NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
May 8 – 12, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released May 8 – 12, 2023, by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website Monday, May 15, 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the 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 Document.

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PLAINTIFF, ON THE DAY OF TRIAL, REQUESTED AND WAS GRANTED A DISCONTINUANCE WITHOUT PREJUDICE; PLAINTIFF COULD NOT TAKE ADVANTAGE OF THE SIX-MONTH EXTENSION OF THE STATUTE OF LIMITATIONS AFFORDED BY CPLR 205(A) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the discontinuance of the action without prejudice, which plaintiff requested on the day of trial, did not entitle plaintiff to the six-month extension of the statute of limitations afforded by CPLR 205(a):

CPLR 205(a) "extends the time to commence an action after the termination of an earlier related action, where both actions involve the same transaction or occurrence or series of transactions or occurrences" … . The statute "provides a six-month grace period" where the previous action has been dismissed in "any 'other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits'" … .

In this case, CPLR 205(a) was not available to extend the limitations period beyond the termination of the 2001 action, since that action was terminated by means of a voluntary discontinuance. The plaintiff affirmatively requested the discontinuance, and it was granted at his behest and over his adversary's objection. An action may be voluntarily discontinued either by a stipulation or notice, pursuant to CPLR 3217(a), or by a court order, pursuant to CPLR 3217(b). Contrary to the plaintiff's contention, a discontinuance sought by a plaintiff and effectuated by a court order under CPLR 3217(b) is no less voluntary within the meaning of CPLR 205(a) than a discontinuance effectuated by a stipulation or notice under CPLR 3217(a) … . Islam v 495 McDonald Ave., LLC, 2023 NY Slip Op 02501, Second Dept 5-10-23

Practice Point: A discontinuance without prejudiced granted to plaintiff over objection is a voluntary discontinuance to which the six-month extension of the statute of limitations afforded by CPLR 205(a) does not apply.

MAY 10, 2023

CIVIL PROCEDURE, NEGLIGENCE, TRAFFIC ACCIDENTS.

WHERE, AS HERE, A PARTY IS A DEFENDANT IN ONE ACTION AND A PLAINTIFF IN ANOTHER ACTION, BOTH OF WHICH STEM FROM THE SAME TRAFFIC ACCIDENT, THE ACTIONS SHOULD BE CONSOLIDATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the two actions stemming from a single traffic accident should have been consolidated. Decedent leased a truck from defendant Travis and had an accident. Decedent sued Travis alleging negligent maintenance of the truck, Travis sued decedent for the damage to the truck. The two actions should have been consolidated:

CPLR 602(b) provides that "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." Although a motion pursuant to CPLR 602 "is addressed to the sound discretion of the trial court, consolidation or joinder for trial is favored to avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts. Where common questions of law or fact exist, a motion . . . to consolidate [or for a joint trial] should be granted, absent a showing of prejudice to a substantial right by the party opposing the motion" … .

Here, the two actions involve significant common questions of law and fact; a failure to try them jointly would result in a duplication of trials, unnecessary costs and expense, and a danger of an injustice resulting from divergent decisions; and there has been no showing of prejudice by Travez … . Sherpa v Ford Motor Co., 2023 NY Slip Op 02550, Second Dept 5-10-23

Practice Point: Where two actions arise from the same traffic accident and a party is a defendant in one action and a plaintiff in the other, the actions should be consolidated pursuant to CPLR 602(b).

MAY 10, 2023

CIVIL PROCEDURE, TRUSTS AND ESTATES.

THE ADMINISTRATOR'S MOTION TO BE SUBSTITUED AS PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION, INITIALLY DENIED, SHOULD NOT HAVE BEEN GRANTED UPON THE MOTION TO RENEW; THE CRITERIA FOR A MOTION TO RENEW, AND A MOTION TO BE SUBSTITUTED FOR A DECEASED PARTY ARE EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the administrator's (Walter's) motion to renew in this medical malpractice action should not have been granted. Walter moved to be substituted as plaintiff. Initially the motion was denied but upon Walter's motion to renew, the motion was granted:

"A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain

reasonable justification for the failure to present such facts on the prior motion" … . "CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form" … . However, "[w]hile it may be within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the prior motion, a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation"… . "Thus, the court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion"… . "While law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion, the movant must submit supporting facts to explain and justify the failure, and mere neglect is not accepted as a reasonable excuse" … .

"If a party dies and the claim for or against him [or her] is not thereby extinguished the court shall order substitution of the proper parties" (CPLR 1015[a]). "A motion for substitution may be made by the successors or representatives of a party or by any party" … . "If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made" … . "In determining reasonableness, a court should consider the plaintiff's diligence in seeking substitution, prejudice to the other parties, and whether the action is shown to have potential merit" … . "Even if the plaintiff's explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits" … . Tollinchi v Jamaica Hosp. Med. Ctr., 2023 NY Slip Op 02554, Second Dept 5-10-23

Practice Point: The criteria for a motion to renes, and for a motion to be substituted as a party after the death of a party explained in some depth. Here the motion to renew and the motion to be substituted as a party should have been denied.

MAY 10, 2023

CONSTITUTIONAL LAW, MUNICIPAL LAW, PUBLIC FUNDS FOR FOOTBALL STADIUM.

THE LEGISLATION ALLOWING PUBLIC FUNDS TO BE USED TO CONSTRUCT A $1.4 BILLION STADIUM FOR THE BUFFALO BILLS IS CONSTITUTIONAL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, determined the statutes authorizing the use of public funds to construct a stadium for the Buffalo Bills are constitutional:

… [T]he NY Constitution establishes that "[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking" (NY Const, article VII, § 8 [1]). "[T]he appropriate standard for resolving a challenge to an appropriation, whether under article VIII, § 1 or article VII, § 8 (1)," is that "an appropriation is valid where it has a predominant public purpose and any private benefit is merely incidental" … . Moreover, "it is undisputed that article VII, § 8 (1) permits the granting of public funds to public benefit corporations for a public purpose" … and expenditures for stadiums have expressly been found to have a public purpose … Further, "[b]ecause public benefit corporations … benefit from a status separate and apart from the State, money passed to public corporations consequently cannot be subject to the article VII, § 8 (1) prohibition against gifting or loaning state money as such money is no longer in the control of the State" … . Matter of Schulz v State of New York, 2023 NY Slip Op 02575, Third Dept 5-11-23

Practice Point: Statutes allowing public funds to be used for the construction of a stadium for the Buffalo Bills are constitutional.

MAY 11, 2023

CONTRACT LAW, TORTIOUS INTERFERENCE WITH CONTRACT.

UNDER THE FACTS, PLAINTIFF CAN ASSERT A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST DEFENDANT, EVEN THOUGH BOTH ARE SIGNATORIES TO THE MULTILATERAL CONTRACTS; THE PARTIES HAVE DIFFERENT RIGHTS AND DUTIES UNDER THE CONTRACTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that, under the facts, plaintiffs should be allowed to state a claim for tortious interference with contract against another signatory to the multilateral agreements:

We are asked to decide whether a party to multilateral contracts may be sued by its contracting counterparty for inducing a breach of those contracts. Here, we answer that question in the affirmative. The rights and duties of defendants are separate from those of the breaching party. Plaintiffs also lack a contractual remedy against defendants. Under this narrow set of circumstances, plaintiffs should be permitted to assert a cause of action for tortious interference with contract, despite defendants being signatories to the multilateral agreements. * * *

The general principle that only a nonparty to a contract can be liable for tortious interference derives from cases involving either bilateral contracts or contracts under which all defendants had the same or similar contractual obligations … . * * *

This reasoning does not apply, however, if the inducing party is subject to duties that are different from those it allegedly encouraged another party to the contract to breach. Given such facts, the plaintiff cannot assert that the offending defendant breached a contractual obligation to it. "[T]he fact that one may derive rights under the same agreement as two other contracting parties does not excuse interference with their contractual rights" … . When breaching and inducing parties have different rights and duties, if the plaintiff is unable to recover fully from the breaching party, a tortious interference claim against the inducing party may be necessary for the plaintiff to be made whole. Arena Invs., L.P. v DCK Worldwide Holding Inc., 2023 NY Slip Op 02476, First Dept 5-9-23

Practice Point: Usually only a nonparty to a contract can be liable for tortious interference. Here plaintiff and defendant were both signatories to multilateral contracts. Because both had different rights and duties under the contracts, plaintiff

was allowed to assert a claim for tortious interference with contract against defendant.

MAY 9, 2023

CORPORATION LAW, JUDICIAL DISSOLUTION.

IN A JUDICIAL DISSOLUTION, IF THE PARTIES CANNOT AGREE ON THE DISPOSITION OF THE ASSETS THE ONLY OPTION IS LIQUIDATION AT A PUBLIC SALE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court did not have the authority to order a sealed-bid auction of the corporate assents in this judicial dissolution case. Because the parties could not agree on the disposition of the assents, under the Business Corporation Law, the only option is liquidation at a public sale:

"'Postdissolution procedures in a judicial dissolution proceeding are set forth in Business Corporation Law § 1005 through 1008'" … . Business Corporation Law § 1005(a)(2) states that after dissolution "[t]he corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business." "When the parties cannot reach an agreement amongst themselves with respect to the sale of the corporation's assets either to one another or to a third party, 'the only authorized disposition of corporate assets is liquidation at a public sale'" … . Thus, since the parties were not able to reach a full agreement as to the terms of the private sale, the Supreme Court did not have the authority to authorize the sealed-bid auction … . Matter of ANO, Inc. v Goldberg, 2023 NY Slip Op 02508, Second Dept 5-10-23

Practice Point: In a judicial dissolution of a corporation, if the parties cannot agree on the disposition of the assets, liquidation at a public sale is the only option.

MAY 10, 2023

CRIMINAL LAW, SENTENCING.

DEFENDANT IN THIS MANSLAUGHTER CASE WAS THE VICTIM OF DOMESTIC VIOLENCE AND SHOULD HAVE BEEN SENTENCED UNDER THE ALTERNATIVE SENTENCING SCHEME IN THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (FOURTH DEPT).

The Fourth Department determined defendant should have been sentenced in accordance with the Domestic Violence Survivors Justice Act (DVSJA) in this manslaughter prosecution and reduced her incarceration to four years:

Penal Law § 60.12 (1) … provides an alternative sentencing scheme that the sentencing court may apply where it determines that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in .. ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh."

Here, we conclude that a preponderance of the evidence supports both a finding that defendant was a victim of domestic violence during her relationship with the victim and was subjected to "substantial physical, sexual or psychological abuse" and a finding that "such abuse was a significant contributing factor to the defendant's criminal behavior" … . We further conclude that sentencing defendant pursuant to the normal sentencing guidelines would be "unduly harsh" in light of the "nature and circumstances of the crime and the history, character and condition of the defendant" … . People v Partlow, 2023 NY Slip Op 02479, Fourth Dept 5-9-23

Practice Point: The defendant in this manslaughter prosecution was a victim of domestic violence. She met the criteria for a reduced sentence pursuant to the Domestic Violence Survivors Justice Act.

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CRIMINAL LAW, BURGLARY, EVIDENCE.

THE STORE MANAGER TOOK THE TWO CANS OF RED BULL DEFENDANT WAS CARRYING FROM HIM AND TOLD HIM TO LEAVE THE STORE; THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE BURGLARY CONVICTION; AN EXTENSIVE TWO-JUSTICE DISSENT ARGUED OTHERWISE (FIRST DEPT).

The First Department, over a two-justice dissent, determined the evidence supported the burglary charge. The defendant was stopped by the store manager carrying two cans of Red Bull. The manager took the cans and defendant left the store. The dissenters argued there was no evidence the defendant intended to leave the store without paying:

We disagree with the dissent that the surveillance video supports a reasonable inference that defendant was planning to purchase the two cans of Red Bull because he has "what appears to be cash" in his hand, while walking toward the front of the store. The record indicates that when defendant walked down the store aisle, toward the front of the store, holding a can of Red Bull in each hand, the store manager told him to stop. She then told defendant that he did not belong in CVS, and asked defendant to leave and to give her the two cans. Defendant apparently "became upset," put the two cans down and immediately left the store. Defendant never indicated that he intended to buy the two cans of Red Bull or made any effort to pay for them. Following his arrest, defendant admitted to police that "[he] was thirsty, [he] need[ed] something to drink[,]" and that "all [he] took was a Red Bull." In fact, the defense never sought to prove that defendant was carrying cash in his hand or made such an argument to the jury. This argument is purely speculative. The jury viewed the video and was able to decide for itself whether the video was "grainy" as well as what reasonable inferences could be drawn from the defendant's actions. People v Williams, 2023 NY Slip Op 02467, First Dept 5-9-23

Practice Point: Here the store manager took the two cans of Red Bull defendant was carrying and told the defendant to leave the store, which he did. The strong dissent argued the burglary conviction was not supported because there was no evidence defendant did not intend to pay for the Red Bull.

MAY 9, 2023

CRIMINAL LAW, SIROIS HEARING.

THE DEFENDANT WAS ENTITLED TO A SIROIS HEARING ON WHETHER HE PROCURED THE VICTIM'S REFUSAL TO TESTIFY; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the defendant was entitled to a Sirois hearing. The People argued the victim's statement should be placed in evidence because the defendant had procured her silence at trial. But the evidence on the issue was conflicting, necessitating a hearing:

… "[D]efendant should have been afforded an opportunity to test the causal link between [the victim's refusal to testify at trial and the jail calls], as [defendant] requested, at a separate hearing" … . Although the People contend that a hearing was not necessary because the jail calls "so overwhelming[ly]" establish that the victim's silence was procured by defendant's misconduct, "this conclusion . . . is not the test inasmuch as [this Court] cannot evaluate the record in its present state since no hearing was held" … . Moreover, although a defendant may waive a hearing … , that did not occur here. There is no evidence in the record that defendant agreed to forego a hearing or agreed to proceed without further inquiry. In fact, when Supreme Court ruled on the ultimate Sirois issue, rather than on whether the People had "allege[d] specific facts which demonstrate a distinct possibility that a criminal defendant has engaged in witness tampering" such that a hearing was required … , defendant's trial counsel, the next day, prior to any opening statements, requested a hearing … . The court, however, refused this request, reiterating that it found that the People met their ultimate burden on their submissions. Given this, we find that Supreme Court erred by casting aside "the constitutionally guaranteed truth-testing devices of confrontation and cross-examination … . People v Robinson, 2023 NY Slip Op 02561, Second Dept 5-10-23

Practice Point: Where there is conflicting evidence about whether a defendant procured a witness's refusal to testify, the judge should not rule on it without holding a hearing.

MAY 11, 2023

ELECTION LAW, CONSTITUTIONAL LAW.

THE STATUTE ALLOWING ONLY MEMBERS OF THE RELEVANT PARTY TO SUBMIT WRITE-IN BALLOTS IN A PRIMARY ELECTION IS CONSTITUTIONAL (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the statute allowing only members of the relevant party to submit write-in ballots in a primary election is constitutional:

The statute, which became effective on October 8, 2021, amended three sections of the Election Law to limit the universe of permissible write-in primary votes to enrolled members of the relevant party. Election Law § 6-164 was amended to specify that the opportunity to ballot process could be carried out on behalf of only candidates enrolled in the relevant party (see L 2021, ch 480, § 1). Section 6-166 (2) was amended to change the language required on the opportunity to ballot petition correspondingly (see L 2021, ch 480,§ 2). Finally, section 8-308 was amended to state: "A write-in ballot cast in a party primary for a candidate not enrolled in such party shall be void and not counted" (Election Law § 8-308 [4]; see L 2021, ch 480, § 3). * * *

… [T]he intended effect of the statute is to limit the universe of permissible write-in candidates in a party primary election to individuals who are members of that party. Political parties have protected associational rights, which include the right to identify their own members and to select candidates who best represent their ideals and preferences … and the "right to exclude non-members from their candidate nomination process" … . We conclude that the restrictions imposed by the statute were intended to protect those rights, and that petitioners have no associational right to involve non-members in the nomination process of their parties … . Matter of Kowal v Mohr, 2023 NY Slip Op 02480, Fourth Dept 5-9-23

Practice Point: The statute allowing only members of the relevant party to submit write-in ballots in a primary election is constitutional.

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ELECTION LAW, CIVIL PROCEDURE, FRAUD.

AN ORDER TO EFFECT SERVICE OF PROCESS IN A MANNER WHICH CANNOT BE COMPLIED WITH PRECLUDES PERSONAL JURISDICTION; PETITIONER DID NOT PRESENT SUFFICIENT EVIDENCE OF ELECTION FRAUD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) the order to show cause specified a method of service which could not be complied with; therefore personal jurisdiction over Williams was not obtained: (2) election fraud on Williams part was not demonstrated:

Since the method of service provided in the order to show cause was jurisdictional in nature, and the affidavit of service is deficient on its face for identifying an address for mailing purportedly obtained from a document that did not exist, the court should have granted that branch of Williams's motion which was, in effect, to dismiss the amended petition for lack of personal jurisdiction. …

"A candidate's designating petition or independent nominating petition 'will be invalidated on the ground of fraud if there is a showing that the entire petition is permeated with fraud'" … . "Absent permeation with fraud, a designating [or independent nominating] petition may be invalidated where the candidate has participated in or is chargeable with knowledge of the fraud" … . Here, Stark [petitioner] failed to meet her burden of demonstrating by clear and convincing evidence that the designating petition was permeated with fraud or that Williams participated in or was chargeable with knowledge of any fraud … . Matter of Stark v Williams, 2023 NY Slip Op 02583, Second Dept 5-11-23

Practice Point: If an order to show cause directs service of process to be made in a manner which cannot be complied with, personal jurisdiction is precluded even if the affidavit of service purports to have complied with the order.

MAY 11, 2023

ELECTION LAW, FRAUD.

UGELL SHOULD NOT HAVE BEEN DISQUALIFIED AS A CANDIDATE FOR TOWN SUPERVISOR; THE FACT THAT UGELL IS A TOWN JUSTICE IS NOT DISQUALIFYING; ELECTION FRAUD MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE, LACKING HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Ugell, a town justice, should not have been disqualified as a candidate for town supervisor. The fact that Ugell is a town justice was not disqualifying. There was no clear and convincing evidence of election fraud:

The petitioners presented no basis to disqualify Ugell under Election Law § 6-122. The fact that Ugell is subject to the Rules Governing Judicial Conduct (22 NYCRR) part 100 as a Town Justice does not disqualify him from running for the office of Town Supervisor … .

"The proper evidentiary standard for proving fraud in an Election Law proceeding is clear and convincing evidence" … . "[A]s a general rule, a petition for an opportunity to ballot will be invalidated on the ground of fraud only if there is a showing that the entire petition is permeated with fraud" … . "The inclusion of a candidate's name on a designating petition, without his or her consent, may constitute fraud"… . Here, in light of the conflicting and, in part, incredible testimony, the Supreme Court erred in determining that the petitioners established, by clear and convincing evidence, fraud so as to warrant invalidating the designating petition … . Moreover, the petitioners failed to establish, by clear and convincing evidence, "actual deception of the voters or members of the party involved" … . Matter of King v Ugell, 2023 NY Slip Op 02601, Second Dept 5-11-23

Practice Point: The fact that Ugell was a town justice did not disqualify him from running for town supervisor. Election fraud must be proven by clear and convincing evidence, lacking here.

MAY 11, 2023

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

UNDER THE 2022 AMENDMENT TO CPLR 213, A BANK WHICH HAS STARTED A FORECLOSURE ACTION CANNOT STOP THE RUNNING OF THE STATUTE OF LIMITATIONS BY A VOLUNTARY DISCONTINUANCE; THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the 2022 amendment to CPLR 213 (the Foreclosure Abuse Prevention Act [FAPA]) overruled the recent Court of Appeals case which held a voluntary discontinuance of a foreclosure action stopped the running of the statute of limitations. In addition, the Second Department ruled the plaintiff bank did not demonstrate compliance with the notice requirements of RPAPL 1304:

FAPA amended CPLR 3217, governing the voluntary discontinuance of an action, by adding a new paragraph (e), which provides that "[i]n any action on an instrument described under [CPLR 213(4)], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute." * * *

Here, the plaintiff failed to establish … it complied with the requirements of RPAPL 1304. The affidavit of Cynthia Wallace, an officer of Specialized Loan Servicing, LLC (hereinafter SLS), the plaintiff's loan servicer, was insufficient to establish that the plaintiff complied with RPAPL 1304. Wallace attested that she was familiar with the types of records maintained by SLS in connection with the loan, that she had personal knowledge of the procedures for creating the records, and that the plaintiff mailed the notices, but she failed to attest that she personally mailed the notices or that she was familiar with the mailing practices and procedures of the plaintiff or SLS. Therefore, Wallace failed to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (see id.). The plaintiff also failed to submit any domestic return receipts or other documentation proving the certified and first-class mailings … . Bank of N.Y. Mellon v Stewart, 2023 NY Slip Op 02487, Second Dept 5-10-23

Practice Point: A recent amendment CPLR 213 prohibits a bank which has started a foreclosure action from stopping the running of the statute of limitations by voluntarily discontinuing the action.

Practice Point: If the bank doesn't prove strict compliance with the mailing requirements of RPAPL 1304, its summary judgment motion in a foreclosure action must be denied.

MAY 10, 2023

LABOR LAW-CONSTRUCTION LAW.

THE FACT THAT PLAINTIFF WAS USING HIS OWN LADDER WHEN IT FELL DID NOT PRECLUDE RECOVERY UNDER LABOR LAW 240(1); AS THERE WAS NO EVIDENCE OF MEASURES TAKEN TO PREVENT THE LADDER FROM FALLING, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this Labor Law 240(1) ladder-fall case. Plaintiff brought his own ladder to the job and the feet of the ladder apparently slipped away from the wall. Plaintiff alleged the ladder should have been secured in some way (i.e., a person should have been holding the ladder):

… [T]here is no dispute that plaintiff used his own equipment, which does not preclude liability under Labor Law § 240 (1) … . The testimony as to the ladder's functionality at the time of the accident does not aid defendants, as there is no dispute "that no one was holding the ladder from which plaintiff fell when it suddenly shifted or wobbled, and that no safety devices were provided to prevent the ladder from slipping or plaintiff from falling if it did" … . Nor is there some indication that plaintiff was recalcitrant in deliberately refusing available safety devices … . Barnhardt v Richard G. Rosetti, LLC, 2023 NY Slip Op 02574, Third Dept 5-11-23

Practice Point: Plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this ladder-fall case. The fact that plaintiff was using his own ladder did not preclude recovery.

MAY 11, 2023

NEGLIGENCE, CORPORATION LAW, EMPLOYMENT LAW.

THE FRANCHISOR, TOYOTA, DID NOT EXERCISE CONTROL OVER THE FRANCHISEE'S, PLAZA TOYOTA'S, DAILY OPERATIONS; THEREFORE TOYOTA COULD NOT BE HELD VICARIOUSLY LIABLE FOR PLAZA TOYOTA'S NEGLIGENCE; HERE A WHEEL FELL OFF PLAINTIFF'S CAR AFTER IT WAS SERVICED AT PLAZA TOYOTA (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint against the franchisor, here Toyota, for the negligence of the franchisee car dealership, Plaza Toyota, should have been dismissed. After the plaintiff's car was worked on at Plaza Toyota, a front wheel fell off:

Supreme Court erred in denying the Toyota defendants' cross-motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them. "In determining whether a defendant, as a franchisor, may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred" … .

Here, affidavits submitted by the Toyota defendants in support of their motion established, prima facie, that they lacked the requisite control over the manner in which Plaza Toyota serviced vehicles … . Caceres v Toyota Motor N. Am., Inc., 2023 NY Slip Op 02492, Second Dept 5-10-23

Practice Point: A franchisor can be held vicariously liable for the negligence of a franchisee only if the franchisor exercises control over the franchisee's daily operations, not the case here.

MAY 10, 2023

NEGLIGENCE, RELEASES.

THE RELEASE SIGNED BY PLAINTIFF BEFORE TAKING A MANDATORY COLLEGE FITNESS-EDUCATION COURSE PRECLUDED HER LAWSUIT AGAINST THE COLLEGE ALLEGING INJURIES SUSTAINED TAKING THE COURSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the release signed by the plaintiff precluded her suit against defendant community college (DCC) for alleged injuries sustained in a mandatory fitness education course:

The plaintiff enrolled in a wellness and fitness education course, which was a mandatory course that had to be taken as part of her general studies degree program at Dutchess Community College. The plaintiff informed the course instructor of her prior back injuries, and signed a release which, in relevant part, "discharge[d] Dutchess Community College from all liability for . . . any claim of injury to [the plaintiff's] person . . . whether harm is caused by the negligence of the releasees or otherwise." The release further provided that it was "intended to be broad and inclusive in keeping with state laws." * * *

"Where the language of an exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for its own negligence, the agreement will be enforced" … . "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" … . Sjogren v Board of Trustees of Dutchess Community Coll., 2023 NY Slip Op 02551, Second Dept 5-10-23

Practice Point: An unambiguous release will preclude a lawsuit absent fraud sufficient to void the agreement.

MAY 10, 2023

NEGLIGENCE, SLIP AND FALL.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL WAS LAST INSPECTED PRIOR TO FALL; THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE DEFECTIVE CONDITION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined defendant building owner, 797 Broadway, did not demonstrate it did not have constructive notice of the alleged loose elevator threshold plate over which plaintiff slipped and fell:

… 797 Broadway submitted the sworn affidavit of David Fallati, who … acted as the property manager for the building. Fallati stated that he visited the building twice a week, "including the time period of the alleged incident." According to Fallati, he did not observe, or receive complaints about, any tripping hazards near the elevator threshold area where the accident occurred. We find that this proof was insufficient to establish that 797 Broadway lacked constructive notice of the condition of the threshold plate. Unlike trip-and-fall cases where the specific area in question was inspected on the date of the accident … . Fallati's vague affidavit, in which he only stated generally that his inspections occurred twice per week, did not indicate when he had last inspected the elevator threshold area prior to plaintiff's fall. Thus, the Fallati affidavit failed to eliminate all factual questions "as to whether the alleged dangerous condition . . . existed for a sufficient period of time prior to plaintiff's fall to permit [797 Broadway] to discover it and take remedial action" … . Lloyd v 797 Broadway Group, LLC, 2023 NY Slip Op 02573, Third Dept 5-11-23

Practice Point: Without sufficient proof when the area of the slip and fall was last inspected the defendant cannot demonstrate a lack of constructive notice of the condition.

MAY 11, 2023

NEGLIGENCE, SLIP AND FALL.

DEFENDANTS IN THIS WET-FLOOR SLIP AND FALL CASE WERE NOT ENTITLED TO SUMMARY JUDGMENT; DEFENDANTS DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED BEFORE THE FALL AND THERE WAS EVIDENCE THE MAT AND WARNING SIGN PLACED IN THE AREA WERE INADEQUATE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants were not entitled to summary judgment in this wet-floor slip and fall case. There was no evidence when the area was last inspected prior to fall. And there was evidence the mat and warning sign placed in the area were inadequate:

… [D]efendants failed to make a prima facie showing that they lacked actual or constructive notice of the hazardous condition caused by the wet and slippery floor where plaintiff fell, as they did not submit any evidence establishing when they last inspected the vestibule on the day of the accident … . Rather, the evidence shows that the building's superintendent was aware of the hazardous condition and tried to address it with a mat and caution sign. In addition, plaintiffs raised issues of fact as to whether these precautions were reasonable under the circumstances. Although a landlord is not obligated to continuously mop moisture tracked onto the floor of its premises by people entering from outside or to cover the entire floor with mats, here plaintiff claims that her accident was caused by the building superintendent's placement of an unreasonably short anti-slip floor mat on known wet, glossy tiles on a newly laid floor … . Plaintiffs also claim that defendants failed to check to see if the wet floor warning sign remained in place after it was initially placed as a precautionary device. Rodriguez v KWIK Realty, LLC, 2023 NY Slip Op 02471, First Dept 5-9-23

Practice Point: In a slip and fall case the defendant must show the area was inspected close in time to the fall in order to prove a lack of constructive notice.

Practice Point: Even where, as here, the defendant attempts to address the dangerous condition (placing a mat and a warning sign in the area of the wet floor0 a question of fact may be raised about whether the measures taken were adequate.

Similar constructive-notice issue and result in Gomez v Samaritan Daytop Vil., Inc., 2023 NY Slip Op 02458, First Dept 5-9-23

MAY 9, 2023

NEGLIGENCE, CIVIL PROCEDURE, INSURANCE LAW.

IN THIS TRAFFIC ACCIDENT CASE WHERE "SERIOUS INJURY" WAS AN ISSUE, VIDEO SURVEILLANCE OF PLAINTIFF TAKEN BEFORE THE DEPOSITION AND AFTER A DISCOVERY ORDER WAS PRECLUDED FROM BOTH THE SUMMARY JUDGMENT STAGE AND TRIAL; THERE IS NO SPECIFIC DEADLINE FOR PROVIDING VIDEO SURVEILLANCE GATHERED AFTER THE DEPOSITION; THE POST-DEPOSITION VIDEO SURVEILLANCE WAS NOT PRECLUDED (SECOND DEPT).

The Second Department, modifying Supreme Court, in a full-fledged opinion by Justice Dillon, determined that video surveillance of the plaintiff taken prior to the deposition in this traffic accident case, and after a discovery order requiring disclosure of video surveillance had been issued, could not be used in support of a summary judgment motion re: "serious injury" or at trial. However, video surveillance taken after the deposition need not be provided to the plaintiff by any specific deadline and was not precluded:

… [W]e conclude that the defendant's noncompliance with the plaintiff's discovery notice and two court orders, over an extended period of time, was willful and strategic with regard to the [pre-deposition] surveillance video. … [T]he defendant should have been precluded from using the … surveillance video of the plaintiff …, as it was not disclosed prior to the plaintiff's deposition … . * * *

CPLR 3101(i) contains no language prohibiting the acquisition of surveillance video of a party after that party has testified at a deposition. Nor does any decisional authority. Indeed, CPLR 3101(h) recognizes that disclosure is a continuing obligation, requiring parties to amend or supplement discovery responses when later information is obtained that renders an earlier response inaccurate or incomplete when made or when the prior response, though correct and complete when made, is materially no longer so. And parties are not required to be more forthcoming with surveillance videos than they would with any ordinary discovery material under CPLR 3101(a) … .

That said, CPLR 3101(i) provides no fixed deadline for the disclosure of post-deposition surveillance video footage … . Rather, trial courts may regulate issues

of timing through their preliminary and compliance conference orders … , subject to their authority and discretion to manage their calendars and determine whether to preclude evidence under CPLR 3126(2) for any noncompliance with court-imposed deadlines … . Pizzo v Lustig, 2023 NY Slip Op 02541, Second Dept 5-10-23

Practice Point: Here surveillance video of the plaintiff which was gathered before the deposition and after a disclosure order was precluded from both the summary judgment stage and the trial. There is no specific deadline for turning over video surveillance of the plaintiff gathered after deposition and that video evidence was not precluded.

MAY 10, 2023

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

STRIKING A PEDESTRIAN IS NEGLIGENCE PER SE; FAILING TO SEE WHAT THERE IS TO SEE IS NEGLIGENCE; ANY COMPARATIVE NEGLIGENCE ON PLAINTIFF'S PART IS NOT TO BE CONSIDERED; PLAINTIFF PEDESTRIAN'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian-vehicle traffic accident case should have been granted. Striking a pedestrian is a violation of the Vehicle and Traffic Law which is negligence per se. In addition a driver is expected to see what there is to be seen. Defendant was in the middle lane of traffic when plaintiff was struck:

The plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability through the submission of evidence that established the defendant driver was negligent in failing to see what there was to be seen and in failing to exercise due care in avoiding the collision with the plaintiff (see Vehicle and Traffic Law § 1146 [a] …).. By the defendant driver's own admissions at his deposition, he never saw the plaintiff before the defendants' vehicle struck the plaintiff; in fact, upon impact, the defendant driver thought "maybe a tire or something . . . hit [the defendants'] car," and when he first saw the plaintiff, the plaintiff was lying on the pavement. Moreover, the record demonstrates that the

road was flat, the weather was clear, and visibility was good. Further, the defendants' vehicle was traveling in the middle lane of three southbound lanes, when it made contact with the plaintiff who was crossing from the right side of the road, "giving the defendant driver ample time to notice plaintiff crossing the street" … . Beityaaghoob v Klein, 2023 NY Slip Op 02488, Second Dept 5-10-23

Practice Point: Under the facts in this pedestrian-vehicle traffic accident case, striking plaintiff pedestrian was negligence per se (a violation of the Vehicle and Traffic Law) and defendant's acknowledged failure to see the plaintiff constituted negligence. Any comparative negligence on plaintiff's part is not to be considered. Plaintiff's motion for summary judgment should have been granted.

MAY 10, 2023

NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE IT DID NOT CREATE THE DANGEROUS CONDITION OR DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant did not demonstrate it did not create the dangerous condition and did not demonstrate it did not have constructive notice of the condition. A metal gate, which should have been secured, fell on plaintiff:

… [T]estimony, if credited, indicates that the gate was not secured to the track, thereby raising a triable issue of fact as to whether the manager created the alleged dangerous condition that caused the plaintiff's injuries by failing to properly secure the gate at the end of his shift that day … .

… [T]he service manager testified at his deposition that it was his regular practice to inspect the area of the gate "two [or] three times a day," but the defendant offered no evidence as to when the gate was last inspected on the date of the plaintiff's injuries. The service manager's testimony, which "merely referenced his general inspection practices" and failed to indicate when the area where the accident occurred "was last inspected . . . relative to the accident," was insufficient

to demonstrate a lack of constructive notice … . Pena v Pep Boys-Manny, Moe & Jack of Del., Inc., 2023 NY Slip Op 02530, Second Dept 5-10-23

Practice Point: Here a metal gate which should have been secured fell on plaintiff. The defendant did not demonstrate when the area where the accident occurred was last inspected. Therefore defendant failed to demonstrate it did not have constructive notice of the unsecured gate.

Similar constructive-notice issue and result in a slip and fall: Rolon v Arden 29, LLC, 2023 NY Slip Op 02545, Second Dept 5-10-23

MAY 10, 2023

REAL ESTATE, CONTRACT LAW.

THE PARTIAL PAYMENTS MADE TOWARD THE DOWN PAYMENT ON THE REAL ESTATE PURCHASE CONTRACT DID NOT CONSTITUTE PART PERFORMANCE OF THE ALLEGED ORAL MODIFICATION OF THE AGREEMENT; THE STATUTE OF FRAUDS RENDERED THE ALLEGED ORAL MODIFICATION UNENFORCEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the alleged oral modification of the real estate purchase contract was unenforceable pursuant to he statute of frauds. The original contract called for a $750,000 down payment by a specified date. The payment was not made. Plaintiff argued defendant had orally agreed to take installment payments toward the down payment and two partial payments had in fact been made and accepted. Plaintiff sued for specific performance of the contract. The defendant asserted the statute of frauds affirmative defense. The Second Department held that the two payments did not constitute part performance which would excuse the absence of a writing:

While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance (see General Obligations Law § 5-703[4]), "the claimed partial performance must be unequivocally referable to the agreement" … . Unequivocally referable conduct is conduct that is "inconsistent with any other explanation" … . It is insufficient "that the oral agreement gives significance to plaintiff's actions" … . "Rather, the actions alone

must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" … . "Significantly, the doctrine of part performance is based on principles of equity, in particular, recognition of the fact that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield" … . S&G Golden Estates, LLC v New York Golf Enters., Inc., 2023 NY Slip Op 02548, Second Dept 5-10-23

Practice Point: In order to constitute part performance of a contract such that the statute of frauds does not apply, the part performance must be inconsistent with any other explanation. The actions must be explainable only with reference to the oral agreement (not the case here).

MAY 10, 2023

REAL PROPERTY TAX LAW.

THE COUNTY DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPTL 1125 IN THIS PROPERTY TAX FORECLOSURE CASE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the county (petitioner) in this real property tax foreclosure case did not demonstrate the respondent received notice of the foreclosure as required by RPTL 1125 and a recent Court of Appeals ruling:

In James B. Nutter & Co. v County of Saratoga (__ NY3d ___, 2023 NY Slip Op 01469 [2023], revg 195 AD3d 1359 [3d Dept 2021]), the Court ruled that RPTL 1125 (1) (b) (i) contains no presumption of service and that "an interested party may create a factual issue as to whether the taxing authority has complied with the requirements of RPTL 1125 (1) (b) . . . despite the taxing authority's submission of the 'affidavit[s] of mailing' mandated by [RPTL] 1125 (3) (a) and evidence that no mailings were returned" (id. at *3). Here, petitioner's attorney avers in support of its motion for summary judgment that "affidavits documenting compliance with all RPTL requirements for this proceeding have been publicly filed with the [c]ounty [c]lerk as a part of the judgment roll therein; and, assuming without conceding, that any noticing defects as to [a]nswerants occurred, by service of an [a]nswer therein [a]nswerants concedes actual notice of the pendency of this proceeding and its applicability to the above said parcel, thereby as a matter of law obviating any such

defects." Although RPTL 1125 (1) (b) "contains no requirement of actual notice and evidence of the failure to receive notice is, by itself, insufficient to demonstrate noncompliance" (id.), this generic language failed to affirmatively establish compliance with the statutory mailing requirements as it failed to establish that the notice of foreclosure was mailed to respondent's actual mailing address or the last address listed in petitioner's records and that the records had been searched to verify that the mailings to respondent were not returned … . Matter of County of Albany (Johnson), 2023 NY Slip Op 02564, Third Dept 5-11-23

Practice Point: Here the county failed to prove strict compliance with the notice requirements of RPTL 1125 precluding summary judgment in this real property tax foreclosure case.

MAY 11, 2023