NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
August 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in August 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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APPEALS, MOTION TO VACATE.

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.

ARTICLE 16 DEFENSES, APPEALS, MEDICAL MALPRACTICE.

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

CHILD VICTIMS ACT, COURT OF CLAIMS.

THE "TIME WHEN" ALLEGATIONS IN THE CLAIM IN THIS CHILD VICTIMS ACT SUIT WERE SUFFICIENT, COURT OF CLAIMS REVERSED (SECOND DEPT).

The Second Department, reversing the Court of Claims, over an instructive concurrence, determined the claim in this Child Victims Act action sufficiently alleged the "time when" the sexual abuse allegedly occurred:

… [T]he date ranges provided in the claim, together with the other information set forth therein, were sufficient to satisfy the "time when" requirement of Court of Claims Act § 11(b). The claimant alleged, among other things, that "[i]n approximately 1987, when [he] was approximately sixteen (16) years old, [he] was admitted to" a State-operated psychiatric hospital "for inpatient residential treatment," and that "[while] admitted to the . . . facility" he was "sexually abused and assaulted" by a staff member on two occasions. Additionally, the claimant identified his alleged abuser in the claim and set forth the details of the two alleged assaults, including the location within the facility where they allegedly occurred. The claimant also alleged that, before the second incident of abuse occurred, he reported to his treating psychiatrist, whom the claimant identified by name, that the alleged perpetrator made the claimant "uncomfortable." "Given that the CVA allows claimants to bring civil actions decades after the alleged sexual abuse

occurred, it is not clear how providing exact dates, as opposed to the time periods set forth in the instant claim, would better enable the State to conduct a prompt investigation of the subject claim" … . We note, however, "that our determination that the claimant met the 'time when' requirement in the context of this action brought under the CVA does not change our jurisprudence with respect to the 'time when' requirement under different contexts, such as where a 'single incidence of negligence' occurs on a discrete date or other situations where 'a series of ongoing acts or omissions occur[ ] on multiple dates over the course of a period of time' … . Rodriguez v State of New York, 2023 NY Slip Op 04146, Second Dept 8-2-23

Practice Point: Here the allegations the sexual abuse took place in "approximately 1987" were deemed sufficient in this Child Victims Act suit.

AUGUST 2, 2023

CONTRACT LAW, STATE A CAUSE OF ACTION.

TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT, THE PROVISIONS OF THE CONTRACT WHICH WERE ALLEGEDLY BREACHED MUST BE IDENTIFIED IN THE COMPLAINT; WHERE IT IS CONCEDED THAT A CONTRACT EXISTS, A CAUSE OF ACTION FOR QUASI CONTRACT MUST BE DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint did not adequately allege breach of contract or quasi contract and therefore should have been dismissed:

"[T]o state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" … . Here, the complaint failed to specify the provision of the parties' contract that was allegedly breached … .

… Supreme Court should have granted those branches of the defendant's motion which were pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging quasi contract sounding in restitution and unjust enrichment. The parties do not dispute that a contract … exists … . We Transp., Inc. v Westbury Union Free Sch. Dist., 2023 NY Slip Op 04394, Second Dept 8-23-23

Practice Point: A complaint alleging breach of contract does not state a cause of action if the specific provisions alleged to have been breached are not identified.

Practice Point: Where the existence of a contract is conceded, a cause of action for quasi contract must be dismissed.

AUGUST 23, 2023

DISMISS, MOTIONS TO, EVIDENCE.

IN THIS LEGAL MALPRACTICE ACTION, THE EVIDENCE SUBMITTED BY DEFENDANT ATTORNEYS IN SUPPORT OF THE MOTION TO DISMISS WAS NOT "DOCUMENTARY EVIDENCE;" THE PROOF REQUIREMENTS FOR A MOTION TO DISMISS ARE DIFFERENT FROM THE PROOF REQUIREMENTS FOR SUMMARY JUDGMENT; THE MOTION TO DISMSS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to dismiss in this legal malpractice case should not have been granted because the evidence offered in support of the motion (a letter from the insurer denying coverage and the insurance policy) was not "documentary evidence." In addition, the Second Department noted that any deficiencies in the complaint were remedied by plaintiff's affidavit submitted in opposition to the motion to dismiss. The complaint alleged defendant attorneys failed to timely file an action seeking recovery for personal injuries from a disability-insurance carrier:

"'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss'" … . * * *

"A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, [thereby] conclusively establishing a defense as a matter of law" … . "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" … . "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are

essentially undeniable, would qualify as documentary evidence in the proper case" … . "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" … . Maursky v Latham, 2023 NY Slip Op 04115, Second Dept 8-2-23

Practice Point: Irrespective of the possible result of a summary judgment motion, a motion to dismiss which depends on evidence and is not supported by "documentary evidence" will lose.

AUGUST 2, 2023

DISMISS, MOTIONS TO, CONVERSION TO SUMMARY JUDGMENT, FORECLOSURE.

THE PRE-ANSWER MOTION TO DISMISS SHOULD NOT HAVE BEEN CONVERTED TO A SUMMARY JUDGMENT MOTION; THE AFFIDAVITS SUBMITTED BY DEFENDANTS DID NOT WARRANT GRANTING THE MOTION TO DISMISS; THE AFFIFAVITS WERE NOT "DOCUMENTARY EVIDENCE" AND DID NOT DEMONSTRATE ANY MATERIAL FACT ALLEGED BY PLAINTIFFS WAS NOT "A FACT AT ALL" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' pre-answer motion to dismiss the complaint, and the motion to treat the dismissal motion as a summary judgment motion should not have been granted. The motion should not have been treated as a summary judgment motion because it was premature. The motion should not have been granted as a dismissal based on documentary evidence because the affidavits submitted by the defendants do not constitute "documentary evidence" within the meaning of the CPLR:

The record demonstrates that the defendants' pre-answer motion was made less than two months after the action was commenced, and that the plaintiff has had no opportunity to conduct discovery. Further, the defendants seek summary dismissal on the basis of facts asserted in their affidavits about which the plaintiff has no personal knowledge. Under these circumstances, the plaintiff is correct that a summary judgment motion would be premature … . Therefore, the defendants' motion pursuant to CPLR 3211(a) should not have been converted into a motion for summary judgment … . * * *

"While a court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7), affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" … by showing that a material fact as claimed by the plaintiff "is not a fact at all" and that "no significant dispute exists regarding it" … . * * *

The affidavits submitted by the defendants, which merely contained conclusory denials of the facts asserted by the plaintiff in the complaint, as well as bare factual assertions regarding their use and occupancy of the subject premises, did not demonstrate that "a material fact as claimed by the [plaintiff] to be one is not a fact at all" and that "no significant dispute exists regarding it" … . Russo v Crisona, 2023 NY Slip Op 04438, Second Dept 8-30-23

Practice Point: Although a pre-answer motion to dismiss can be converted to a motion for summary judgment, to do so here was premature. Affidavits generally will not be enough to warrant granting a motion to dismiss. Affidavits are not "documentary evidence."

AUGUST 30, 2023

DISMISS, MOTIONS TO, EVIDENCE.

THE DEFENDANT'S AFFIDAVIT SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT "DOCUMENTARY EVIDENCE" WHICH UTTERLY REFUTED THE ALLEGATIONS IN THE COMPLAINT; EVEN THOUGH DEFENDANT MIGHT WIN AT THE SUMMARY JUDGMENT STAGE, THE PROOF REQUIREMENTS FOR DISMSSAL ARE DIFFERENT AND WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant contractor's motion to dismiss the complaint against him individually should not have been granted. Defendant, Gabbay, executed the subject home renovation contract on behalf of "Dansha Corp.," an entity which does not exist. Defendant asserted in an affidavit submitted to support the motion to dismiss, that "Dansh Corp." is a trade name for "Dansha Realty Corp.," which does exist. Therefore, defendant argued, he can not be individually liable on the contract. However,

irrespective of what might be determined in a motion for summary judgment, a motion to dismiss which relies on evidence must be supported by "documentary evidence." Defendant's affidavit does not constitute "documentary evidence:"

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it[,] . . . dismissal should not eventuate'" … . "'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss'" … . "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" … . …

Although there is "no individual liability for principals of a corporation for actions taken in furtherance of the corporation's business" … , "'a person entering into a contract on behalf of a nonexistent corporate entity may be held personally liable on the contract'" … . Here, accepting the allegations in the complaint as true and giving the plaintiff the benefit of every possible favorable inference, the complaint states causes of action against Gabbay to recover damages for breach of contract … and money had and received … . There is no dispute that "Dansha Corp.," the entity named as the general contractor in the contract, does not exist. Furthermore, the evidence submitted by Gabbay failed to conclusively establish that "Dansha Realty Corp." was the intended party to the contract for purposes of a prediscovery CPLR 3211 motion to dismiss … . The affidavit submitted by Gabbay in support of the motion was not "documentary" within the meaning of CPLR 3211(a)(1) … , and the remainder of the evidence, including invoices sent to the plaintiff from "Dansha Corp.," do not prove that "Dansha Corp." is a trade name for "Dansha Realty Corp." … . Churong Liu v Gabbay, 2023 NY Slip Op 04108, Second Dept 8-2-23

Practice Point: This decision illustrates the different proof requirements for a motion to dismiss based on documentary evidence and a motion for summary judgment. Irrespective of whether a party may win a summary judgment motion, a

motion to dismiss supported by an affidavit which is not "documentary evidence" will not win.

AUGUST 2, 2023

EXPERT EVIDENCE, NOTICE.

DEFENDANT SHOULD NOT HAVE BEEN PRECLUDED FROM PRESENTING EXPERT EVIDENCE AT TRIAL, PLAINTIFF WAS GIVEN ADEQUATE NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant should not have been precluded from presenting expert evidence at trial. The Second Department noted that there is no rigid time requirement for the notice of the intent to present expert testimony and plaintiff was provided with the nature of the expert's opinion prior to setting the trial date:

"CPLR 3101(d)(1)(i) requires a party, upon request, to identify the expert witnesses the party expects to call at trial" … . However, CPLR 3101(d)(1)(i) "does not require a response at any particular time or mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute" … .

Here, the defendant served his expert notice prior to a trial date being set, and thus it was not untimely … . Further, the notice was not deficient. It identified the expert witness, indicated that he was a vocational expert, and included the expert's qualifications. Although the notice did not include the expert's opinion and grounds for that opinion, that information was in the draft report that was received by the plaintiff prior to the trial date being set (see CPLR 3101[d]).

The defendant also complied with the requirements set forth in 22 NYCRR 202.16(g) by disclosing his expert witness shortly after the expert had been retained … and serving the expert report more than 60 days before trial (see 22 NYCRR 202.16[g][2]). Giovinazzo-Varela v Varela, 2023 NY Slip Op 04441, Second Dept 8-30-23

Practice Point: There is no strict time-limit for providing notice of the intent to present expert evidence and the nature of that evidence. Here defendant provided

plaintiff with timely notice and the expert evidence should not have been precluded.

AUGUST 30, 2023

FORECLOSURE, NOTICE OF, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

THE BANK'S FAILURE TO COMPLY WITH THE NOTICE-OF-FORECLOSURE REQUIREMENTS OF RPAPL 1304 CAN BE RAISED AT ANY TIME BEFORE THE JUDGMENT OF FORECLOSURE AND SALE (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the bank's failure to comply with the notice provisions of RPAPL 1304 can be raised as a defense at any time before the judgment of foreclosure and sale. Here the defense was raised in opposition to the bank's motion to confirm the referee's report:

… "[F]ailure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale" … and thus, the defendants properly raised it in opposition to the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale.

"Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" … . RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower … .

… The affidavit of Brittany Wilson, an officer of Wells Fargo Bank, N.A. … , the servicing agent of the plaintiff, was insufficient to establish that the plaintiff complied with RPAPL 1304. While Wilson attested that she was familiar with Wells Fargo's records and record-keeping practices and that the plaintiff complied with RPAPL 1304 by mailing the required notices, which were attached to her affidavit, she failed to attest that she personally mailed the notices or that she was familiar with the mailing practices and procedures of Wells Fargo. Therefore, the plaintiff "failed to establish proof of standard office practice and procedures designed to ensure that items are properly addressed and mailed" … . U.S. Bank N.A. v Valencia, 2023 NY Slip Op 04426, Second Dept 8-30-23

Practice Point: The bank's failure to demonstrate compliance with the notice of foreclosure requirements of RPAPL 1304 can be raised at any time before the judgment of foreclosure and sale.

AUGUST 30, 2023

HUMAN RIGHTS LAW, NYS VS NYC, COLLATERAL ESTOPPEL, EMPLOYMENT LAW.

DISMISSAL OF THE HOSTILE WORK ENVIRONMENT CAUSES OF ACTION IN FEDERAL COURT DID NOT COLLATERALLY ESTOP PLAINTIFF'S HOSTILE WORK ENVIRONMENT CAUSE OF ACTION IN STATE COURT PURSUANT TO THE NEW YORK CITY HUMAN RIGHTS LAW (NYCHRL) (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the dismissal of the hostile work environment causes of action by the federal court did not collaterally estop plaintiff's hostile work environment cause of action in state court pursuant to the New York City Haman Rights Law (NYCHRL):

Supreme Court erred in granting dismissal of the cause of action alleging hostile work environment pursuant to CPLR 3211(a)(5). The District Court analyzed the hostile work environment claims under the standards set by Title VII and NYSHRL, and determined that those claims were neither "pervasive" nor "extraordinarily severe." Under NYCHRL, a claimant must only prove that they were "treated less well than other employees" because of their gender … . As the plaintiff's allegations of sexual harassment and improper touching could constitute "more than petty slights and trivial inconveniences" without rising to the level of being severe and pervasive, Supreme Court should not have granted dismissal of this cause of action pursuant to the doctrine of collateral estoppel … . Domingo v Avis Budget Group, Inc., 2023 NY Slip Op 04463, Second Dept 8-30-23

Practice Point: The New York City Human Rights Law has less stringent standards for a hostile work environment cause of action than those required by the New York State Human Rights Law.

AUGUST 30, 2023

LONG-ARM JURISDICTION, FRAUD, CONTRACT LAW, LIMITED LIABILITY COMPANY LAW.

THE CRITERIA FOR LONG-ARM JURISDICTION BASED UPON A TORT COMMITTED "WITHIN THE STATE" CLARIFIED; NEW YORK DID NOT HAVE LONG-ARM JURISDICTION OVER THE OUT-OF-STATE INDIVIDUAL DEFENDANTS, MEMBERS OF AN LLC WHICH SOLD N95 MASKS TO THE NEW YORK PLAINTIFF; IT WAS ALLEGED THE QUALITY OF THE MASKS WAS MISREPRESENTED IN AN EMAIL TO THE NEW YORK PLAINTIFF (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Pitt-Burke, determined New York did not have long-arm jurisdiction over out-of-state individual defendants based upon an alleged misrepresentation in an email sent by defendants as principals of defendant LLC (RPP) to the New York plaintiff. RPP sold N95 masks to plaintiff. A picture of a mask sent in the email had the FDA-approval logo on the packaging. Plaintiff alleged the masks actually shipped were not FDA approved:

This appeal presents the opportunity to reaffirm this Court's position on what constitutes a tort committed within the boundaries of this state for purposes of New York's long-arm jurisdiction under CPLR 302(a)(2). … [W]e find that the language "within the state" in CPLR 302(a)(2), means that a nondomiciliary is only subject to New York's long-arm jurisdiction under subsection (a)(2) when they have committed a tortious act, in person or through an agent, while physically present within the boundaries of this state. * * *

… [I]t is undisputed that the alleged fraudulent statements were made outside of New York and that the individual defendants communicated with plaintiff solely in their capacity as principals of RPP. Therefore, we find that plaintiff has failed to demonstrate a basis for imposing long-arm jurisdiction over the individual defendants pursuant to CPLR 302(a)(2), and the motion court should have granted the individual defendants' motion to vacate the default judgment pursuant to CPLR 5015(a)(4) and dismissed the cause of action as against them pursuant to CPLR 3211(a)(8). In light of our determination, we need not reach the issue of whether the exercise of personal jurisdiction comports with due process or whether a discretionary vacatur was warranted as it relates to the individual defendants. SOS

Capital v Recycling Paper Partners of PA, LLC, 2023 NY Slip Op 04480, First Dept 8-31-23

Practice Point: Here the criteria for long-arm jurisdiction based upon a tort committed in New York were clarified by the First Department.

AUGUST 31, 2023

PRIVILEGE, MEDICAL RECORDS.

EVEN THOUGH DEFENDANT'S PHYSICAL CONDITION WAS IN CONTROVERSY, DEFENDANT DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE WITH RESPECT TO THE MEDICAL RECORDS CONCERNING SEXUALLY-TRANSMITTED DISEASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not waive the physician-patient privilege and, therefore, plaintiff was not entitled to defendant's medical records which relate to sexually-transmitted disease:

"A party seeking to inspect a defendant's medical records must first demonstrate that the defendant's physical or mental condition is 'in controversy' within the meaning of CPLR 3121(a)" … . "Even where this preliminary burden has been satisfied, discovery may still be precluded where the information requested is privileged and thus exempt from disclosure pursuant to CPLR 3101(b)" … . Once the physician-patient privilege is validly asserted, it must be recognized, and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived (see CPLR 3101[b]; * * *

… [I]n order to effect a waiver, a defendant must affirmatively assert the condition 'either by way of counterclaim or to excuse the conduct complained of by the plaintiff" … . * * *

The record was insufficient to establish that the defendant voluntarily disclosed any information to the plaintiff or other third parties which would have served as a waiver of privilege … . Hausman v Smith, 2023 NY Slip Op 04457, Second Dept 8-30-23

Practice Point: Even where a party's physical condition is in controversy, the physician-patient privilege may preclude discovery of medical records concerning a condition which was not affirmatively asserted by that party.

AUGUST 30, 2023

REAL PROPERTY TAX LAW, COMMENCEMENT OF ACTION.

THE REAL PROPERTY TAX LAW (RPTL), NOT THE CPLR, CONTROLS THE COMMENCEMENT OF A REAL PROPERTY TAX FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city in this property tax foreclosure proceeding properly followed the procedure for commencing the action prescribed in the Real Property Tax Law (RPTL) (as opposed to the CPLR procedure):

Real Property Tax Law provides that a proceeding for the foreclosure of tax liens in rem shall be commenced in the manner provided in Real Property Tax Law article 11, title 3 (see id. § 1120). Title 3 sets forth specific requirements for public notice by publication and personal notice to owners and other persons with a right, title, or interest in affected properties (see id. §§ 1124, 1125). RPTL 1125(3)(c) provides that the service required by that section "shall be deemed to be equivalent to the service of a notice of petition pursuant to [CPLR 403]" … . Thus, the City was required to comply with the service requirements set forth in the Real Property Tax Law, rather than those set forth in the CPLR … . The City established that it satisfied the notice and service requirements set forth in the Real Property Tax Law and that it is entitled to a default judgment with respect to the parcels of real property identified in the City's motion (see RPTL 1131, 1136[3]). Matter of Foreclosure of Tax Liens (City of Newburgh), 2023 NY Slip Op 04381, Second Dept 8-23-23

Practice Point: The procedure for commencing a real property tax foreclosure action is prescribed by the Real Property Tax Law (RPTL), not the CPLR.

AUGUST 23, 2023

REARGUE, MOTIONS TO.

PLAINTIFF'S MOTION TO REARGUE MERELY REPEATED HER EARLIER ARGUMENTS AND DID NOT DEMONSTRATE THE COURT HAD OVERLOOKED OR MISUNDERSTOOD FACTS OR LAW; THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to reargue the summary judgment motion in this slip and fall case should not have been granted. Supreme Court had originally granted the city's motion for summary judgment on the ground it did not have written notice of the dangerous condition. After the motion to reargue was granted, Supreme Court denied the city's motion. Because the motion to reargue did not present new information and merely repeated the earlier arguments, it should have been denied:

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" … . However, "[a] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented" … . * * *

In support of her motion for leave to reargue, the plaintiff merely repeated her earlier arguments and did not demonstrate that the Supreme Court had overlooked or misapprehended any matter of fact or law in rendering the prior determination … . Hallett v City of New York, 2023 NY Slip Op 04367, Second Dept 8-23-23

Practice Point: A motion to reargue must be based on law or facts allegedly overlooked or misunderstood by the court. Here the motion merely repeated earlier arguments and, therefore, the motion should not have been granted.

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SERVICE OF PROCESS, FORECLOSURE.

A HEARING IS REQUIRED TO DETERMINE WHETHER DEFENDANT WAS PROPERLY SERVED IN THIS FORECLOSURE ACTION AND WHETHER DEFENDANT SHOULD BE ESTOPPED FROM CONTESTING SERVICE (SECOND DEPT).

The Second Department, reversing Supreme Court, over a concurrence arguing defendant is estopped from contesting service of process, determined a hearing was required to determine whether defendant was properly served in this foreclosure action and whether defendant should be estopped from contesting service:

The defendant's sworn statements that he had relocated to California and was living there at the time of the purported service, coupled with a copy of the defendant's executed residential lease agreement for an apartment in Los Angeles, were sufficient to warrant a hearing to determine whether service was properly effectuated … . …

… [T]he plaintiff's evidence demonstrating that the defendant failed to update his address with the plaintiff or with the United States Postal Service was insufficient to establish, without a hearing, that the defendant should be estopped from contesting service as a matter of law … . The defendant's statement on a 2015 mortgage assistance application that the subject property was his principal residence also does not establish, as a matter of law, that the defendant is estopped from contesting that the subject property was a valid address for service of process, as the defendant's representation on the mortgage assistance application was made prior to the date when he claims to have relocated to California, and three years prior to the date of purported service at the subject property … . U.S. Bank N.A. v Henry, 2023 NY Slip Op 04391, Second Dept 8-23-23

Practice Point: A party who takes steps to avoid service of process may be estopped from contesting service. Here a hearing on the issue should have been held.

AUGUST 23, 2023

STATUTES OF LIMITATIONS, 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.

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AUGUST 9, 2023

STATUTES OF LIMITATIONS, COVID TOLL, NEGLIGENCE.

THE COVID STATUTE OF LIMITATIONS TOLL FROM MARCH TO NOVEMBER 2020 DID NOT ONLY APPLY TO ACTIONS WHOSE STATUTES OF LIMITATIONS EXPIRED DURING THAT PERIOD; THEREFORE PLAINTIFF'S ACTION WAS TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the COVID toll of the statute of limitations rendered plaintiff's negligence action timely, noting that the toll did not apply only to statutes of limitations which expired during the toll period:

Pursuant to CPLR 214(5), an action to recover damages for personal injuries is subject to a three-year statute of limitations. In Brash v Richards, this Court held that the executive orders "constitute a toll" of the filing deadlines applicable to litigation in New York courts (Brash v Richards, 195 AD3d 582, 582 …). … [T]his toll of the statute of limitations did not only apply to statutes of limitations that expired between March 20, 2020, and November 3, 2020 … .

… [D]ue to the tolling provision of the executive orders, the statute of limitations within which the plaintiff was required to commence this action was tolled between March 20, 2020, and November 3, 2020 … Thus, this action … was commenced against those defendants well within the statute of limitations. Williams v Ideal Food Basket, LLC, 2023 NY Slip Op 04436, Second Dept 8-30-23

Practice Point: The COVID toll of the statute of limitations from March to November 2020 applies to all actions, not only those whose statutes of limitations expired during that period of time.

AUGUST 30, 2023