NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
August 14 – 18, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 14 – 18, 2023, and Posted on the New York Appellate Digest Website on Monday, August 21, 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.

Contents

CRIMINAL LAW, JUDGES.

DEFENSE COUNSEL RAISED A BATSON OBJECTION TO THE STRIKING OF FIVE JURORS; THE JUDGE RESTRICTED THE CHALLENGES TO TWO OF THE FIVE STRUCK IN THE MOST RECENT ROUND OF JURY SELECTION; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the trial judge should not have limited the defense Batson objections to the prosecutor's striking non-white potential jurors. Defense counsel challenged the striking of five jurors but the judge limited the challenges to the two struck in the most recent round of jury selection:

… [D]efense counsel made an application pursuant to Batson as to the five prospective nonwhite jurors stricken from the three rounds. Defense counsel stated: "that will be a total of . . . five non-white jurors that were struck by the People, and there have not been that many non-white potential jurors we have seen." Defense counsel added, "so out of the 11 strikes, five of them were for non-white jurors," and "I believe that makes a prima facie case regarding the protective class". The court responded: "Let's talk about this round only." The People proceeded to

proffer reasons for striking only the two panelists from the third round. The defense renewed its Batson challenge when the prosecution struck a sixth nonwhite potential juror in a subsequent round, stating that the People "are deliberately striking non-white jurors." The court specifically stated it was "not going to address that" and defense counsel noted their exception. …

The trial court erred in denying defendants an opportunity to present their full Batson challenge when it improperly limited the inquiry to only two of the challenged prospective jurors. As this Court held in People v Frazier (125 AD3d 449, 449 [1st Dept 2015]), "[a]lthough the court did not make a specific ruling that defendants satisfied step one of Batson (prima facie case of discrimination), once it ordered the prosecutor to provide the reasons for his peremptory challenges to two of the . . . panelists who were the subject of defendants' application, it should have required the prosecutor to articulate his reasons for striking the remaining . . . panelists, as defendants specifically requested." The People argue that unlike Frazier, the trial court here simply directed the parties to focus on the panelists challenged in round three of jury selection and the prosecutor volunteered race-neutral reasons without being ordered to do so. This is a distinction without a difference. As in Frazier, once the trial court asked the prosecutor to offer race-neutral reasons for striking two of the prospective jurors, it should have also requested an explanation for striking the remaining panelists that were part of the same application. The court failed to do so, and consequently, the case should be remanded for a new trial. People v Julio, 2023 NY Slip Op 04349, First Dept 8-17-23

Practice Point: When defense counsel raised Batson challenges to five jurors who had been struck, the judge limited the challenges to the two struck in the most recent round of jury selection. That was reversible error.

AUGUST 17, 2023

ENVIRONMENTAL LAW, MUNICIPAL LAW.

THE FACT THAT THE CONTAMINATED AREA WHERE THE NEW CONSTRUCTION WAS TO BE LOCATED HAD BEEN REMEDIATED BY THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) WAS NOT ENOUGH TO ENSURE SAFETY WHEN THE SOIL IS DISTURBED FOR CONSTRUCTION; THE SEQRA REVIEW DID NOT TAKE THE REQUISITE HARD LOOK AT THE EFFECTS OF DISTURBING THE SOIL (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the Plattsburgh Common Council, the lead agency responsible for review of a construction project pursuant to the State Environmental Quality Review Act (SEQRA), did not take the requisite hard look at the potential danger associated with disturbing the contaminated soil which had been cleaned up and declared remediated by the Department of Environmental Conservation (DEC):

… Supreme Court correctly determined that, although the soil contamination was addressed, the ZBA (Zoning Board of Appeals) and Planning Board failed to take a hard look at this issue … . More specifically, the failure in providing mitigation measures for this environmental concern did not comply with the mandates of SEQRA … . Preliminarily, the Common Council, and thereafter the Planning Board and ZBA, properly relied on DEC correspondence in determining that the project site in its current form did not present adverse environmental impacts … . Here, however, it was inappropriate to determine that there would be no adverse environmental impacts when it was known that the contemplated site plan would necessarily disturb the contaminated soil … . * * * The fact that the brownfield remediation was successful at the time does not discharge the involved agency's duty to take a hard look relative to the project … . Indeed, the citizens who may be impacted have the right to insist that the construction be done in an environmentally safe manner in accordance with SEQRA. Matter of Boise v City of Plattsburgh, 2023 NY Slip Op 04338, Third Dept 8-17-23

Practice Point: Here the construction area had been contaminated and was successfully remediated by the DEC. But the SEQRA review required a hard look at the effects of disturbing the soil n the remediated area during construction. The review could not simply rely on the remediation-conclusions of the DEC.

AUGUST 17, 2023

FAMILY LAW, NEGLECT.

PETITIONER WAS NOT REQUIRED TO PROVE THE SON ACTUALLY SEXUALLY ABUSED THE DAUGHTER TO MAKE A NEGLECT FINDING BASED UPON MOTHER'S LEAVING THE DAUGHTER UNDER THE SON'S SUPERVISION; THE DAUGHTER'S ALLEGATIONS SHE WAS SEXUALLY ABUSED WERE DEEMED SUFFICIENTLY CORROBORATED BY HER KNOWLEDGE ABOUT SEX AND PORNOGRAPHY; STRONG DISSENT (SECOND DEPT).

The Second Department, reversing Family Court, over a detailed and comprehensive dissent, determined the neglect petition was supported by the evidence. It was alleged that mother left her young daughter in the care of her 15-year-old son despite concerns about the son's sexual behavior. Family Court held the Administration for Children's Services (ACS) was required to, but did not, prove the son sexually abused his sister. Family Court also held that the sister's claims her brother sexually abused her were not corroborated. The dissent agreed with Family Court. The majority held ACS was not required to prove the alleged sexual abuse took place and the sister's claims of sexual abuse were corroborated by her knowledge about sex:

A finding of neglect is warranted when a parent allows the child to be harmed or placed in substantial risk of harm … . A parent, who, by willful omission, fails to protect a child, and as a consequence places the child at imminent risk of harm, demonstrates a fundamental defect in understanding the duties and obligations of parenthood and creates an atmosphere detrimental to the physical, mental, and emotion well-being of the child … . Here, ACS contended that the mother neglected the child because, despite her knowledge of the son's sexually inappropriate behavior, the mother failed to provide proper care and supervision for the child by leaving the child alone with the son. * * *

This Court has found that evidence of a change in the demeanor of a child, sexual references by a child which are not age appropriate, and detailed, consistent out-of-court statements of sexual abuse can be sufficient to corroborate a child's out-of-court statements of sexual abuse … . For example, in Matter of Osher W. (Moshe W.) (198 AD3d 904), this Court determined that, "'[a]lthough the mere repetition

of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions'" … . Here, the child's statements to school personnel, her godmother, and the caseworkers were consistent and detailed about the sexual activity that the son had engaged in with her. In addition, both the mother's acknowledgment at the hearing that the son admitted to her that he watched pornography in the child's presence and the son's admission to the first caseworker that he had his own pornography account directly corroborated the child's statements that the son watched pornography in her presence. The child's knowledge of sexual behavior despite her age—her depiction to school personnel of the son's pumping motion with his penis and her discussion of sex, which she called "polo" to the first caseworker, describing it as where "a man and a woman they don't have any clothes on and they put their private parts into each other," was further corroboration of her out-of-court statements about the son's sexual abuse of her. Moreover, the records submitted into evidence demonstrate that the child, who had been happy and talkative at the hospital, became withdrawn and quiet when asked about the sexual abuse. Matter of Jada W. (Fanatay W.), 2023 NY Slip Op 04318, Second Dept 8-16-23

Practice Point: This decision discusses in depth the proof requirements for neglect based upon a mother's leaving her daughter under the supervision of her son, despite concerns about the son's sexual behavior (here it was not necessary to prove the sexual abuse actually occurred).

Practice Point: In addition, the decision discusses in depth the nature of proof sufficient for corroboration of a child's allegations of sexual abuse (here the child's knowledge about sex was deemed sufficient corroboration).

AUGUST 16, 2023

FORECLOSURE, APPEALS.

WHERE A COMPLAINT IS DISMISSED WITHOUT A MOTION ON NOTICE, AN APPEAL IS NOT AVAILABLE BUT A MOTION TO VACATE THE DISMISSAL IS APPROPRIATE; THE BANK IN THIS FORECLOSURE ACTION SOUGHT AN ORDER OF REFERENCE WITHIN ONE YEAR OF THE DEFAULT; THEREFORE THE BANK DID NOT ABANDON THE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action demonstrated it had not abandoned the action by moving for an order of reference within one year of the default judgment. The Second Department noted that where, as here, the dismissal of the complaint was not based upon a motion on notice, a motion to vacate the dismissal, as opposed to an appeal, is the appropriate procedure:

A motion pursuant to CPLR 2221(a) is not subject to any specific time limitation … . Where, as here, an order directing dismissal of a complaint is not appealable as of right because it did not decide a motion made on notice, it is procedurally proper for the aggrieved party to move pursuant to CPLR 2221(a) to vacate that order … .

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)" … . Nor is a plaintiff required to specifically seek the entry of a judgment within a year … . As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) … .

Here, the plaintiff initiated proceedings for the entry of a judgment by moving for an order of reference in December 2008, which was within one year of the defendant's default in the action … . Deutsche Bank Natl. Trust Co. v Campbell, 2023 NY Slip Op 04303, Second Dept 8-16-23

Practice Point: The dismissal of a complaint not based upon a motion on notice is not appealable. A motion to vacate the dismissal, for which there is no time limitation, is appropriate.

Practice Point: In a foreclosure action where defendant defaulted, the bank need only take some action within the year following the default, here seeking an order of reference, to demonstrate the action had not been abandoned.

AUGUST 16, 2023

FORECLOSURE.

A PROPOSED LOAN MODIFICATION DID NOT REVOKE THE ACCELERATION OF THE MORTGAGE DEBT BY THE COMMENCEMENT OF THE FORECLOSURE PROCEEDINGS; THEREFORE THE FORECLOSURE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action had not revoked the acceleration of the mortgage debt and the action was therefore time-barred:

… [I]t is undisputed that the mortgage debt was accelerated on February 20, 2008, by the commencement of the 2008 foreclosure action … . Thus, absent an affirmative act of revocation during the ensuing six-year period, the statute of limitations to commence a new action to foreclose the mortgage debt expired on February 20, 2014 (see CPLR 213[4]). Contrary to the finding of the Supreme Court, the January 2013 proposed loan modification did not constitute an affirmative act of revocation sufficient to de-accelerate the mortgage debt. Not only did the January 2013 proposed loan modification fail to clearly and unequivocally indicate that the acceleration was being revoked and the loan was returned to installment status, but it was contingent on the Gardners' [plaintiffs'] acceptance of the proposed loan modification as well as their successful completion of a trial period, neither of which occurred … . Moreover, contrary to the defendant's contention, it failed to establish that the plaintiffs are barred from obtaining a judgment in their favor under the doctrine of unclean hands … . Gardner v Wells Fargo Bank N.A.., 2023 NY Slip Op 04304, Second Dept 8-16-23

Practice Point: Commencing a foreclosure action accelerates the debt and starts the statute of limitations. The acceleration can be explicitly revoked to stop the running of the statute. But the bank's offering a loan modification is not an explicit revocation.

AUGUST 16, 2023

FORECLOSURE.

ALTHOUGH THE BANK IN THIS FORECLOSURE ACTION SUBMITTED AN AFFIDAVIT TO DEMONSTRATE DEFENDANT'S DEFAULT, AND THE AFFIDAVIT QUOTED FROM THE RELEVANT BUSINESS RECORDS, THE RECORDS THEMSELVES WERE NOT SUBMITTED, RENDERING THE AFFIDAVIT HEARSAY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the band did not prove defendant defaulted on the note in this foreclosure action. The affidavit which discussed the relevant business records (apparently quoting from them) was hearsay. The business records themselves were not submitted:

While the affidavit submitted by the plaintiff made the requisite showing that the affiant was familiar with the plaintiff's record-keeping practices and procedures with respect to the payment history, the affiant failed to submit any business record substantiating the alleged default … . "While a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay" … . "[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . Christiana Trust v Corbin, 2023 NY Slip Op 04298, Second Dept 8-16-23

Practice Point: Where business records are necessary proof (here to prove defendant's default in a foreclosure action), it is not enough to submit an affidavit quoting from the records, which is hearsay that will not support summary judgment. The records themselves must be authenticated and submitted.

AUGUST 16, 2023

MUNICIPAL LAW, ELECTION LAW.

THE PETITIONS FOR A PERMISSIVE REFERENDUM ON THE BONDS TO BE ISSUED FOR THE CONSTRUCTION OF CERTAIN TOWN BUILDINGS WERE NOT REJECTED WITHIN THE MEANING OF THE CONTROLLING STATUTES; THEREFORE THE TOWN WAS REQUIRED TO SET UP THE PERMISSIVE REFERENDUM FOR NOVEMBER 2023 (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the Town Clerk did follow the statutory procedure for rejecting the petitions for a permissive referendum on bonds to be issued to fund the construction of certain Town road-maintenance buildings. Therefore the town was obligated to set up the permissive referendum:

We need not … decide whether the Town Clerk acted beyond the scope of her authority in rejecting the referendum petitions prior to their filing because, contrary to respondents' contentions, the subject referendum petitions were received and accepted for filing by the Town Clerk on October 11, 2022 … . The record contains a receipt of filing stating that the Town Clerk "received from [petitioner] three petitions" which were identified by name in the receipt. The receipt issued by the Town Clerk also bears both a signature and a date stamp indicating that the petitions were received for filing … . The receipt issued and signed by the Town Clerk did not constitute a legal rejection of the petition within the contemplation of Town Law § 91 and, as a matter of fact, was not so intended by her to be a rejection since she stated in her own affidavit that she subsequently reviewed the filed petitions with both the Association of Towns of the State of New York and the town attorney and consulted with them regarding the petitions' handling. Matter of Long v Town of Caroga, 2023 NY Slip Op 04352, Third Dept 8-17-23

Practice Point: Here the statutory requirements for the rejection of petitions for a permissive referendum on bonds to be issued for the construction of town buildings were not met. To the contrary, the Town Clerk accepted the petitions, and the town must set up the permissive referendum for November 2023.

AUGUST 17, 2023

NEGLIGENCE, SLIP AND FALL.

PLAINTIFF, AT HER DEPOSITION, COULD NOT IDENTIFY THE CAUSE OF HER STAIRWAY SLIP AND FALL; COMPLAINT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this stairway slip and fall, based upon her deposition testimony, could not identify the cause of her fall which required dismissal of the complaint:

"… [A] defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without [resort to] speculation'" … . "'[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation'" … . "'Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused [the plaintiff to fall], any determination by the trier of fact as to causation would be based upon sheer speculation'" … .

Here, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting, inter alia, the plaintiff's deposition testimony, in which she identified a defect in another step than that from which she fell as the cause of her accident and admitted that she did not know what caused her to lose her balance and fall. Thus, any determination that the defect identified by the plaintiff was the proximate cause of her accident, rather than a misstep or loss of balance, would be based on speculation … . De Rose v Anna & Rose Realty Co., LLC, 2023 NY Slip Op 04302, Second Dept 8-16-23

Practice Point: A slip and fall plaintiff who acknowledges in a deposition she does not know what caused her to fall loses the case.

AUGUST 16, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS.

DEFENDANT ALLOWED PLAINTIFF'S DECEDENT, 18, TO DRIVE HIS LAMBORGHINI WHILE DEFENDANT WAS A PASSENGER; PLAINTIFF'S DECEDENT LOST CONTROL AT 180 MPH, STRUCK A GUARD RAIL, WAS EJECTED AND DIED FROM HIS INJURIES; THERE WAS A QUESTION OF FACT, RAISED BY PLAINTIFF'S EXPERT, WHETHER DEFENDANT HAD SPECIAL KNOWLEDGE WHICH RENDERED PLAINTIFF'S DECEDENT'S USE OF THE CAR UNREASONABLY DANGEROUS; THE NEGLIGENT ENTRUSTMENT CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined negligent entrustment causes of action should not have been dismissed. Defendant owned a high performance car (a Lamborghini) and allowed plaintiff's decedent, who was 18, to drive it. Plaintiff's decedent apparently lost control of the car at 180 mph, struck a guard rail, was ejected and died from his injuries. Defendant was a passenger at the time of the accident:

"The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" … . To establish a cause of action under a theory of negligent entrustment, the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous, or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous … . "An owner of a motor vehicle may be liable for negligent entrustment if [he or she] was negligent in entrusting it to a person [he or she] knew, or in exercise of ordinary care should have known, was not competent to operate it" … .

Here, the defendant failed to establish his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent entrustment. Although the decedent's possession of a driver license is a factor to be considered, the defendant nevertheless failed to eliminate triable issues of fact as to whether he had special knowledge concerning a characteristic or condition peculiar to the

decedent which rendered his use of the Lamborghini unreasonably dangerous … . Shepard v Power, 2023 NY Slip Op 04330, Second Dept 8-16-23

Practice Point: Here there was a question of fact, raised by plaintiff's expert, whether defendant's allowing plaintiff's decedent, 18, to drive defendant's Lamborghini constituted negligent entrustment. Plaintiff's decedent lost control at 180 mph, crashed and died from his injuries.

AUGUST 16, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS.

LOANING PLAINTIFF'S DECEDENT A CAR WITH A BROKEN FUEL GAUGE WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH; THE CAR RAN OUT OF GAS AND PLAINTIFF'S DECEDENT PULLED OVER ONTO THE SHOULDER OF A TWO-LANE ROAD; SHE WAS STRUCK BY A HIT AND RUN DRIVER WHILE PUTTING GAS IN THE CAR WITH A GAS CAN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligence ascribed to the defendant in this fatal traffic-accident case was not a proximate cause of the accident. Defendant allegedly loaned a car with a broken fuel gauge to plaintiff's decedent. The car ran out of gas on a two-lane highway and plaintiff's decedent pulled the car over onto the shoulder. When plaintiff's decedent was attempting to put gas in the car with a gas can, she was struck and killed by a hit-and-run driver:

… [T]he plaintiff alleged that the defendant knew that his vehicle had a malfunctioning gas gauge but nonetheless "allowed the decedent . . . to borrow and use" the vehicle. The plaintiff further alleged that the defendant negligently failed to maintain the vehicle in proper working order and loaned the vehicle to the decedent while it was in a state of disrepair, and that this negligence caused the decedent's injuries. After the completion of discovery, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him, contending, inter alia, that it was not foreseeable that running out of gas would result in the decedent being struck by a hit-and-run driver, and that the defendant's alleged conduct was not a proximate cause of the accident. …

… [T]he defendant established, prima facie, that his alleged negligence was not a proximate cause of the accident. Even assuming, arguendo, that permitting the decedent to borrow a vehicle with a malfunctioning gas gauge "furnished the condition or occasion" for the accident … , under the circumstances here, a hit-and-run driver striking the decedent constituted an intervening act which was not foreseeable … . Biamonte v Biamonte, 2023 NY Slip Op 04296, Second Dept 8-16-23

Practice Point: Here plaintiff's decedent was struck and killed by a hit and run driver after the car loaned to her by defendant ran out of gas. The broken fuel gauge in the loaned car was not a proximate cause of her death. The hit and run accident was deemed an intervening act which was not foreseeable.

AUGUST 16, 2023