MEANING OF CPLR 3211(A)(1); THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Davis v Henry, 2023 NY Slip Op 00076, Second Dept 1-11-23](#)

Practice Point: “Documentary evidence” which will support a motion to dismiss include mortgages, deeds, contracts, etc., not affidavits, deposition testimony or letters.

JANUARY 11, 2023

NEGLECT 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 NEGLECT, NOT, AS HERE, A SINGLE INSTANCE OF NEGLECT (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

PRODUCTS LIABILITY, JURISDICTION, FOREIGN CORPORATIONS.

NEW YORK DID NOT HAVE LONG-ARM OR PERSONAL JURISDICTION OVER THE ITALIAN MANUFACTURER OF A HOSE USED AS A COMPONENT IN A DISHWASHER MADE AND SOLD BY A NONPARTY (SECOND DEPT).

[Economy Premier Assur. Co. v Miflex 2 S.p.A., 2023 NY Slip Op 00303, Second Dept 1-25-23](#)

Practice Point: Here plaintiff did not demonstrate the Italian company which manufactured a component of a dishwasher purposefully availed itself of the privilege of conducting business in New York. Therefore New York did not have long-arm or personal jurisdiction over the Italian company.

JANUARY 25, 2023

VENUE, CORPORATION LAW, NEGLIGENCE.

EVEN THOUGH THE DEFENDANT CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY AND THE TRAFFIC ACCIDENT OCCURRED IN NASSAU COUNTY WHERE THE CORPORATION DID HAVE AN OFFICE, VENUE WAS APPROPRIATELY PLACED IN NEW YORK COUNTY BASED ON DEFENDANT'S CERTIFICATE OF INCORPORATION (FIRST DEPT).

[Marte v Lampert, 2023 NY Slip Op 00375, First Dept 1-26-23](#)

Practice Point: Here the traffic accident happened in Nassau County where defendant corporation had an office. But defendant's certificate of incorporation indicated defendant's principal office was in New York County. The certificate controls, even though the defendant corporation did not actually have an office in New York County.

JANUARY 26, 2023

VERDICT SHEETS, JUROR CONFUSION, MOTION TO SET ASIDE VERDICT.

NO ONE OBJECTED TO THE VERDICT SHEET BEFORE THE VERDICT AND JUROR AFFIDAVITS ALLEGING CONFUSION ARE NOT TO BE CONSIDERED EXCEPT IN EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE; THE MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

[Suarez v Ades, 2023 NY Slip Op 00175, First Dept 1-12-23](#)

Practice Point: The verdict should not have been set aside on jury-confusion grounds. No one objected to the verdict sheet before the verdict and the juror affidavits alleging confusion should only be considered in extraordinary circumstances not present in this case.

JANUARY 12, 2023

Copyright 2023 New York Appellate Digest, LLC