

NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts March 6 – 10, 2023, and Posted on the Digest Website Monday, March 13, 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
March 6 – 10, 2023

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[Sullivan v St. Ephrem R.C. Parish Church, 2023 NY Slip Op 01207, Second Dept 3-8-23](#)

Practice Point: Here plaintiff alleged the Catholic school sent him to a priest, who was not employed by the school, for school-related discipline and the priest molested him. The causes of action for negligent supervision of the plaintiff-student and failure to warn the plaintiff-student should not have been dismissed.

The fact that the priest was not employed by the school did not require dismissal because the school allegedly released the plaintiff into a dangerous situation. Nor did the fact that the priest allegedly committed criminal acts relieve the school of potential liability.

MARCH 8, 2023

CHILD VICTIMS ACT, COURT OF CLAIMS.

THE NOTICE OF CLAIM IN THIS CHILD VICTIMS ACT LAWSUIT AGAINST THE STATE ALLEGING SEXUAL ABUSE AT A PSYCHIATRIC HOSPITAL SUFFICIENTLY DESCRIBED THE TIME PERIOD WHEN THE ABUSE ALLEGEDLY TOOK PLACE; THE ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

[D. G. v State of New York, 2023 NY Slip Op 01183, Second Dept 3-8-23](#)

Practice Point: Here the notice of claim sufficiently described the three-month time-frame when the alleged sexual abuse of the plaintiff took place at a state psychiatric hospital, The Child Victims Act lawsuit should not have been dismissed.

MARCH 8, 2023

CONTRACT LAW, DEBTOR-CREDITOR, FORECLOSURE.

THE PROCEEDS OF THE SALE OF COLLATERAL TO THE MAJORITY LENDERS WERE NOT DISTRIBUTED TO THE MINORITY LENDERS IN THE MANNER REQUIRED BY THE CREDIT AND SECURITY AGREEMENTS IN THIS PRIVATE FORECLOSURE; THE MINORITY LENDERS' BREACH OF CONTRACT CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

[AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC, 2023 NY Slip Op 01157, First Dept 3-7-23](#)

Practice Point: This comprehensive opinion concerns a private foreclosure of collateral and the distribution of the proceeds to the majority and minority lenders pursuant to complex credit and security agreements.

MARCH 7, 2023

CONTRACT LAW, EVIDENCE.

THE HANDWRITTEN ADDITION TO THE PRINTED CONTRACT IS PRESUMED TO EXPRESS THE LATEST INTENTION OF THE PARTIES; HERE THE ENTRY CREATED AMBIGUITY IN THE "NO DAMAGES FOR DELAY" CLAUSE REQUIRING DISCOVERY (FIRST DEPT).

[Henick-Lane, Inc. v 616 First Ave. LLC, 2023 NY Slip Op 01163, First Dept 3-7-23](#)

Practice Point: A handwritten entry in a printed contract is presumed to reflect the latest intention of the parties.

MARCH 7, 2023

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CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HER MOTION TO VACATE HER CONVICTION BASED UPON AN APPELLATE DECISION WHICH CAME OUT AFTER HER APPEAL BUT BEFORE SHE APPLIED FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS; THE COURT OF APPEALS DECISION WHICH HELD THE EXECUTIVE LAW ALLOWING DEFENDANT TO BE PROSECUTED BY THE “JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS” UNCONSTITUTIONAL SHOULD NOT BE APPLIED RETROACTIVELY (THIRD DEPT).

[People v Rice, 2023 NY Slip Op 01211, Third Dept 3-9-23](#)

Practice Point: Defendant should have been granted a hearing on her motion to vacate her conviction based on an appellate decision which came out after defendant’s appeal but before she applied for permission to appeal to the court of appeals.

Practice Point: The Court of Appeals decision which declared the statute under which defendant was prosecuted was not applied retroactively because it did not go to the heart of a reliable determination of guilt or innocence.

MARCH 9, 2023

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT COMMITTED A HEINOUS SECOND DEGREE MURDER, THE PROOF OF THE STATUTORY ELEMENTS OF FIRST DEGREE MURDER WAS LEGALLY INSUFFICIENT (FIRST DEPT).

[People v Estrella, 2023 NY Slip Op 01240, First Dept 3-9-23](#)

Practice Point: Here the evidence of two elements of first degree murder, torture and “relishing” the infliction of pain, were not proven. Therefore the first degree murder conviction was vacated.

MARCH 7, 2023

FAMILY LAW, JUDGES.

FATHER’S PETITION TO SUSPEND CHILD SUPPORT WAS PROPERLY DISMISSED BUT THE DISMISSAL SHOULD NOT HAVE BEEN “WITH PREJUDICE” BECAUSE FAMILY COURT HAS CONTINUING JURISDICTION OVER SUPPORT MATTERS (SECOND DEPT).

[Matter of Lew v Lew, 2023 NY Slip Op 01192, Second Dept 3-8-23](#)

Practice Point: Family Court has continuing jurisdiction over support matters. Therefore father’s petition to suspend child support, although properly dismissed, should not have been dismissed “with prejudice.”

MARCH 8, 2023

FORECLOSURE, JUDGES, CIVIL PROCEDURE.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION AFTER PLAINTIFF FAILED TO MEET A DEADLINE SET IN A STATUS CONFERENCE (SECOND DEPT).

[Deutsche Bank Trust Co. Ams. v Martinez, 2023 NY Slip Op 01179, Second Dept 3-8-23](#)

Practice Point: Sua sponte dismissals of complaints are disfavored. Here the failure to meet a deadline set in a status conference did not justify a sua sponte dismissal of the complaint.

MARCH 8, 2023

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

IN A FORECLOSURE ACTION THE BANK MUST PROVE COMPLIANCE WITH RPAPL 1306 WHICH REQUIRES PROOF PAPERS WERE FILED WITHIN THREE BUSINESS DAYS OF MAILING THE RPAPL 1304 NOTICE OF DEFAULT; HERE THERE WAS NO PROOF WHEN THE RPAPL 1304 NOTICE WAS MAILED, SO THE PROOF OF COMPLIANCE WITH RPAPL 1306 WAS INSUFFICIENT (SECOND DEPT).

[PROF-2013-S3 Legal Title Trust V v Johnson, 2023 NY Slip Op 01204, Second Dept 3-8-23](#)

Practice Point: In a foreclosure action, if there is no proof when the RPAPL 1304 notice of default was mailed, the bank can't prove the papers filed pursuant to RPAPL 1306 were filed within three business days of mailing the RPAPL 1304 notice (which is a requirement of strict compliance with RPAPL 1306).

MARCH 8, 2023

NEGLIGENCE, SLIP AND FALL, LANDLORD-TENANT.

DEFENDANTS IN THIS ICY-STEP SLIP AND FALL CASE DID NOT DEMONSTRATE THEY WERE OUT-OF-POSSESSION LANDLORDS WHO WERE NOT RESPONSIBLE FOR ICE AND SNOW REMOVAL; DEFENDANTS DID NOT SUBMIT THE LEASE IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

[Maharaj v Kreidenweis, 2023 NY Slip Op 01185, Second Dept 3-8-23](#)

Practice Point: Here the defendant landlords did not submit the lease in support of their motion for summary judgment in this icy-step slip and fall case. Therefore the defendants did not demonstrate they were out-of-possession landlords not responsible for ice and snow removal.

MARCH 8, 2023

NEGLIGENCE, SLIP AND FALL.

THERE WAS EVIDENCE OF TWO PROXIMATE CAUSES OF PLAINTIFF’S SLIP AND FALL: (1) HER KNEE BUCKLED; AND (2) WHEN SHE TRIED TO STOP HER FALL BY GRABBING THE VANITY, THE VANITY MOVED FIVE INCHES AWAY FROM THE WALL (SECOND DEPT).

[Moe-Salley v Highbridge House Ogden, LLC, 2023 NY Slip Op 01187, Second Dept 3-8-23](#)

Practice Point: There can be more than one proximate cause of a slip and fall. Here plaintiff’s knee buckled as she stepped out of the shower. When she tried to stop her fall by grabbing the vanity, the vanity moved and she fell. There was testimony that a properly installed vanity would not move away from the wall.

MARCH 8, 2023

NEGLIGENCE, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

A VIDEO CAMERA HAD BEEN INSTALLED IN A GRAPEFRUIT-SIZED HOLE BEHIND A TOILET IN A WOMEN’S RESTROOM AND VIDEO HAD BEEN RECOVERED; OVERRULING PRECEDENT, THE FIRST DEPARTMENT HELD THAT “EXTREME AND OUTRAGEOUS CONDUCT” IS NOT AN ELEMENT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND THAT CAUSE OF ACTION WAS REINSTATED (FIRST DEPT).

[Brown v New York Design Ctr., Inc., 2023 NY Slip Op 01228, First Dept 3-9-23](#)

Practice Point: All four appellate division departments have now held “extreme and outrageous conduct” is not an element of negligent infliction of emotional distress.

MARCH 7, 2023

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