NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 28 – September 1, 2023, and Posted on the New York Appellate Digest Website on Tuesday, September 5, 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.

Weekly Reversal Report
August 28 – September 1, 2023

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CIVIL PROCEDURE, CONTRACT LAW, FRAUD, 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.

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CIVIL PROCEDURE, EVIDENCE.

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.

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CIVIL PROCEDURE, 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

CIVIL PROCEDURE, 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.

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

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.

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HUMAN RIGHTS LAW, MUNICIPAL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

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.

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LEGAL MALPRACTICE, ATTORNEYS, FRAUD.

PLAINTIFF IN THIS LEGAL MALPRACTICE ACTION WAS NOT REPRESENTED BY DEFENDANT ATTORNEY; PLAINTIFF ALLEGED HE WAS REQUIRED TO DEFEND A FAKE CUSTODY PETITION "FILED" BY DEFENDANT ATTORNEY; PLAINTIFF STATED CAUSES OF ACTION FOR LEGAL MALPRACTICE AND A VIOLATION OF JUDICIARY LAW 487 DESPITE THE ABSENCE OF PRIVITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the legal malpractice action brought by a party who was not represented by the defendants should not have been dismissed. Plaintiff alleged the defendant attorney "filed" a fake custody petition for which plaintiff incurred $28,000 in attorney's fees to defend against:

"While the complaint does not allege an attorney-client relationship between the plaintiff[ ] and the defendants, it sets forth a claim which falls within 'the narrow exception of fraud, collusion, malicious acts or other special circumstances' under which a cause of action alleging attorney malpractice may be asserted absent a showing of privity" … .

The Supreme Court further erred in granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging violation of Judiciary Law § 487. As relevant here, Judiciary Law § 487 imposes civil liability on any attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive . . . any party." Here, accepting the plaintiff's allegations as true and giving the plaintiff the benefit of every possible favorable inference, the amended complaint adequately states a cause of action to recover damages for violation of Judiciary Law § 487 … . Garanin v Hiatt. 2023 NY Slip Op 04459, Second Dept 8-30-23

Practice Point: There are, as here, circumstances where a party who was not represented by the attorney can bring legal malpractice and "violation of Judiciary Law 487" actions against the attorney. Plaintiff alleged he was forced to defend against a fake custody petition "filed" by defendant attorney.

AUGUST 30, 2023

MEDICAL MALPRACTICE, EVIDENCE.

IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' EXPERTS DID NOT ADDRESS ALL THE ALLEGATIONS IN THE BILLS OF PARTICULARS AND RELIED ON A DISPUTED FACT; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice actions should not have been granted. It was alleged that plaintiff's decedent was not properly treated for a stroke. The defendants' experts did not address all the allegations in the bills of particulars and relied on a disputed fact:

… [T]he expert physician for the defendants …, failed to address all of the specific allegations set forth in the plaintiff's bill of particulars … . Because [the] affirmation relied upon a disputed fact, specifically that the decedent's condition was improving … , it was insufficient to establish, prima facie, that.[defendants] did not deviate or depart from accepted medical practice or that such deviation or departure was not a proximate cause of the decedent's injuries … . Hiegel v Orange Regional Med. Ctr., 2023 NY Slip Op 04434, Second Dept 8-30-23

Practice Point: In a medical malpractice action, at the summary judgment stage, the defense experts must address all the allegations in the bill of particulars and may not rely on facts which are disputed.

AUGUST 30, 2023

MEDICAL MALPRACTICE, EVIDENCE.

THE EXPERT AFFIDAVITS SUBMITTED BY DEFENDANT HOSPITAL IN THIS MEDICAL MALPPRACTICE ACTION WERE CONCLUSORY AND DID NOT ADDRESS ALL OF PLAINTIFF'S ALLEGATIONS; THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court in this medical malpractice action, determined the expert affidavits were conclusory and did not address all the allegations made by plaintiff. Therefore defendant's (St. Luke's) motion for summary judgment should not have been granted:

The expert nurse and expert neurologist on whose affidavits St. Luke's relied merely averred in a conclusory manner that the decedent could not have been monitored in a way to prevent her fall, that St. Luke's implemented every appropriate fall risk procedure before the decedent's fall, and that the decedent's fall and the resulting subdural hematoma were not substantial factors in causing the decedent's death … . The expert nurse also did not submit the fall risk assessment or hospital fall prevention policy in accordance with which, she claimed, the decedent was monitored … . Because St. Luke's did not carry its prima facie burden on its motion, Supreme Court should have denied defendant's motion with respect to those predicates, regardless of the sufficiency of the moving papers … .

As for the remaining predicates for plaintiffs' medical malpractice claim, St. Luke's did not address them in its moving papers, nor did its experts address them in their affidavits. Accordingly, St. Luke's did not establish its prima facie entitlement to summary judgment dismissing them … . Martir v St. Luke's-Roosevelt Hosp. Ctr., 2023 NY Slip Op 04478, First Dept 8-31-23

Practice Point: To warrant summary judgment in a medical malpractice action, the expert affidavits cannot be conclusory and must address all of the relevant allegations.

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MUNICIPAL LAW, NEGLIGENCE.

A MUNICIPALITY HAS A DUTY TO INSPECT TREES ADJACENT TO ROADWAYS EVEN IF THE TREES ARE NOT ON THE MUNICIPALITY'S LAND; HERE THE MUNICIPALITY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITON OF THE TREE WHICH FELL ON PLAINTIFFS CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the town's motion for summary judgment in this falling-tree traffic-accident case should not have been granted. Although the tree which fell on plaintiff's car was on private property, it was adjacent to the road. A municipality has a duty to inspect trees adjacent to roads and the town failed to demonstrate it did not have constructive notice of the dangerous condition of the tree:

"A municipality's duty to maintain its roadways in a reasonably safe condition encompasses those trees, adjacent to the roads, which could reasonably be expected to pose a danger to travelers. However, liability will not attach unless the municipality had actual or constructive notice of the dangerous condition and subsequently failed to take reasonable measures to correct the condition" … . "Municipalities also possess a common-law duty to inspect trees adjacent to their roadways" … .

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . "Where there is no evidence that the tree showed any visible, outward signs of decay prior to the accident, it cannot be said that the municipality had constructive notice of a defect. Rather, a manifestation of decay must be readily observable in order to give rise to a duty to prevent harm" … . Jourdain v Metropolitan Transp. Auth., 2023 NY Slip Op 04421, Second Dept 8-30-23

Practice Point: A town has a duty to inspect trees which are adjacent to roads, even if the trees are on private property. Here the town did not demonstrate that it did not have constructive notice of the condition of the tree which fell on plaintiff's car.

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NEGLIGENCE, BATTERY, COURT OF CLAIMS.

ALTHOUGH THE STATE HAS A DUTY TO PROTECT INMATES FROM ASSAULTS BY OTHER INMATES, THAT DUTY DOES NOT EXTEND TO UNFORESEEABLE ATTACKS (SECOND DEPT).

The Second Department, reversing the Court of Claims. determined the state's motion for summary judgment in this inmate-on-inmate assault case should have been granted. The complaint alleged the assault occurred because of the state's negligent supervision of the inmates in a block yard:

"Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates" … . "That duty does not,

however, render the State an insurer of inmate safety," and negligence cannot be established by the "mere occurrence of an inmate assault" … . Rather, the scope of the State's duty is "limited to providing reasonable care to protect inmates from risks of harm that are reasonably foreseeable, i.e., those that [the State] knew or should have known" …. .

Here, in support of its motion, the State established its prima facie entitlement to judgment as a matter of law dismissing the claim by demonstrating that the alleged assault upon the claimant was not reasonably foreseeable. The State's submissions demonstrated that the claimant did not know his assailant, who unexpectedly engaged in a "surprise attack" against the claimant. Further, the State proffered evidence that it undertook security measures, including requiring every inmate entering the B Block yard to "go through a [m]agnetometer," as well as subjecting inmates to random "pat frisks" and searches. Contrary to the determination of the Court of Claims, the State's failure to employ the use of a particular magnetometer did not present a triable issue of fact … . Armwood v State of New York, 2023 NY Slip Op 04465, Second Dept 8-30-23

Practice Point: Here the state demonstrated it took adequate steps to prevent inmates from bringing weapons into the block yard and the attack on claimant with a scalpel was not reasonably foreseeable. The state's motion for summary judgment in this inmate-on-inmate assault case should have been granted.

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PRIVILEGE, EVIDENCE.

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 ESTATE, CONTRACT LAW.

ALTHOUGH THE MORTGAGE CONTINGENCY PROVISION OF THE PURCHASE CONTRACT WAS NO LONGER OPERABLE BECAUSE THE MORTGAGE COMMITMENT WAS REVOKED AFTER THE CONTINGENCY PERIOD HAD ELAPSED, THE SELLER'S BAD FAITH WARRANTED RETURN OF THE DOWN PAYMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff purchaser was entitled to return of the down payment after the bank refused to extend the mortgage commitment because the seller had not submitted an environmental report. Although the original mortgage-contingency clause was no longer operable (because the loan commitment had been extended pending receipt of the environmental report), it was the seller's failure to provide the report, and not the actions or omissions of the purchaser, which resulted in the termination of the loan commitment:

"A mortgage contingency clause is construed to create a condition precedent to the contract of sale" … . "The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period" … . "However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to any bad faith on the part of the purchaser" … . Rivkin v 1946 Holding Corp., 2023 NY Slip Op 04427, Second Dept 8-30-23

Practice Point: Here the mortgage commitment was revoked after the contingency period in the purchase contract had elapsed. Therefore the contingency provision was no longer operable. However, the seller was responsible for the revocation of the mortgage commitment for failure to submit an environmental report. Therefore the purchaser was entitled to return of the down payment.

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