NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
August 7 – 11, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 7 – 11, 2023, and Posted on the New York Appellate Digest Website on Monday, August 14, 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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CIVIL PROCEDURE, CONTRACT LAW, FIDUCIARY DUTY, FRAUD, TRUSTS AND ESTATES.

EVERY CAUSE OF ACTION WAS ERRONEOUSLY DISMISSED AS TIME-BARRED; THE PROPER CRITERIA FOR DETERMINING THE CORRECT STATUTES OF LIMITATIONS DISCUSSED IN SOME DETAIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined several causes of action including fraud, breach of fiduciary duty, breach of constructive trust, and breach of contract should not have been dismissed as time-barred:

"'[W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)'" … . * * * … [P]laintiffs discovered the alleged fraud in 2019 and the cause of action was timely commenced within two years. * * *

… [T]he statute of limitations on the cause of action for the imposition of a constructive trust did not begin to run until 2019, when [defendant] allegedly breached his promise … . …

"[I]n order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs" … . * * *

… Supreme Court erred in concluding that the causes of action alleging fraud in the inducement and promissory estoppel are time-barred. The statute of limitations for those causes of action is six years … . …

The statute of limitations applicable to a breach of contract cause of action is six years (see CPLR 213[2]), "and begins at the time of the breach, even when no damage occurs until later, and even though the injured party may be ignorant of the existence of the wrong or injury" … . Statharos v Statharos, 2023 NY Slip Op 04226, Second Dept 8-9-23

Practice Point: Here the criteria for determining the applicable statute of limitations for breach of fiduciary duty, fraud, breach of constructive trust, declaratory judgment, promissory estoppel, fraud in the inducement and breach of contract are discussed in some detail.

AUGUST 9, 2023

CONTRACT LAW, EVIDENCE.

THE DEFENDANT REHABILITATION FACILITY DID NOT PROVE PLAINTIFF'S DECEDENT SIGNED THE ADMISSIONS AGREEMENT USING AN ELECTRONIC FORMAT CALLED DOCUSIGN; THEREFORE THE AGREEMENT WAS NOT AUTHENTICATED AND THE FORUM SELECTION CLAUSE IN THE AGREEMENT COULD NOT BE ENFORCED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, reversing Supreme Court, over a dissent, determined the defendant rehabilitation facility, Dewitt. did not demonstrate plaintiff's decedent signed the facility's admission agreements. Therefore the forum selection clause in the agreements should not have been enforced by the motion court. The agreements were allegedly signed using an electronic format called Docusign. But the defendant did not submit any evidence demonstrating how Docusign works and did not submit an affidavit by the representative who allegedly witnessed plaintiff's signatures. The agreement was not, therefore, authenticated and was not admissible evidence of an agreement to the forum:

… [T]he "burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it" … . This requires, in the first instance, authentication of the purported writing … . Authentication may be effected by various means, including, for example, by certificate of acknowledgment (see CPLR 4538), by comparison of handwriting (see CPLR 4536), or by the testimony of a person who witnessed the signing of the document … .

Here, …in support of its motion, Dewitt submitted Trimarchi's [the defendant's director of admission's] affidavit, along with copies of the admissions agreements. Trimarchi admitted, however, that she was not present during the signing of the admissions agreement. Trimarchi attested only to her understanding of how admissions agreements were usually signed; she had no actual knowledge of how the agreements bearing decedent's name came to be signed. Moreover, Trimarchi did not describe any protocols governing the use of Docusign. Accordingly, her affidavit cannot serve to authenticate the agreements … . Dewitt did not seek to authenticate decedent's signature by any other means, such as a certificate of

acknowledgment or a handwriting exemplar. Since Dewitt failed to authenticate the agreements, it correspondingly failed to show that the forum selection clauses set forth in those documents are enforceable against plaintiff … . Knight v New York & Presbyt. Hosp., 2023 NY Slip Op 04258, First Dept 8-10-23

Practice Point: This case illustrates the need to authenticate signatures which involve some sort of electronic signing format. Here the defendant did not demonstrate how the electronic signature format worked and therefore did not authenticate plaintiff's decedent's signature. The forum selection clause in the agreement, therefore, could not be enforced.

AUGUST 10, 2023

CRIMINAL LAW, EVIDENCE, APPEALS.

THE SUPPRESSION MOTION WAS PROPERLY GRANTED; THE POLICE DID NOT HAVE REASONABLE SUSPICION WHEN DEFENDANT'S CAR WAS BLOCKED BY A POLICE CAR; THE APPELLATE COURT MAY CONSIDER A RULING WHICH WAS NOT EXPLICIT BASED ON THE CONTEXT OF THE RULING WITHIN THE RECORD (SECOND DEPT).

The Second Department, over a two-justice dissent, determined the suppression motion was properly granted because the police blocked defendant's car before there was reasonable suspicion of criminal activity or danger to the public. The majority also concluded the issue could be decided on appeal in the absence of a specific ruling by the motion court by relying on the record for the context of the ultimate ruling:

Officer Cox's conduct in stopping the police vehicle "directly in front of the driveway" in a position "blocking the location" where the Audi was stopped with the engine running "constituted a stop, which required reasonable suspicion that the defendant or other occupants of the vehicle were either involved in criminal activity or posed some danger to the police" … . Joyette, the driver of the Audi, could not have pulled out of the driveway due to the police vehicle blocking the driveway, and thus, the police conduct constituted a "'significant interruption with an individual's liberty of movement'" … .

Further, the People failed to present any evidence showing that Officer Cox and his fellow officers observed any criminal activity at the time Officer Cox blocked the Audi from leaving the driveway. * * *

While CPL 470.15 bars this Court from deciding an appeal on a ground not ruled upon by the trial court … , "nothing in the language of CPL 470.15(1) . . . prohibits an appellate court from considering the record and the proffer colloquy with counsel to understand the context of the trial court's ultimate determination" … . Moreover, "where the trial court gives a reason [for its decision] and there is record support for inferences to be drawn from that reason, the Appellate Division does not act beyond the parameters legislatively set forth in CPL 470.15(1) when it considers those inferences" … . People v Joyette, 2023 NY Slip Op 04216, Second Dept 8-9-23

Practice Point: When the police blocked defendant's car they did not have reasonable suspicion of criminal activity. Therefore the suppression motion was properly granted.

Practice Point: When a court's ruling is not explicit the context of the ruling can be turned to by the appellate court to determine the exact nature of the ruling.

AUGUST 9, 2023

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE ERROR WAS DEEMED HARMLESS, THE FORENSIC STATISTICAL TOOL (FST) DNA ANALYSIS SHOULD NOT HAVE BEEN ADMITTED WITHOUT HOLDING A FRYE HEARING (SECOND DEPT).

The Second Department determined the DNA analysis using the forensic statistical tool (FST) should not have been admitted in the absence of a Frye hearing. However, there error was deemed harmless:

Supreme Court improperly admitted into evidence the results of DNA analysis conducted using the forensic statistical tool (hereinafter FST) without first holding a hearing pursuant to Frye v United States (293 F 1013 [DC Cir]) … . However, this error was harmless. The evidence of the defendant's guilt was overwhelming. The surviving police officer who was shot at by the defendant at close range, under good lighting conditions, and without obstruction identified the defendant within

hours of the shooting. Other uncontested, single-source, non-FST DNA testing connected the defendant to the gun used in the shooting. Witnesses who knew the defendant and lived in the vicinity of the shooting testified that they saw the defendant running through their yards just after they heard the gun shots, holding a gun similar to the gun identified as the one used in the shooting. The defendant provided a false name to law enforcement officers canvassing the area of the shooting when he was approached by them, by which point he had abandoned some of the clothing he was wearing during the shooting, and he was apprehended wearing someone else's ill-fitting clothes and shoes. Additionally, the People's evidence offered in rebuttal to the defendant's extreme emotional disturbance defense was compelling. Therefore, there is no significant probability that the jury would have acquitted the defendant had it not been for this error. People v Blackwell2023 NY Slip Op 04211, Second Dept 8-9-23

Practice Point: A DNA analysis using the forensic statistical tool (FST) should not be admitted in the absence of a Frye hearing.

AUGUST 9, 2023

CRIMINAL LAW, EVIDENCE.

THE SEARCH WARRANT FOR DEFENDANT'S CELL PHONE DID NOT MEET THE PARTICULARITY REQUIREMENT, THE EVIDENCE GLEANED FROM THE CELL PHONE SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED; KIDNAPPING SECOND DEGREE IS AN INCLUSORY CONCURRENT COUNT OF KIDNAPPING SECOND DEGREE AS A SEXUALLY MOTIVATED FELONY, THE COUNTS MUST BE SUBMITTED TO THE JURY IN THE ALTERNATIVE (FOURTH DEPT).

he Fourth Department, reversing defendant's conviction, determined the search warrant for defendant's cell phone was overly broad. Therefore the evidence derived from the cell phone should have been dismissed. The court noted that kidnapping in the second degree is an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony … and that the court upon retrial should submit to the jury the kidnapping in the second degree count in the alternative only:

A warrant must be "specific enough to leave no discretion to the executing officer" … . To meet the particularity requirement, a warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" … . Here, the search warrant simply stated that the police were directed to search defendant's cellular phone for "digital and/or electronic evidence from August 13, 2016 to August 15, 2016." The warrant contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion of the search to the executing officers … . People v Saeli, 2023 NY Slip Op 04268, Fourth Dept 8-11-23

Practice Point: A search warrant for a cell phone which simply states to search for "digital and/or electronic evidence from August 13, 2016 to August 15, 2016" does not meet the particularity requirement (the warrant is overly broad).

Practice Point: Kidnapping in the second degree is an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony.

AUGUST 11, 2023

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF WAS NOT HIRED BECAUSE HE TESTED POSITIVE FOR MARIJUANA WHEN HE WAS UNDER TREATMENT WITH MARIJUANA; THAT STATED A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION (SECOND DEPT).

The Second Department determined that refusing to hire plaintiff for testing positive for marijuana when he was being treated with marijuana stated a cause of action for employment discrimination:

We find unavailing the defendant's contention that the complaint failed to state a cause of action to recover damages for employment discrimination on the basis of disability in violation of the NYCHRL [New York City Human Rights Law] because the defendant chose not to hire the plaintiff based only on his positive drug test and not his disability. Refusing to hire the plaintiff because he tested positive

for marijuana while knowing that he was being treated with marijuana by a licensed physician for a medical condition effectively denied the plaintiff the opportunity of a reasonable accommodation, and therefore, under these circumstances, is appropriately recognized as a cognizable cause of action to recover damages for employment discrimination on the basis of disability in violation of the NYCHRL … . Brouillard v Sunrun, Inc., 2023 NY Slip Op 04184, Second Dept 8-9-23

Practice Point: Refusing to hire plaintiff for testing positive for marijuana when plaintiff was under a doctor's treatment with marijuana stated a cause of action for denying the plaintiff the opportunity of a reasonable accommodation.

AUGUST 9, 2023

FAMILY LAW, JUDGES.

THE CHILD HAD LIVED WITH HIS GRANDPARENTS FOR HIS ENTIRE LIFE; THE GRANDPARENTS DEMONSTRATED EXTRAORDINARY CIRCUMSTANCES NECESSITATING A BEST INTERESTS OF THE CHILD HEARING PRIOR TO RULING ON MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY; TWO-JUSTICE DISSENT; MATTER REMITTED FOR A HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, over a two-justice dissent, determined the grandparents established extraordinary circumstances necessitating a best interests hearing before a ruling on mother's request for a modification of custody. Mother sought to regain custody of the child who was eight years old and had resided with the grandparents for his entire life:

It is undisputed that the child, who was eight years old at the time of the hearing, had lived with the grandparents for his entire life in the only home he has ever known; the child expressed a strong desire to continue residing with his grandparents and the AFC adheres to that position on appeal; the mother and the father both suffered from severe substance abuse problems for years and were unable to care for the child on their own; the mother failed to contact the child for a period of 18 months before resuming visitation in January 2018; the child's half-sister also resided with the grandparents and the child developed a sibling

relationship with her; and "the grand[parents] ha[ve] taken care of the child for most of his life and provided him with stability" … Additionally, according to the AFC, the child had "developed a strong emotional bond with the grand[parents]" … .

… [W]e conclude that, "even if the prolonged separation alone is entitled to little significance here, the combination of that factor along with others present on this record sufficiently establish the existence of extraordinary circumstances" … , and that the court's contrary determination is not supported by a sound and substantial basis in the record.

… [W]e remit the matter to Family Court for a new hearing to determine whether the modifications of the prior order sought by the mother are in the best interests of the child … . Matter of Tuttle v Worthington, 2023 NY Slip Op 04282, Fourth Dept 8-11-23

Practice Point: The child's grandparents made a showing of extraordinary circumstances requiring a best interests of the child hearing before ruling on mother's petition for a modification of custody. The child, eight years old, had lived his entire life with his grandparents.

AUGUST 11, 2023

FAMILY LAW, JUDGES.

THE GRANDPARENTS' PETITION FOR VISITATION SHOULD NOT HAVE BEEN DENIED ABSENT A FULL BEST INTERESTS OF THE CHILD HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the court should not have dismissed the grandparents' petition for visitation before holding a best interests of the child hearing:

… [T]he court erred in granting respondents' motion and in terminating the hearing before petitioners had completed the presentation of their case … . "[E]ven where . . . a grandparent has established standing to seek visitation, 'a grandparent must then establish that visitation is in the best interests of the grandchild . . . Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the

grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent' " … . Visitation and "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' " … , "[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of the child['s] best interests" … . Upon our review of the record, we conclude that, "[a]bsent a[full] evidentiary hearing, . . . the court here lacked sufficient evidence . . . to enable it to undertake a comprehensive independent review of the [children]'s best interests" … . We therefore reverse the order, deny the motion, reinstate the petitions, and remit the matter to Supreme Court for a full evidentiary hearing on the petitions. DeMarco v Severance, 2023 NY Slip Op 04284, Fourth Dept 8-11-23

Practice Point: The grandparents' petition for visitation should not have been dismissed absent a full best interests of the child hearing.

AUGUST 11, 2023

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

A TITLE HOLDER WHO DID NOT SIGN THE NOTE BUT DID SIGN THE MORTGAGE IS ENTITLED TO THE RPAPL 1304 NOTICE OF FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a defendant (Courtney) who did not sign the note but did sign the mortgage was a "borrower" entitled to notice of the foreclosure pursuant to RPAPL 1304:

… [I]t is undisputed that the plaintiff failed to serve Courtney [defendant] with notice pursuant to RPAPL 1304, and, contrary to the plaintiff's contention, he was entitled to such notice as a "borrower" within the meaning of that statute. Although Courtney did not sign the note, both of the defendants were title owners of the subject property and each executed the mortgage as a "borrower." "Where, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304, notwithstanding . . . any ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured"

… . Since Courtney "signed the mortgage as a 'borrower' and, in that capacity, agreed to pay the amounts due under the note, [he] was entitled to . . . notice pursuant to RPAPL 1304" … . Wells Fargo Bank N.A. v Carney, 2023 NY Slip Op 04231, Second Dept 8-9-23

Practice Point: A title owner who does not sign the note but signs the mortgage is a "borrower" entitled to notice of the foreclosure.

AUGUST 9, 2023

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

IN THIS FORECLOSURE ACTION, A HEARING SHOULD HAVE BEEN HELD TO DETERMINE IF THE BANK HAD PERSONAL JURISDICTION OVER A DEFENDANT, THE BANK ESTABLISHED STANDING (NOTE AFFIXED TO THE COMPLAINT), THE BANK FAILED TO DEMONSTRATE COMPLIANCE WITH RPAPL 1303 AND 1304 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a defendant was properly served, the bank demonstrated standing to foreclose by affixing the note to the complaint, and the bank failed to demonstrate compliance with RPAPL 1303 and 1304:

Ordinarily, a process server's affidavit of service gives rise to a presumption of proper service … . However, "a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing" … . "If an issue regarding service turns upon a question of credibility, a hearing should be held to render a determination on this issue" * * *

The plaintiff established, prima facie, that it had standing to commence this action by submitting in support of its motion a copy of the note, endorsed in blank, that was annexed to the certificate of merit filed with the summons and complaint at the time the action was commenced … . Where, as here, the note is affixed to the complaint, "'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" * * *

… [T]he plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1303 … . RPAPL 1303 requires that the party foreclosing a mortgage on residential property deliver, along with the summons and complaint, a notice titled "Notice to Tenants of Buildings in Foreclosure" to any tenant of the property by certified mail, if the identity of the tenant is known to the foreclosing party … . * * *

… [T]he affiant did not state that he had personal knowledge of the purported mailings, and the documents that he relied upon to affirm that the mailings took place failed to establish that the RPAPL 1304 notices were actually mailed … by both certified and first-class mail. Since the plaintiff "failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure," the plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304 … . U.S Bank N.A. v 22-33 Brookhaven, Inc., 2023 NY Slip Op 04228, Second Dept 8-9-23

Practice Point: Here a defendant raised a question of fact whether he was properly served, requiring a hearing.

Practice Point: In this foreclosure action the bank established standing by affixing the note to the complaint.

Practice Point: The bank's failure to strictly comply with RPAPL 1303 or 1304 precludes summary judgment.

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LABOR LAW-CONSTRUCTION LAW.

THE MAJORITY CONCLUDED PLAINTIFF WAS DOING ROUTINE MAINTENANCE WHICH WAS NOT PART OF A CONSTRUCTION OR RENOVATION PROJECT WHEN HE WAS ELECTROCUTED AND FELL FROM A LADDER; THEREFORE THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION WERE DISMISSED; THE TWO-JUSTICE DISSENT ARGUED PLAINTIFF WAS "CLEANING" WITHIN THE MEANING OF LABOR LAW 240(1) AND WAS DOING CONSTRUCTION OR RENOVATION WORK WITHIN THE MEANING OF LABOR LAW 241(6) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the work plaintiff was doing was not covered by Labor Law 240(1) or 241(6). Primosch v Peroxychem, LLC, 2023 NY Slip Op 04285, Fourth Dept 8-11-23. The Fourth Department concluded plaintiff's work was routine maintenance, not cleaning covered by Labor Law 240(10, and was not done in connection with construction or renovation work. In a separate decision which incorporated the first, two justices disagreed in a dissent, finding that plaintiff's work was "cleaning" covered by Labor Law 240(1) and was part of construction or renovation work. The dissent lays out in some detail the proof requirements for "cleaning" within the meaning of Labor Law 240(1). Apparently plaintiff was on a ladder cleaning electrical equipment when he was electrocuted and fell from the ladder. Primosch v Peroxychem, LLC, 2023 NY Slip Op 04286, Fourth Dept 8-11-23

Practice Point: The dissent includes a detailed explanation of what constitutes "cleaning" within the meaning of Labor Law 240(1).

AUGUST 11, 2023

MEDICAL MALPRACTICE, CIVIL PROCEDURE, APPEALS.

THE ORDER DENYING DEFENDANTS THE ABILITY TO ASSERT CPLR ARTICLE 16 DEFENSES IS APPEALABLE; DEFENDANTS SHOULD NOT HAVE BEEN PRECLUDED FROM ASSERTING THE CPLR ARTICLE 16 DEFENSES ATTRIBUTING LIABILITY IN THIS MEDICAL MALPRACTICE ACTION TO NON-PARTIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants in this medical malpractice action should not have been precluded from asserting the negligence of non-parties (CPLR article 16 defenses) as an affirmative defenses. The court noted that, although the a ruling on a motion in limine is generally not appealable, a ruling on a motion which seeks to limit the legal theories which can be asserted is appealable:

"Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" … . There is, however, "a distinction between an order that 'limits the admissibility of evidence,' which is not appealable . . . , and one that 'limits the legal theories of liability to be tried' or the scope of the issues at trial, which is appealable" … . * * *

… [D]efendants are entitled to assert their CPLR article 16 defenses regarding the nonparty providers. "As provided in CPLR 1601 (1), a defendant may raise the CPLR article 16 defense regarding a nonparty tortfeasor, provided that the plaintiff could obtain jurisdiction over that party" … . Here, defendants are entitled to raise their pleaded affirmative defenses pursuant to CPLR article 16 … because plaintiff could have sought to maintain an action against the nonparty providers in Supreme Court … .

The crux of the issue on appeal is whether defendants were required, in response to plaintiff's demands for bills of particulars, to particularize the pleaded CPLR article 16 defense, and thus whether the court properly precluded them from asserting that defense at trial when they did not timely particularize that defense. We conclude that no such particularization was required under the circumstances of this case, and thus that the court erred in precluding defendants from asserting the CPLR article 16 defense at trial. Harris v Rome Mem. Hosp., 2023 NY Slip Op 04273, Fourth Dept 8-11-23

Practice Point: Motions in limine generally are not appealable. But motions seeking to preclude legal theories of liability are appealable.

Practice Point: Under the unique circumstances of this case, defendants in this medical malpractice action should not have been precluded from presenting CPLR article 16 affirmative defenses on the ground the defenses were not particularized in the bill of particulars. It was not clear the demands related to the CPLR article 16 affirmative defenses.

AUGUST 11, 2023

NEGLIGENCE, LIMITED LIABILITY COMPANY LAW, CORPORATION LAW, CONTRACT LAW.

THE ALLEGATIONS WERE SUFFICIENT TO SUPPORT PIERCING THE CORPORATE VEIL TO REACH DEFENDANT LLC MEMBER PERSONALLY FOR BREACH OF THE HOUSING MERCHANT IMPLIED WARRANTY OBLIGATIONS; AND DEFENDANT COULD BE HELD PERSONALLY LIABLE FOR NEGLIGENT REPAIRS UNDER A HOME RENOVATION CONTRACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiffs in this home-renovation-contract dispute sufficiently alleged the corporate veil should be pierced to reach the defendant Assaf, member of the LLC, personally for failing to comply with the implied warrant requirements. Defendant could also be held personally liable for negligent repairs:

Among the plaintiffs' allegations were that Assaf wound down the LLC's business following the closing of title in an effort to keep the LLC undercapitalized and judgment proof and that, following the closing, he distributed sale proceeds without reserving sufficient assets needed to satisfy the LLC's obligations under New York State's housing merchant implied warranty and any contingent liability.

… "Although [c]orporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts, corporate officers may be held personally liable for torts committed in the performance of their corporate duties" … . Here, the plaintiffs

adequately alleged that Assaf personally engaged in acts of negligence in performing repairs at the home … . Gold v 22 St. Felix, LLC, 2023 NY Slip Op 04194, Second Dept 8-9-23

Practice Point: Here the allegation that defendant LLC member undercapitalized the LLC supported piercing the corporate veil for breach of the home merchant implied warranty obligations.

Practice Point: A member of an LLC may be personally liable for negligent repairs pursuant to a home-renovation contract.

AUGUST 9, 2023

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

DEFENDANT DEMONSTRATED PLAINTIFF CAUSED THE TRAFFIC ACCIDENT BY MAKING AN UNREASONABLE LEFT TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW (NEGLIGENCE PER SE); THE COURT MAY DETERMINE THE PROXIMATE CAUSE OF A TRAFFIC ACCIDENT AT THE SUMMARY JUDGMENT STAGE AS A MATTER OF LAW IF ONLY ONE CONCLUSION CAN BE DRAWN FROM THE FACTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this traffic accident case demonstrated plaintiff violated the Vehicle and Traffic Law by unreasonably making a left turn, which constitutes negligence per se:

… [T]he defendant established her prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that the plaintiff's conduct in making a left turn directly into the path of the defendant's vehicle without yielding the right-of-way to the defendant, in violation of Vehicle and Traffic Law § 1141, and when it was not reasonably safe to make a left turn, in violation of Vehicle and Traffic Law § 1163(a), was the sole proximate cause of the accident … . The issue of proximate cause may be decided as a matter of law where, as here, only one conclusion may be drawn from the established facts … . Lylan Pham v Lee, 2023 NY Slip Op 04200, Second Dept 8-9-23

Practice Point: Causing a traffic accident by making an unreasonable left turn into defendant's lane of traffic in violation of the Vehicle and Traffic Law is negligence per se.

Practice Point: A judge at the summary judgment stage can determine the proximate cause of a traffic accident as a matter of law if there is only one conclusion which can be drawn from the facts.

AUGUST 9, 2023

WATER LAW.

THE OWNER OF LAND HAS AN ABSOLUTE PROPERTY RIGHT IN THE SURFACE WATERS COLLECTED ON THAT LAND AND CAN DIVERT IT BEFORE IT FLOWS INTO A DEFINITE WATER COURSE (A STREAM, FOR EXAMPLE) (FOURTH DEPT).

The Fourth Department, in this dispute over water rights, noted that the Monroe County Water Authority (MCWA) owned surface water on its land and could divert it before it entered a definite water course:

… [W]e agree with MCWA that the court erred in determining that plaintiffs (a golf course) have riparian rights to the surface waters collecting on MCWA's property. "The owners of land on a water-course, are not owners of the water which flows in it" … , and "the law has always recognized a wide distinction, between the right of an owner, to deal with surface water falling or collecting on [its] land, and [an owner's] right in the water of a natural water-course" … . "In such [surface] water, before it leaves [the owner's] land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and [the owner] may appropriate it to [its] exclusive use, or get rid of it in any way [it] can, provided only that [the owner] does not cast it by drains, or ditches, upon the land of [its] neighbor; and [the owner] may do this, although by so doing [it] prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to . . . other proprietors on the stream" … . Webster Golf Club, Inc. v Monroe County Water Auth., 2023 NY Slip Op 04280, Fourth Dept 8-11-23

Practice Point: A property owner owns the surface water collected on the property and can divert the surface water before it reaches a definite water course like a stream or river.

AUGUST 11, 2023