NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
March 6 – 10, 2023

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

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CHILD VICTIMIS ACT, EDUCATION-SCHOOL LAW.

THE CAUSES OF ACTION FOR NEGLIGENT SUPERVISION (OF THE PLAINTIFF-STUDENT) AND NEGLIGENT FAILURE TO WARN (THE PLAINTIFF-STUDENT) SHOULD NOT HAVE BEEN DISMISSED IN THIS CHILD VICTIMS ACT CASE; THE COMPLAINT ALLEGED PLAINTIFF WAS SENT TO A PRIEST NOT EMPLOYED BY THE SCHOOL FOR DISCIPLINE AND WAS MOLESTED BY THE PRIEST (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligent supervision and negligent failure to warn causes of action against defendant Catholic school should not have been dismissed in this Child Victims Act case. Plaintiff alleged he was sent by the school to a priest, who was not employed by

the school, for discipline. Plaintiff alleged he was molested by the priest and the school knew or should have known of the priest's propensity:

The complaint alleges … the defendant knew or should have known of the priest's propensity to molest children, that the defendant had a duty to exercise the same duty of care of supervision over its minor students as a reasonably prudent parent would, and that the defendant breached its duty to adequately supervise the plaintiff which caused him to be sexually abused by the priest. … … [T]he fact that the sexual abuse occurred off school premises does not require dismissal of the cause of action alleging negligent supervision since, here, the plaintiff has alleged that the defendant released the plaintiff into a potentially hazardous situation and directed him to see a certain priest for discipline knowing that the priest had a propensity to sexually abuse children … . … [T]he criminal intervention of a third party may be a reasonably foreseeable consequence of circumstances created by the defendant, for example where, as here, the plaintiff was permitted to meet with the priest, a person who allegedly had a propensity to abuse children, alone and behind closed doors … .

… Supreme Court erred in determining that the cause of action alleging negligent failure to warn was subject to dismissal because it was duplicative of the cause of action alleging negligent supervision. … [T]hese causes of action are based on distinctive facts, one based on failing to warn the plaintiff about the priest and the other based on the defendant's failure to adequately supervise the plaintiff … . 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).

The Second Department, reversing the Court of Claims in this Child Victims Act action, determined that the notice of claim sufficiently described when the alleged sexual abuse took place at the state's psychiatric center:

The claimant commenced this claim against the State of New York to recover damages resulting from alleged acts of sexual assault committed against her, beginning when she was 15 years old, by an employee of Sagamore Children's Psychiatric Center (hereinafter Sagamore). * * *

… [T]he claim was sufficiently specific to satisfy the pleading requirements of Court of Claims Act § 11(b). The claim alleged negligent hiring, training, and supervision of an employee who had subjected the claimant to multiple sexual assaults at Sagamore between June 5, 2013, and September 16, 2013—a period of approximately three months—while the claimant was a patient at Sagamore. This was sufficiently specific to enable the State to investigate the claim promptly and ascertain its liability … . 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.

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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).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Renwick, determined the breach of contract claims by the minority lenders against the majority lenders and a collateral agent should not have been dismissed. Collateral was sold to the majority lenders but the proceeds were not distributed to the minority lenders in the manner required by the credit and security agreements. The opinion is fact-specific and far too complex to fairly summarize here:

… [T]he pro rata sharing provisions required that all minority lenders receive pro rata treatment of their debt obligations, which meant that the proceeds of the sale of the collateral (notes and equity) should have been distributed to all secured lenders pro rata in accordance with the terms of the credit agreement. … While the Collateral Agent, as directed by the majority lenders, was authorized to define the terms, conditions, and limitations of how the restructuring sale should be carried out, the reorganization had to be for the pro rata benefit of all those holders of secured debt, including minority lenders. Thus, the minority lenders have the right to object to the restructure sale conducted through credit bidding based upon the failure to provide them adequate protection of their pro rata interest on the foreclosed collateral. 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).

The First Department, reversing Supreme Court, determined a handwritten entry in a printed contract is presumed to express the latest intention of the parties and created ambiguity requiring discovery:

The subcontractor agreement between plaintiff and defendant JDS Construction Group LLC contains clauses precluding damages for delay. It also provides that if plaintiff's work was "delayed or disrupted by fault of [JDS], Architect, or any other contractor, or by abnormal weather conditions, then the time fixed for the completion of the Work shall be extended for a period equivalent to the time actually lost, in the discretion of [JDS] *and compensated for additional, mutually agreed to costs*," with the words in italics handwritten onto the typed agreement.

… [A] handwritten provision that conflicts with the language of the preprinted form document will control, "as it is presumed to express the latest intention of the parties" … . The handwritten amendment to the no-damages-for-delay clause renders the clause ambiguous as to whether plaintiff is entitled to be compensated for costs incurred as a result of such delays, which requires discovery to discern the parties' intent … . 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

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).

The Third Department, reversing Supreme Court, over a two-justice concurrence, determined defendant was entitled to a hearing on her motion to vacate her conviction based on an appellate decision which came out after her appeal but before she applied for permission to appeal to the Court of Appeals. In addition, the Third Department held the Court of Appeals decision which found the statute (Executive Law § 552 (2)) authorizing her prosecution by the "Justice Center for the Protection of People with Special Needs" unconstitutional should not be applied retroactively:

Under the unique circumstances of this case, where the case defendant relies upon — Hodgdon [175 AD3d 65]— had not yet been decided at the time that her direct appeal was perfected, we find that her failure to challenge whether the Justice Center had permission to prosecute her and whether the District Attorney maintained responsibility of the prosecution was justified … . Therefore, County Court abused its discretion in concluding that it was "bound" to deny defendant's motion under CPL 440.10 (2) (c), without a hearing, on the ground that defendant unjustifiably failed to raise the Hodgdon defense on direct appeal. … [W]e remit the matter to County Court for a hearing pursuant to CPL 440.30 (5). …

Defendant contends … she should be entitled to the benefit of the decisions in Hodgdon and People v Viviani (36 NY3d 564 [2021]), which found that Executive Law § 552 was unconstitutional to the extent that it empowered the Justice Center with concurrent prosecutorial authority … . * * *

… [T]he holding in Viviani does not go to the heart of a reliable determination of guilt or innocence … . * * *

… [D]efendant is not entitled to have the new constitutional rule articulated by Viviani applied retroactively to her matter … . 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 hear 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).

The First Department, reversing defendant's first degree murder conviction, determined that, although defendant committed a heinous murder, the statutory criteria for first degree murder were not met:

… [T]he evidence was legally insufficient to prove that defendant inflicted torture on the victim within the meaning of the statute in two respects. First, we conclude that defendant did not engage in a "course of conduct" with the intention of inflicting "extreme physical pain" on the victim. Extreme physical pain cannot be defined precisely. However, it cannot be reasonably doubted that the fatal blow to the victim's neck caused extreme pain. Yet, that blow was a single act rather than a course of conduct. Thus, we find that defendant and his accomplices did not engage in a "course of conduct" involving the intentional infliction of extreme physical pain. Accordingly, the conduct at issue here does not satisfy the statutory definition of torture in that respect.

… [T]he record also fails to support the conclusion that defendant "relished" or "evidenced a sense of pleasure in the infliction of extreme physical pain." In arguing to the contrary, the People point out that, after the homicide, defendant

twice told other gang members that he had "hit [the victim] in the neck," in a tone that the listener considered boastful. This did not meet the statutory standard. In our view, the statute contemplates evidence that the defendant savored the infliction of extreme pain in the process of inflicting the pain, and for its own sake. The record does not indicate that this occurred here … . 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).

The Second Department, modifying Family Court, determined that although father's petition to suspend child support was properly dismissed, it should not have been dismissed "with prejudice:"

Family Court properly dismissed that branch of the father's petition which was to suspend his basic child support obligation on the ground of parental alienation without a hearing … .

However, the Family Court should not have provided that the dismissal was "with prejudice." The court has continuing jurisdiction to modify, set aside, or vacate a prior order of child support pursuant to Family Court Act § 451 … . 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."

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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).

The Second Department, reversing Supreme Court, determined the judge in this foreclosure proceeding should not have, sua sponte, dismissed the complaint when plaintiff did not move for a judgment of foreclosure and sale by the deadline set in a status conference order:

On March 22, 2017, the Supreme Court issued a status conference order … directing the plaintiff to "file an application for a [j]udgment of [f]oreclosure [and] sale" by June 7, 2017. The plaintiff failed to do so. In an order entered June 15, 2017 (hereinafter the dismissal order), the court, sua sponte, directed dismissal of the complaint and cancellation of the notice of pendency.

A court's power to dismiss an action, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal … . Here, the plaintiff's failure to move for a judgment of foreclosure and sale as directed by the … status conference order was not a sufficient ground upon which to sua sponte direct dismissal of the complaint and cancellation of the notice of pendency … . 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

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).

The Second Department, reversing Supreme Court, determined summary judgment dismissing an affirmative defense (alleging failure to comply with RPAPL 1306) should not have been granted to the plaintiff in this foreclosure action. Because there was no proof of when the notice of default required by RPAPL 1304 was mailed, proof that plaintiff had filed papers with the superintendent of financial services pursuant to RPAPL 1306 was insufficient. RPAPL 1306 requires filing within three business days of mailing the RPAPL 1304 notice. But the date of mailing was not proven:

… [I]n the absence of evidence establishing when the plaintiff mailed the notices required by RPAPL 1304, the plaintiff could not establish, as a matter of law, that it complied with the requirement of RPAPL 1306 to file with the superintendent of financial services within three business days of the mailing of the notice required by RPAPL 1304. Thus, the court should have denied that branch of the plaintiff's motion which was, in effect, for summary judgment dismissing so much of the defendant's fifth affirmative defense as alleged a failure to comply with RPAPL 1306…. . 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).

The Second Department, reversing Supreme Court, determined defendants in this icy-steps slip and fall case did not demonstrate they had transferred possession and control of the property such that they were not responsible for removal of ice and snow. The lease was not submitted in support of defendants' motion for summary judgment:

… [T]he defendants' submissions failed to establish, prima facie, that they were out-of-possession landlords. The defendants did not submit a copy of any lease, and the deposition testimony submitted in support of the motion failed to establish, prima facie, that the defendants had transferred possession and control of the premises … . Moreover, the deposition testimony submitted in support of the motion included testimony that the defendants were responsible for maintaining the property, including snow removal, and had engaged in snow removal on the premises. The defendants thus also failed to establish, prima facie, that they had no duty, by contract or course of conduct, to remove snow and ice from the premises … . 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).

The Second Department, reversing Supreme Court, determined there was evidence of two proximate causes of the slip and fall: (1) plaintiff/s knee buckled when she stepped out of the shower; and (2) when plaintiff tried to stop her fall by grabbing onto the vanity, the vanity moved five inches and she fell. The building superintendent testified that a properly installed vanity would not move away from the wall:

"There can be more than one proximate cause of an accident, and a defendant moving for summary judgment must show that it is free from fault" … . "'Generally, it is for the trier of fact to determine the issue of proximate cause'" … .

Here, the defendant failed to establish, prima facie, that the plaintiff losing her balance due to her knee buckling was the sole proximate cause of the accident and that the defendant was free from fault in the happening of the accident … . In support of its motion, the defendant submitted, inter alia, the transcript of the plaintiff's deposition testimony, at which she testified that, after she lost her balance due to her knee buckling and she grabbed the vanity with one hand, the vanity moved about five inches away from the wall, "and when it moved I lost my balance even more and that's when I fell." Moreover, the plaintiff testified that the vanity had been installed around "a couple of weeks" prior to the accident. The defendant also submitted the transcript of the deposition testimony of the superintendent for the apartment building, who testified that a vanity which had been properly installed should not move away from the bathroom wall through "normal use." 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.

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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).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Webber, determined "extreme and outrageous conduct" is not an essential element of negligent (as opposed to intentional) infliction of emotional distress. Here there was a hole in the wall behind a toilet in the women's restroom. There was a video camera in the hole and video had been recovered.. Complaints about the hole in the wall had been made. Supreme Court properly upheld the negligence cause of action, but dismissed the negligent infliction of emotional distress cause of action:

Although it has been recognized that there may be recovery for negligent infliction of emotional distress, the elements necessary for recovery has developed through case law. This Department's case law has held that both intentional infliction of emotional distress and negligent infliction of emotional distress require a showing of extreme and outrageous conduct.

… There is no stated rationale as to why extreme and outrageous conduct would be a required element for both an intentional act as well as a negligent act.

As such, we now hold that extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress.

This holding is in line with recent decisions of the Second, Third and Fourth Departments. 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