NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts February 27 – March 3, 2023, and Posted on the New York Appellate Digest Website on Monday, March 6, 2023. 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 Report.

Weekly Reversal Report
February 27 – March 3, 2023

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CIVIL PROCEDURE, EVIDENCE, JUDGES.

AFTER AN IMPORTANT PLAINTIFFS' WITNESS BECAME ILL DURING CROSS-EXAMINATION AND WAS TAKEN BY AMBULANCE TO THE HOSPITAL, THE JUDGE, SUA SPONTE, DECLARED THE WITNESS UNAVAILABLE, STRUCK HIS TESTIMONY AND ADMITTED HIS DEPOSITION TESTIMONY; THERE WAS NO SUPPORT IN THE RECORD FOR THE FINDING THE WITNESS WOULD BE UNABLE TO TESTIFY; JUDGMENT REVERSED (SECOND DEPT).

The Second Department, reversing the judgment after trial, determined the trial judge should not have, sua sponte, announced that an important witness for plaintiffs (Awad) was unavailable due to illness, struck the witness's testimony and admitted the witness's deposition testimony:

During his cross-examination, Awad fell ill, and was taken from the courthouse by ambulance. …

CPLR 3117(a)(3)(iii) permits the reading of a witness's deposition at trial where the court finds "that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment" … . In exercising its discretion under CPLR 3117, "the trial court may not act arbitrarily or deprive a litigant of a full opportunity to present [its] case" … .

Here, there is no information in the record regarding the nature of Awad's illness or the treatment he received, or whether he was hospitalized and for how long. Thus, the Supreme Court's sua sponte determination that Awad was unavailable to testify due to sickness or infirmity lacked support in the record, and the court improvidently exercised its discretion in determining that Awad's deposition testimony was admissible under CPLR 3117(a)(3)(iii) … . 244 Linwood One, LLC v Tio Deli Grocery Corp., 2023 NY Slip Op 01072, Second Dept 3-1-23

Practice Point: Here a witness became ill during cross-examination and was taken to the hospital by ambulance. Without putting any additional information on the record, the judge declared the witness unavailable, struck his testimony and admitted his deposition. Because there was no support in the record for the judge's (sua sponte) determination the witness would not be able to testify, the judgment after trial was reversed.

MARCH 1, 2023

CIVIL PROCEDURE.

THE MOTION TO CHANGE VENUE WAS MADE MORE THAN 15 DAYS AFTER THE DEMAND TO CHANGE VENUE; THE 15-DAY TIME-LIMIT IS STRICTLY ENFORCED AND THE MOTION SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion to change venue pursuant to CPLR 511(b) was made more than 15 days after their demand to change venue and was therefore untimely:

Supreme Court should have denied defendants' motion to change venue from Bronx County to Westchester County because it was untimely made. Defendants have a reasonable excuse for their failure to make a timely demand to change venue. They learned of plaintiff's Westchester address on April 5, 2022, when they

received plaintiff's medical authorizations and a copy of the Aided report, and made a prompt demand to change venue the day after, on April 6, 2022 … . However, pursuant to CPLR 511(b), defendants had until April 21, 2022, 15 days after service of their demand, to make the motion. Defendants' motion made on April 26, 2022, 20 days after the demand, is untimely and should have been denied. Defendant did not move within the strict time limits provided by the statute and failed to offer any explanation for the delay … . Gomez v Cypser, 2023 NY Slip Op 01060, First Dept 2-28-23

Practice Point: Once defendant makes a demand to change venue, defendant has 15 days to make a motion to change venue pursuant to CPLR 511(b). The 15-day time-limit is strictly enforced. Here the motion was made 20 days after the demand and Supreme Court should not have granted it.

FEBRUARY 28, 2023

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT AND DEFENDANT'S SISTER TOLD THE COMPLAINANT TO HAVE SEX WITH THEIR BOYFRIENDS, THERE WAS NO EVIDENCE OF FORCIBLE COMPULSION; DEFENDANT, WHO RECORDED SOME OF THE SEXUAL ACTS, HAD A REASONABLE BELIEF COMPLAINANT WAS OVER 17; RAPE, CRIMINAL SEXUAL ACT AND USE OF A CHIILD IN A SEXUAL PERFORMANCE CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's rape first, criminal sexual act firs and use of a child in a sexual performance convictions, determined there was no evidence complainant was forced to have sex and defendant had a reasonable belief the complainant was not under 17. Complainant was told by defendant to have sex with her boyfriend (Graham) in a group setting and defendant recorded some of the acts on her phone. Defendant's sister also told complainant to have sex with her boyfriend (Wapples). Although complainant felt uncomfortable, she complied:

There was no evidence in this case that either Graham or Wapples used actual physical force to compel the complainant to engage in sexual intercourse or oral sexual conduct, and the complainant herself testified that she was not explicitly

threatened by any of the perpetrators. To the extent that this case turned on whether there was sufficient evidence of an implied threat, we conclude, viewing the evidence in the light most favorable to the People, that there was not sufficient evidence of an implied threat here. * * *

… [W]e also vacate the defendant's conviction of use of a child in a sexual performance … . The complainant testified at trial that she had "lied" … about her age, and that she had not ever told the defendant how old she really was. A trial witness who had rented rooms to … the complainant testified that the complainant stated that she was in her early 20s. People v Patterson, 2023 NY Slip Op 01103, Second Dept 3-1-23

Practice Point: Here, although the defendant told the complainant to have sex with her boyfriend, there was no evidence of forcible compulsion. There also was no evidence defendant, who recorded some of the sexual acts, was aware the complainant was less than 17. Rape, criminal sexual act and use of a child in a sexual performance convictions reversed.

MARCH 1, 2023

CRIMINAL LAW, EVIDENCE.

EVIDENCE DEFENDANT COMMITTED A BANK ROBBERY ONE MONTH AFTER THE CHARGED MURDER WAS NOT ADMISSIBLE UNDER MOLINEUX TO FILL IN A GAP IN THE EVIDENCE OR EXPLAIN A RELATIONSHIP WITH A WITNESS OR TO SHOW A CONSCIOUSNESS OF GUILT; A WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY DEFENDANT THREATENED TO KILL ANOTHER WITNESS UNDER THE "OPENING THE DOOR" THEORY BECAUSE THERE WAS NO MISLEADING TESTIMONY WHICH NEEDED TO BE CORRECTED (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the evidence defendant committed a bank robbery one month after the murder should not have been admitted. The Second Department also found that the evidence defendant had threatened to kill another witness should not have been admitted under the "opening the door" theory:

… [T]he evidence of the bank robbery did not fill a gap in the story or illuminate the defendant's motive, nor was it necessary to explain the nature of the relationship between the defendant and the witness since the nature of the relationship had already been explained by the witness in detail … .

… Supreme Court should not have admitted the testimony regarding the bank robbery as evidence of the defendant's consciousness of guilt. "Evidence of flight is admissible as circumstantial evidence of consciousness of guilt" … . However, here, the testimony, which contained allegations that the defendant robbed a bank in order to fund his evasion of authorities, was unnecessary given that the People had already established that the defendant fled to Florida and Texas after the murder … .

… Supreme Court also erred in its determination that the defendant "opened the door" on cross-examination to allow the People to elicit testimony that the defendant previously threatened to kill another witness. "The extent of redirect examination is, for the most part, governed by the sound discretion of the trial court" … . "The 'opening the door' theory must necessarily be approached on a case-by-case basis" … . "[A] trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression" … . Here, on cross-examination, defense counsel mostly questioned the witness about the previous lies that the witness told authorities related to certain observations that he made on the night of the murder, which the People had already elicited on direct examination. This did not create a "misleading impression" that required corrective testimony … . People v Smith, 2023 NY Slip Op 01106, Second Dept 3-1-23

Practice Point: This decision demonstrates the limits that should be placed on allowing Molineux (other-crime) evidence to come in. Evidence defendant committed a bank robbery after the charged murder was not necessary to fill in a gap in the proof, explain a relationship with a witness or to demonstrate a consciousness of guilt. Testimony the defendant threatened to kill another witness was not admissible under the "opening the door" theory because there was no misleading testimony to be corrected.

MARCH 1, 2023

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

20 POINTS SHOULD NOT HAVE BEEN ASSESSED UNDER RISK FACTOR 7 (RELATIONSHIP WITH THE VICTIM) BECAUSE THE VICTIM WAS NOT A STRANGER; ALTHOUGH SUBTRACTING 20 POINTS WOULD RESULT IN A LEVEL TWO SEX OFFENDER CLASSIFICATION, THE MATTER WAS SENT BACK BECAUSE THE PEOPLE INDICATED IF DEFENDANT WAS NOT DESIGNATED A LEVEL THREE OFFENDER THEY WOULD SEEK AN UPWARD DEPARTURE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined 20 points should not have been assessed under risk factor 7 (relationship with the victim) because the victim and defendant were not strangers. The People conceded there was a familial relationship:

Supreme Court improperly assessed 20 points under risk factor 7 (relationship with victim), since the People failed to establish by clear and convincing evidence that the defendant and the victim were strangers to each other … . To the contrary, the People conceded that the defendant and the victim had a familial relation, which is "specifically excluded by the Commentary and by the plain language of the Guidelines" with respect to risk factor 7 … .

Thus, 20 points must be deducted from the total risk assessment of 120 points, which places the defendant's point score within the range of a level two sexually violent offender. Nevertheless, since the record of the SORA hearing reflects that the People would have sought an upward departure had the Supreme Court not designated the defendant a level three sexually violent offender, we remit the matter … to determine whether an upward departure is warranted and for a new determination of the defendant's risk level … . People v Perez, 2023 NY Slip Op 01108, Second Dept 3-1-23

Practice Point: Defendant should not have been assessed 20 points under risk factor 7 because the victim was not a stranger. Subtracting 20 points designated defendant a level two sex offender. Because the People indicated they would seek an upward departure if defendant was not designated a level three offender, the matter was remitted.

MARCH 1, 2023

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS (SECOND DEPT).

The Second Department determined criminal possession of a weapon second degree and criminal possession of a firearm are inclusory concurrent counts:

CPL 300.30(4) provides that "[c]oncurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater." CPL 300.40(3)(b) provides, in relevant part, that with respect to inclusory concurrent counts, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" … .

Here, the defendant was convicted of criminal possession of a weapon in the second degree under Penal Law § 265.03(1)(b) and criminal possession of a firearm … . As the People correctly concede, because the charge of criminal possession of a weapon in the second degree and the charge of criminal possession of firearm are inclusory concurrent counts, the conviction of criminal possession of a firearm, as well as the sentence imposed thereon, must be vacated, and that count of the indictment must be dismissed … . People v Harvey, 2023 NY Slip Op 01099, Second Dept 3-1-23

Practice Point: Criminal possession of a weapon second degree and criminal possession of a firearm are inclusory concurrent counts. The criminal possession of a firearm conviction and sentence were vacated.

MARCH 1, 2023

EDUCATION-SCHOOL LAW, NEGLIGENCE.

PLAINTIFF-STUDENT'S CHEMICAL BURNS WERE CAUSED BY THE INTENTIONALLY WRONGFUL, SPONTANEOUS, UNFORESEEABLE ACTS OF THIRD PARTIES OVER WHOM DEFENDANT SCHOOL HAD NO CONTROL OR AUTHORITY; STUDENTS HAD APPARENLY PUT DRANO IN A WATER BOTTLE WHICH PLAINTIFF KICKED; TWO-JUSTICE DISSENT ARGUED THE SCHOOL DID NOT MEET ITS BURDEN OF PROOF ON ITS LACK OF NOTICE (FIRST DEPT).

The First Department, over a two-justice dissent, determined defendant charter school [Mission] did not have notice of the dangerous condition which allegedly caused plaintiff-student's chemical burns. Plaintiff kicked a plastic water bottle which had Drano in it, called a Drano bomb. Plaintiff alleged school personnel knew or should have known other students were making the Drano bombs:

The court properly granted Mission's summary judgment motion, even assuming that a triable issue exists as to whether plaintiff was participating in Mission's afterschool program at the time she was injured. Plaintiff testified that, before she was injured, she had seen other children, who were not participating in Mission's afterschool program, on a different basketball court in the public park pouring a liquid into a Poland Spring bottle, not a Vitamin Water bottle. Plaintiff theorizes that Mission's staff should have observed the conduct of these children and intervened to stop them. However, plaintiff's own testimony, on which Mission was entitled to rely to satisfy its prima facie burden on the summary judgment motion, established that the actions of the children — even indulging the speculative assumption that they created the Drano bomb that later injured plaintiff — were the intentionally wrongful, spontaneous, and unforeseeable acts of third parties over whom Mission had no control or authority … .

From the dissent:

Mission's motion presented no evidence whatsoever from any of its employees, teachers, supervisors, or in the form of records from the afterschool program. Mission consequently failed to address, in the first instance, the issue of whether it had "notice of the dangerous conduct which caused injury" … . Under the circumstances, Mission's reliance on the testimony of other parties was insufficient

to carry its prima facie burden. S. G. v Harlem Vil. Academy Charter Sch., 2023 NY Slip Op 01069, First Dept 2-28-23

Practice Point: Here the school successfully argued the plaintiff-student's chemical burns were caused by the intentionally wrongful, spontaneous, and unforeseeable acts of other children over whom the school had no control. Plaintiff kicked a water bottle which had Drano in it (a Drano bomb). Two dissenters argued the school did not present sufficient evidence of its lack of notice.

FEBRUARY 28, 2023

EMPLOYMENT LAW, ADMINISTRATIVE LAW, COVID.

PETITIONER OPERATED HIS BARBER SHOP OUT OF HIS HOME IN MARCH 2020 AFTER THE GOVERNOR ORDERED BARBER SHOPS CLOSED DUE TO COVID-19; REVOCATION OF PETITIONER'S BARBER LICENSES WAS DEEMED TOO SEVERE A PENALTY; THERE WAS A DISSENT (THIRD DEPT).

The Third Department, over a dissent, determined the revocation of petitioner's barber operator license and barber shop license was too severe a penalty for violating the state's COVID-19 policy in early 2020. After the governor ordered barber shops closed due to COVID, petitioner opened his barber shop in his home in March 2020. He closed his home operation in May 2020 when he was hospitalized with COVID:

The Secretary is empowered to impose a range of penalties for a barber's misconduct, with a reprimand being the least severe, then a fine of up to $500, then license suspension and, most seriously, license revocation (see General Business Law §§ 441 [a]; 443). As noted above, petitioner has been a licensed barber since 1963 and, before the proceedings at issue here, had a clean disciplinary record for nearly six decades. The ALJ found that petitioner "sincerely believed" that he was entitled to reopen his shop in March 2020 and was remorseful for having done so, as well as that he did not knowingly work while suffering from COVID-19. Further, although petitioner failed to operate in accordance with COVID-19 guidelines after he was permitted to reopen, it appears that such resulted from his lack of familiarity with the particulars of the guidelines, and it must be noted that those guidelines and other COVID-19 restrictions had been lifted by the time of the Secretary's determination … . It is accordingly unclear how petitioner's conduct

during the COVID-19 emergency would pose an ongoing threat to the public that would warrant the maximum sanction of permanently barring him from performing the work he had otherwise done without incident for almost 60 years. "Under these circumstances, and considering petitioner's otherwise unblemished record, revocation was too severe a penalty," and we therefore "remit to [the Secretary] to impose a less severe penalty" … . Matter of Lalima v New York State Dept. of State, 2023 NY Slip Op 01121, Third Dept 3-2-23

Practice Point: Here revocation of petitioner's barber licenses was deemed too severe a penalty. After the governor ordered barber shops closed in March 2020 due to COVID, petitioner continued cutting hair in his home.

MARCH 2, 2023

ENVIRONMENTAL LAW, ZONING.

PERMIT/ORDER ALLOWING DEVELOPMENT OF MARINAS ON LOWER SARANAC LAKE IN THE ADIRONDACK PARK ANNULLED (THIRD DEPT).

The Third Department, reversing the Adirondack Park Agency (APA), in a full-fledged opinion by Justice Ceresia, determined that the APA misapplied its wetlands regulations in issuing a permit for the development of marinas on Lower Saranac Lake in the Adirondack Park. The permit/order was therefore annulled. The opinion is too detailed and comprehensive to fairly summarize here:

LS Marina's wetlands permit application required APA to evaluate the freshwater wetland at the Annex location and assign it a value rating between one and four, with one representing the highest value (see 9 NYCRR 578.5). The value rating is arrived at by first determining whether the wetland possesses any one or more of 24 different characteristics, each of which, in turn, has an assigned value of one through four (see 9 NYCRR 578.5 [a]-[x]). These 24 characteristics are grouped under six headings or categories, which APA refers to as "factors." The wetland's overall value is to be no lower than the highest value of any of its characteristics (see 9 NYCRR 578.6 [a]). Furthermore, as is relevant here, if the wetland has three or more characteristics with a value of two, which fall under "more than one factor," this will raise the wetland's value to one (9 NYCRR 578.6 [c]).

There is no dispute that the wetland at the Annex has three value-two characteristics, and that these three characteristics fall under two separate factors

(see 9 NYCRR 578.5 [c], [g], [k]). Nevertheless, APA assigned the wetland an overall value of two rather than one … . … Therefore, APA should have assigned an overall value of one to the Annex wetland and should have analyzed the wetlands permit application accordingly (see 9 NYCRR 578.10 [a] [1]). Matter of Jorling v Adirondack Park Agency, 2023 NY Slip Op 01118, Third Dept 3-2-23

Practice Point: Here the Adirondack Park Agency misapplied its wetlands regulations with respect to a permit for the development of marinas on Lower Saranac Lake in the Adirondack Park. The permit/order was therefore annulled.

MARCH 2, 2023

FAMILY LAW, EVIDENCE.

EVIDENCE OF NEGLECT BASED UPON ALCOHOL USE WAS INSUFFICIENT; THE BASIS WAS OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE NOT CORROBORATED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined the evidence of father's neglect based upon alcohol use was insufficient:

… [A] preponderance of the evidence does not support a finding of neglect based on the father's alcohol use or on any prior incidents of domestic abuse, as those findings were based on out-of-court statements of the child that were not sufficiently corroborated by any other evidence. Matter of Kaylee S. (Kyle L. S.), 2023 NY Slip Op 01150, First Dept 3-2-23

Practice Point: A neglect finding based upon uncorroborated out-of-court statements by a child is not supported by a preponderance of the evidence.

MARCH 2, 2023

FAMILY LAW, JUDGES, ATTORNEYS.

A JUDGE MAY NOT ORDER THAT ONLY THE ATTORNEY FOR THE CHILD (AFC), AND NOT THE DEPARTMENT OF SOCIAL SERVICES, IS ALLOWED TO DISCUSS MATTERS OF SURRENDER OR ADOPTION WITH THE CHILD; SUCH AN ORDER INTERFERES WITH THE DEPARTMENT'S STATUTORY DUTIES (THIRD DEPT).

The Third Department, reversing Family Court in a matter of first impression in this neglect proceeding, in a full-fledged opinion by Justice Clark, determined Family Court could not order the petitioner (Delaware County Department of Social Services) to refrain from discussing matters of surrender or adoption with the child. The attorney for the child (AFC) requested the order which allowed only the AFC to discuss surrender or adoption with the child. The Third Department heard the case as an exception to the mootness doctrine (the order had been vacated, but the issue is likely to recur). The Third Department concluded the order could not stand because it interfered with the petitioner's statutory duties:

Although we recognize that circumstances may arise where it may be appropriate to allow an attorney for children reasonable time to discuss sensitive matters of importance, such as adoption or surrender, with their child-client before anyone else does, Family Court's order was not a temporal arrangement to allow the AFC an opportunity to broach the issue with the child. Instead, the order was an outright ban on anyone, including petitioner's caseworkers, having a discussion with the child regarding issues that are central to the child's permanency (see Family Ct Act § 1089 [c] [1] [ii]).

Although Family Court attempted to differentiate the issues of surrender and adoption as "a legal issue distinguishable from the assessment of the child's well-being," the court construed the issues pertaining to the child's well-being too narrowly, leaving petitioner in an untenable situation…. According to petitioner, for over a year, it was prevented "from speaking with the child to reassess its understanding of the child's wishes" relative to respondent's possible conditional surrender and a subsequent adoption of the child — issues that fall squarely into the category of permanency decisions. Although the child has a right to meaningful representation and to learn about legal issues from the AFC (see Family Ct Act § 241 …), attorneys for children cannot transform such responsibility into a roadblock, as occurred here, preventing petitioner from fulfilling its mandates and

planning for the child's permanency and well-being … . Matter of Michael H. (Catherine I.), 2023 NY Slip Op 01119, Third Dept 3-2-23

Practice Point: Family Court can not order the Department of Social Services to refrain from discussing matters of surrender or adoption with the child. Here the attorney for the child (AFC) asked Family Court for the order allowing only the AFC to discuss surrender or adoption with the child and the request was granted.

MARCH 2, 2023

INSURANCE LAW, NEGLIGENCE.

THE INJURED PARTY WAS STRUCK WITH A BATON IN AN ALTERCATION OUTSIDE A BAR; IT WAS ALLEGED THE INJURY WAS ACCIDENTAL; THE INSURER SOUGHT A DECLARATORY JUDGMENT RE: THE OBLIGATION TO DEFEND AND INDEMNIFY; THERE WERE QUESTIONS OF FACT WHETHER THE INCIDENT FELL OUTSIDE THE COVERAGE OF THE POLICY (NO DISCLAIMER REQUIRED) OR WHETHER THE INCIDENT WAS SUBJECT TO A POLICY EXCLUSION (TIMELY DISCLAIMER REQUIRED) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the disclaimer by the insurer, Mapfre, was required and/or timely in this personal injury case. In the midst of some sort of altercation outside a bar, Groskopf was struck with a baton by Edward Ferrall. Edward Ferrall claimed he did not intend to strike Groskopf. The two questions before the court in this declaratory judgment action were (1) whether the injury was the result of an "occurrence" (accident) within the coverage terms of the policy, and (2) whether the injury was intended and therefore subject to a policy exclusion. If the claim falls outside the coverage terms no disclaimer is required. If the claim is subject to an exclusion from coverage, a timely disclaimer is required:

… Groskopf and the Ferrall defendants failed to establish, prima facie, their respective entitlement to judgment as a matter of law on whether an "occurrence" was involved giving rise to policy coverage and, if so, whether such occurrence fell within the "expected or intended" injury policy exclusion. * * *

… [D]efendants also failed to demonstrate their respective prima facie entitlement to judgment as a matter of law based upon Mapfre's alleged untimely disclaimer. * * * [G]iven that there are triable issues of fact regarding whether the claim falls within the coverage, [the] defendants failed to establish, prima facie, that a timely disclaimer was required. Mapfre Ins. Co. of N.Y. v Ferrall, 2023 NY Slip Op 01082, Second Dept 3-1-23

Practice Point: Here there was an altercation outside a bar and the injured party was struck with a baton. It was alleged the injury was accidental and the insurer sought a declaratory judgment on its obligation to defend and indemnify. There were questions of fact whether the incident fell within the coverage terms (if so, no disclaimer was required) and whether the incident was subject to an exclusion from coverage (if so, a timely disclaimer was required).

MARCH 1, 2023

LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW.

AN ALBANY LOCAL LAW ADDED RESTRICTIONS TO EVICTION PROCEEDINGS AND RENT INCREASES WHICH ARE NOT IN THE STATE'S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW AND REAL PROPERTY LAW; THE LOCAL LAW WAS THEREFORE PREEMPTED BY THE STATE LAW (CONFLICT PREEMPTION) (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the Albany Local Law governing evictions conflicted with the state Real Property Actions and Proceedings Law and Real Property Law and was therefore preempted by state law. The entire Local Law F section 2 was nullified. Local Law F section 2 added sections 30-324 through 30-331 to the Code of the City of Albany:

We agree with Supreme Court that Local Law F § 2 is preempted by state law. To that end, the Code of the City of Albany § 30-327 requires a landlord seeking to evict a tenant to prove the additional element of "good cause," which grounds are enumerated in the Code of the City of Albany § 30-328. This additional element contravenes the statutory construction of RPAPL 711, which permits a landlord to seek eviction following the expiration of a tenant's lease or following a tenant's

default on rent. By adding an element, the Code of the City of Albany §§ 30-327 and 30-328 "prohibit[ ] conduct specifically permitted by State law or impose[ ] restrictions on rights granted by the State"… . Similarly, the Code of the City of Albany §§ 30-327 and 30-328 contradict Real Property Law § 228, as they require a landlord seeking to evict a tenant at will or by sufferance who has provided 30 days' notice to also establish good cause for the eviction. Further, the Code of the City of Albany § 30-328 interferes with a landlord's right to increase rent in compliance with Real Property Law § 226-c, as it imposes the additional requirement that a landlord must rebut a presumption that a rent increase of 5% or more is unconscionable. Therefore, despite defendants' good intentions, the Code of the City of Albany §§ 30-327 and 30-328 impose restrictions on rights granted to landlords by state law and, thus, Supreme Court properly declared those provisions nullified by conflict preemption … . Pusatere v City of Albany, 2023 NY Slip Op 01124, Third Dept 3-2-23

Practice Point: Here an Albany Local Law added restrictions to eviction proceedings and rent increases which are not in the state's Real Property Actions and Proceedings Law and Real Property Law. The Local Law was therefore preempted by the state law (conflict preemption). Ultimately the entire Local Law was nullified.

MARCH 1, 2023

LEGAL MALPRACTICE.

CONCLUSORY AND SPECULATIVE ALLEGATIONS PLAINTIFF WOULD NOT HAVE LOST ITS DISADVANTAGED BUSINESS ENTERPRISE (DBE) STATUS HAD DEFENDANT ATTORNEYS NOT FAILED TO FILE AN ADMINSTRATIVE APPEAL AND REQUEST A HEARING WERE NOT SUFFICIENT TO SURVIVE A MOTION TO DISMISS PURSUANT TO CPLR 3211 (A) (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the legal malpractice complaint should have been dismissed. Defendants allegedly did not pursue an administrative appeal and submitted a written response in lieu of a hearing. Plaintiff Mid City alleged the failures resulted in the termination of its status as a disadvantaged business enterprise (DBE). The Second Department held

plaintiff did not demonstrate that but for the alleged legal malpractice the DBE status would not have been terminated:

… [E]ven accepting the facts alleged in the complaint as true, and according Mid City the benefit of every possible favorable inference … , the complaint failed to plead specific factual allegations demonstrating that, but for the defendants' alleged negligence, there would have been a more favorable outcome regarding the termination of Mid City's status as a DBE … . The allegation that Mid City lost the opportunity to pursue an administrative appeal, without any indication that the appeal would be successful, is insufficient to state a claim … . Similarly, the allegation that Mid City would have been recertified as a DBE had the defendants requested a hearing, rather than having filed a written response to the initial letter proposing termination of its status as a DBE, is speculative and conclusory … . Mid City Elec. Corp. v Peckar & Abramson, 2023 NY Slip Op 01085, Second Dept 3-1-23

Practice Point: To survive a motion to dismiss the complaint in a legal malpractice action, the plaintiff must make specific factual allegations demonstrating that but for the attorney's negligence the outcome would have been more favorable. Conclusory or speculative "but for" allegations are not enough.

MARCH 1, 2023

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

DEFENDANT NYC HOUSING AUTHORITY (NYCHA) UNILATERALLY ADJOURNED THE 5O-H HEARING IN THIS SLIP AND FALL CASE AND ALLEGEDLY SENT A FOLLOW-UP LETTER TO PLAINTIFF; PLAINTIFF DENIED RECEIPT OF THE LETTER AND DEFENDANT IMPROPERLY SUBMITTED AN AFFIDAVIT OF SERVICE IN REPLY; THE AFFIDAVIT WAS NOT CONSIDERED; IN ADDITION, THE AFFIDAVIT DID NOT PROVE THE LETTER WAS MAILED TO PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint against the NYC Housing Authority (NYCHA) in this slip and fall case should not have been dismissed based on plaintiff's failure to attend the General Municipal Law 50-h hearing. The NYCHA unilaterally adjourned the hearing by follow-up

letter. Plaintiff denied receipt of the follow-up letter and the NYCHA included an affidavit of service in its reply. The Second Department noted that the affidavit of service should not be considered because it was first submitted in reply. In addition, the affidavit did not present sufficient proof of mailing:

… [E]ven had the affidavit of service of the follow-up letter been submitted with the defendants' moving papers, the mere assertion therein that the letter was mailed, unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice to ensure that it was properly mailed, was insufficient to give rise to the presumption of receipt that attaches to letters duly mailed … . Inasmuch as there was no adequate proof that NYCHA served the follow-up letter adjourning the 50-h hearing, NYCHA failed to establish entitlement to such a hearing and that the plaintiff was precluded from commencing this action against NYCHA … . Acevedo v Hope Gardens I, LLC, 2023 NY Slip Op 01073, Second Dept 3-1-23

Practice Point: Yet again an affidavit did not prove a document was mailed because the affiant did not have personal knowledge of the mailing and there was no evidence of a standard office practice to ensure proper mailing.

MARCH 1, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS, GRAVES AMENDMENT, EVIDENCE.

AFFIDAVITS NOT BASED ON PERSONAL KNOWLEDGE AND NOT SUPPORTED BY CERTIFIED BUSINESS RECORDS HAVE NO PROBATIVE VALUE; HERE THE AFFIDAVITS FAILED TO PROVE DEFENDANT WAS IN THE BUSINESS OF RENTING TRUCKS SUCH THAT THE GRAVE'S AMENDMENT APPLIED, AND FAILED TO PROVE THE TRUCK WAS PROPERLY MAINTAINED; DEFENDANT SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Mendez, determined defendant lessor of the truck which struck plaintiff's vehicle did not present sufficient evidence that it was in the business of renting trucks, such that the Grave's amendment applied, or that the truck was properly

maintained. The defendant attempted to show it was in the business of renting trucks with affidavits which referred to documents that were not attached. In addition, the papers did not demonstrate the truck was properly maintained:

… [Defendant] failed to establish their entitlement to summary judgment under the Graves Amendment, which bars state law vicarious liability actions against owners of motor vehicles when (1) they are engaged in the trade or business of renting or leasing motor vehicles, (2) they leased the vehicle involved in the accident, (3) the subject accident occurred during the period of the lease or rental and (4) there is no triable issue of fact as to the plaintiff's allegation of negligent maintenance contributing to the accident ,,, , ,,,

Neither affidavit sufficiently establishes the basis — personal knowledge or from identifiable business records — for the affiants' knowledge of the contents of the affidavits. Therefore, they are of no probative value.

The documents submitted with the motion cannot be admitted as business records because they are not certified, and the affidavits do not lay a sufficient foundation for their admissibility … . Although an affidavit that is not based on the affiant's personal knowledge may still serve to authenticate a document for its admissibility as a business record, as long as the affiant demonstrates sufficient personal knowledge of the document in question … , and the affidavit sufficiently establishes that the document falls within the business record exception to the hearsay rule … , here we are lacking both. The "acknowledgment of lease" letters — which refer to an unattached "previously executed Equipment Rental Agreement" — submitted with these affidavits are not certified as business records, nor do the affidavits lay a sufficient foundation for the letters' introduction as business records. Without a proper foundation, these documents are not admissible. …

When a plaintiff seeks to hold a vehicle owner liable for the failure to maintain a rented vehicle, the owner is not afforded protection under the Graves Amendment if it fails to demonstrate that it did not negligently maintain the vehicle … , or to prove that it was not responsible for the maintenance and repair of the vehicle during the lease … . Muslar v Hall, 2023 NY Slip Op 01063, First Dept 2-28-23

Practice Point: Affidavits must either be based upon the affiant's personal knowledge or supported by certified business records. Here the affidavits did not show defendant was in the business of renting trucks and did not show the truck involved in the accident was properly maintained. Therefore the Grave's

amendment criteria were not proven and defendant was not entitled to summary judgment. The Grave's amendment provides that the vehicle-owner who is in the business of renting vehicles will not be liable for an accident if the vehicle was properly maintained.

FEBRUARY 28, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS.

DEFENDANT'S CAR WAS STRUCK BY AN ONCOMING CAR WHICH CROSSED A DOUBLE YELLOW LINE; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE EMERGENCY DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined defendant's motion for summary judgment, based on the emergency doctrine, should have have been granted. A car traveling in the opposite direction crossed a double yellow line into the path of defendant's car:

Pursuant to the emergency doctrine, "those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency" … . "Under appropriate circumstances, the existence of an emergency, as well as the reasonableness of the actor's response to it, may be determined as a matter of law" … . "A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic, and such an event constitutes a classic emergency situation, thus implicating the emergency doctrine" … . Lizares v Conklin, 2023 NY Slip Op 01081, Second Dept 3-1-23

Practice Point: A driver is not obligated to anticipate that an oncoming car will cross a double yellow line into the driver's lane. In such a situation, the emergency doctrine applies to insulate the driver from liability.

MARCH 1, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS.

IN A REAR-END COLLISION, THE ALLEGATION THE CAR IN FRONT STOPPED SHORT DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court in this rear-end traffic accident case, determined the allegation that the car in front stopped short did not raise a question of fact and summary judgment should have been awarded to driver/owner of the car in front:

Plaintiff alleges that he was injured in a two-car collision while he was a passenger in a car driven by Morera and owned by Giovanni. According to plaintiff, defendant Dan Espeut, who was driving behind the Morera defendants' car, rear-ended the Morera defendants' car.

It is well-settled law that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence by the driver of the rear vehicle, and imposes a duty on the driver of the rear vehicle to come forward with an adequate nonnegligent explanation for the accident … . Here, the Morera defendants made a prima facie showing of their entitlement to summary judgment by submitting Morera's affidavit, in which he averred that he was driving straight and gradually applying his brakes because there was traffic ahead of him, and that as he was doing so, the Espeut vehicle rear-ended his vehicle … .

… Espeut's affidavit, in which he averred that Morera stopped short in front of him after entering his lane of traffic, was insufficient to raise an issue of fact … . Moreover, Espeut had the obligation to maintain a safe distance between the vehicles, which, as the record evidence makes clear, he failed to do … . Obando v Espeut, 2023 NY Slip Op 01144, First Dept 3-2-23

Practice Point: In a rear-end collision case, the allegation by the driver of the rear-most car that the car in front stopped short is not a non-negligent explanation for the accident.

MARCH 2, 2023

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NEGLIGENCE, TRAFFICE ACCIDENTS.

THE ALLEGATION THE CAR IN FRONT MADE A SUDDEN STOP DOES NOT RAISE A QUESTION OF FACT IN A REAR-END COLLISION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the allegation plaintiff made a sudden stop in this rear-end collision case did not raise a question of fact about whether there was a non-negligent cause for the traffic accident:

… [T]he plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that her vehicle was stopped for a traffic condition ahead when it was struck in the rear by the defendants' vehicle … . In opposition, the defendants failed to raise a triable issue of fact. The defendants' assertion that it was a sudden stop of the plaintiff's vehicle that caused the accident was insufficient, in and of itself, to raise a triable issue of fact as to whether there was a nonnegligent explanation for the happening of the rear-end collision … . Genao v Cassetta, 2023 NY Slip Op 01078, Second Dept 3-1-23

Practice Point: In a rear-end collision case, the allegation the car in front made a sudden stop does not raised a question of fact about whether there is a non-negligent explanation for the accident.

MARCH 1, 2023