NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
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APPEALS, MOOTNESS DOCTRINE, COVID, ADMINISTRATIVE LAW.

RATHER THAN ADDRESS WHETHER THE REGULATION REQUIRING HOSPITAL PERSONNEL TO BE VACCINATED AGAINST COVID WAS VALID AND ENFORCEABLE, THE FOURTH DEPARTMENT REFUSED TO APPLY THE EXCEPTION TO THE MOOTNESS DOCTRINE TO CONSIDER THE MERITS OF THE APPEAL, FLATLY STATING THE PANDEMIC IS OVER AND IS UNLIKELY TO OCCUR AGAIN (FOURTH DEPT).

The Fourth Department determined the appeal of Supreme Court's ruling that the regulation requiring hospitals to mandate COVID vaccines for certain personnel exceeded the state's authority has been rendered moot. The state has repealed the regulation. The exception to the mootness doctrine did not apply:

"[A]lthough the issue of the lawfulness of the [regulation] implemented as part of the extraordinary response to the COVID-19 pandemic is substantial and novel, that issue is not likely to recur" given the once-in-a-century nature of the pandemic and the emergency governmental response thereto … . Moreover, "the issue is not of the type that typically evades review" … . Indeed, the regulation at issue here received significant review from numerous state and federal courts … . In any

event, under the circumstances of this case, we would "decline to invoke the mootness exception" … . Matter of Medical Professionals for Informed Consent, Individually & On Behalf of Its Members, Kristen Robillard, M.D., Zarina Hernandez-schipplick, M.D., Margaret Florini, A.S.C.P., Olyesya Girich, Rt (r), & Elizabeth Storelli, R.N., Individually & On Behalf of Others Similarly Situated v Bassett, 2023 NY Slip Op 05052, Fourth Dept 10-6-23

Practice Point: Health care workers lost their jobs if they refused to be vaccinated against COVID-19 based upon the regulation at issue here. At this writing, the COVID booster campaign continues unabated for everyone over six months of age. Yet the Fourth Department refused to consider whether the regulation was valid and enforceable, instead declaring the pandemic over and unlikely to occur again.

OCTOBER 6, 2023

ARTICLE 78 VERSUS DECLARATORY JUDGMENT, LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY LAW.

THE PETITIONERS BROUGHT A HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION CHALLENGING A LOCAL LAW PROHIBITING SHORT-TERM RENTAL PROPERTIES; THE COURT NOTED THAT THE SUMMARY PROCEDURE AVAILABLE UNDER ARTICLE 78 SHOULD NOT HAVE BEEN APPLIED TO THE DECLARATORY-JUDGMENT ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that in a hybrid Article 78/declaratory judgment/damages action, the summary procedure under Article 78 does not apply to the declaratory judgment. In order to summarily dispose of the declaratory judgment/damages aspect of the action, a party must request it or the court must notify the parties. Here the petitioners, owners of short-term rental properties, challenged the local law prohibiting rental periods of less than 14 days:

"In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or

seeking a declaratory judgment" … . "[W]here no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action"… .

Here, the record contains no indication that the Supreme Court gave notice to the parties that it was contemplating the summary dismissal of the declaratory judgment causes of action, or that the respondents/defendants had made an application for such relief. Therefore, the court erred in summarily disposing the causes of action for declaratory relief … . Matter of Jellyfish Props., LLC v Incorporated Vil. of Greenport, 2023 NY Slip Op 05136, Second Dept 10-11-23

Practice Point: In a hybrid Article 78/declaratory judgment action, the summary procedure available under Article 78 cannot be used to dispose of the declaratory judgment action unless a party requests it or the court so notifies the parties.

OCTOBER 11, 2023

ATTORNEYS, DISQUALIFICATION, ADVOCATE-WITNESS RULE.

PLAINTIFF'S COUNSEL SHOULD NOT HAVE BEEN DISQUALIFIED PURSUANT TO THE ADVOCATE-WITNESS RULE, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's (Gamez's) counsel should not have been disqualified pursuant to the advocate-witness rule:

"[T]he disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion" … . A party moving to disqualify counsel on the ground that he or she may be called as a witness must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party … . "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight

of the testimony, and availability of other evidence" … . Here, Lopez [defendant] failed to demonstrate that any anticipated testimony by Gamez's counsel would be necessary to Lopez's case and that such testimony would be prejudicial to Gamez … . Gamez v Lopez, 2023 NY Slip Op 05250, Second Dept 10-18-23

Practice Point: The criteria for the disqualification of counsel pursuant to the advocate-witness rule were not met here. The testimony of the opposing party's counsel must be necessary to the moving party's case, and the testimony must be prejudicial to the opposing party.

OCTOBER 18, 2023

BANKRUPTCY, TOLL OF STATUTE OF LIMITATIONS, FORECLOSURE.

EVEN THOUGH THE DEBTOR TRANSFERRED THE PROPERTY TO THE NON-DEBTOR CODEFENDANT YEARS BEFORE FILING FOR BANKRUPTCY, THE BANKRUPTCY TOLLED THE FORECLOSURE STATUTE OF LIMITATIONS FOR THE ACTION AGAINST THE DEBTOR; THE TOLL DID NOT APPLY TO THE ACTION AGAINST THE NON-DEBTOR WHICH NEVER FILED FOR BANKRUPTCY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connolly, reversing (modifying) Supreme Court, determined the foreclosure statute of limitations was tolled by the bankruptcy stay for the action against the defendant who filed for bankruptcy, but not for the defendant to which the property was transferred (who did not file for bankruptcy):

This appeal requires us to examine whether the stay provided by section 362 of the 1978 Bankruptcy Code (11 USC § 362[a]) operates as a "statutory prohibition" under CPLR 204(a) to toll the statute of limitations to commence a mortgage foreclosure action against a defendant debtor who no longer owns the property that is the subject of the mortgage foreclosure action. We hold that the bankruptcy stay pursuant to subsection 362(a)(1) (see 11 USC § 362[a][1]) tolls the statute of limitations for commencing a mortgage foreclosure action against the defendant debtor, regardless of whether that defendant owns the property at the time of the bankruptcy filing.

This appeal also requires us to determine whether the bankruptcy stay pursuant to subsection 362(a) applies to a nondebtor codefendant to which the defendant debtor transferred the property years before filing for bankruptcy. On the record before this Court, the plaintiff failed to meet its burden of raising a question of fact as to whether the bankruptcy stay applied to the nondebtor codefendant. Bank of N.Y. Mellon v DeMatteis, 2023 NY Slip Op 05242, Second Dept 10-18-23

Practice Point: Filing for bankruptcy tolls the foreclosure statute of limitations, even if the property had been transferred before the filing.

OCTOBER 18, 2023

COMPLAINT WHICH IS NOT SERVED IS NOT AN "ACTION."

A COMPLAINT THAT IS NEVER SERVED DOES NOT CONSTITUTE AN "ACTION;" HERE A PRIOR COMPLAINT WAS NEVER SERVED; THEREFORE THE INSTANT COMPLAINT SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THERE WAS ANOTHER IDENTICAL ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint in this traffic accident case should not have been dismissed because it was identical to a prior action. The first complaint was never served so there was no prior action:

CPLR 3211(a)(4) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against [them] on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States." However, a complaint must have been served in that other action, otherwise it is not "another action," or a "prior action pending" … within the meaning of CPLR 3211(a)(4) … . Here, it is undisputed that the complaint in the prior action was not served. Quinones v Z & B Trucking, Inc., 2023 NY Slip Op 05282, Second Dept 10-18-23

Practice Point: A complaint which is never served does not constitute an "action." The subsequent identical complaint should not have been be dismissed on the ground there was a prior identical action.

OCTOBER 18, 2023

COMPLAINT, MOTION TO AMEND, NEGLIGENCE, PUNITIVE DAMAGES.

THE MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES SHOULD HAVE BEEN GRANTED; ADDING ALLEGATIONS WHICH INCREASE A DEFENDANT'S EXPOSURE TO LIABILITY DOES NOT CONSTITUTE PREJUDICE TO THE DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion to amend the complaint to add a claim for punitive damages did not prejudice defendant (Eldridge) and should have been granted:

The court improvidently exercised its discretion and should have granted plaintiffs' motion to amend the complaint to add a claim for punitive damages against Eldridge based on his deposition testimony that he knowingly drove a truck on a public roadway with defective brakes, horn, and one inoperable windshield wiper, and was reaching for his cell phone that had fallen to the floor of the car when his truck collided with the rear of plaintiffs' vehicle. A jury might find that such conduct sufficiently demonstrated a conscious and willful disregard of the interests of others … .

The court denied plaintiffs' motion to reargue their … order upon a finding that the amendment would prejudice Eldridge because it subjected him to personal exposure in the accident. However, greater exposure to liability does not constitute prejudice. There must be some indication that defendant has been hindered in the preparation of its case or has been prevented from taking some measure to support its position, and the burden of demonstrating prejudice is on the party opposing amendment … . Eldridge failed to sustain his burden of showing prejudice. Owens v STD Trucking Corp., 2023 NY Slip Op 05323, First Dept 10-19-23

Practice Point: Here the fact that the proposed amendment to the complaint exposed the defendant to greater exposure to liability does not constitute prejudice. The motion to amend the complaint to add a claim for punitive damages should have been granted.

OCTOBER 19, 2023

COURT OF CLAIMS, SUFFICIENCY OF CLAIM, NEGLIGENCE.

CLAIMANT ALLEGED SHE WAS SEXUALLY ABUSED BY TWO NAMED COUNSELORS FROM 1976 – 1978; THE CLAIM SUFFICIENTLY STATED A CAUSE OF ACTION PURSUANT TO THE CHILD VICTIMS ACT (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim sufficiently stated a Child Victims Act cause of action stemming from claimant's time in foster care from 1976 to 1978:

In August 2021, the claimant commenced this claim pursuant to the Child Victims Act (see CPLR 214-g) against the defendant, inter alia, to recover damages for negligent hiring, retention, and supervision. The claim alleged that the claimant, who had been placed in a group home for foster children when she was a child, was sexually abused by two named counselors at the facility from approximately 1976 to 1978. * * *

Court of Claims Act § 11(b) requires a claim to specify: "(1) the nature of the claim; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed" … . These statutory requirements are "strictly construed," and a failure to comply with any of those requirements "constitutes a jurisdictional defect mandating dismissal" … . The purpose of the pleading requirements is to provide "a sufficiently detailed description of the particulars of the claim" so that the defendant can "investigate and promptly ascertain the existence and extent of its liability" … . "However, absolute exactness is not required, so long as the particulars of the claim are detailed in a manner sufficient to permit investigation" … .

Contrary to the Court of Claims' determination, the claim set forth the nature of the claim with sufficient detail to allow the defendant to investigate the claim in a prompt manner and to assess its potential liability … . Brown v State of New York, 2023 NY Slip Op 04997, Second Dept 10-4-23

Practice Point: To state a cause of action pursuant to the Child Victims Act, the claim need only provide sufficient detail to allow a prompt investigation. Here the claimant alleged sexual while in foster care from 1976 – 1978 by two named counselors. The claim should not have been dismissed.

OCTOBER 4, 2023

COURT OF CLAIMS, SUFFICIENCY OF CLAIM, NEGLIGENCE.

THE "TIME WHEN" THE ALLEGED SEXUAL ABUSE TOOK PLACE IN 1997 WAS ADEQUATELY ALLEGED IN THE CLAIM IN THIS CHILD VICTIMS ACT SUIT (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act action sufficiently described when the alleged sexual abuse took place:

… [T]he Court of Claims incorrectly determined that the claim was insufficient to satisfy Court of Claims Act § 11(b)'s "time when" requirement … . The claimant's allegations, including that the abuse occurred in approximately 1997 when she was approximately 15 years old by a named employee of the facility shortly after her arrival at the facility, provided sufficient information to enable the State to investigate and ascertain its liability under the circumstances … . Ford v State of New York, 2023 NY Slip Op 05124, Second Dept 10-11-23

Practice Point: In Child Victims Act cases where the alleged sexual abuse took place decades ago, the courts are forgiving when determining the sufficiency of the "time when" allegations. Here the allegations claimant was abused by a named employee in 1997, when she was 15, shortly after her arrival at the facility, were deemed sufficient.

OCTOBER 11, 2023

DEFAULT JUDGMENT, MOTION TO VACATE, JUDGES.

A DEFENDANT WHO MOVES TO VACATE A DEFAULT JUDGMENT FOR LACK OF PERSONAL JURISDICTION DOES NOT NEED TO DEMONSTRATE A REASONABLE EXCUSE FOR THE DEFAULT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the motion to vacate a default judgment for lack of personal jurisdiction should not have been treated as a motion to vacate based on an excusable default. The defendant raised a question

of fact about whether he was properly served by demonstrating the address at issue did not exist. There was no requirement that defendant demonstrate a reasonable excuse:

Where, as here, a defendant moves to vacate a judgment entered upon [the defendant's] default in appearing or answering the complaint on the ground of lack of personal jurisdiction [under CPLR 5015 (a) (4)], the defendant is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense" … . Thus, contrary to the court's determination, it is immaterial when defendant first learned of the judgment.

With respect to the merits, defendant contended in support of his motion that the court lacked personal jurisdiction over him because he was not properly served with the supplemental summons and amended complaint pursuant to CPLR 308 (4) (see CPLR 5015 [a] [4]). "Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served[, but] . . . a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit" … . We agree with defendant that, by submitting uncontradicted evidence that the address listed in the affidavit of service does not exist, he overcame the presumption of proper service and created "a genuine question" whether the "nail and mail" service used here was effected in accordance with the statute … . L&W Supply Corp. v Built-Rite Drywall Corp., 2023 NY Slip Op 05079, Fourth Dept 10-6-23

Practice Point: Here defendant was purportedly served by "nail and mail." Defendant demonstrated the address in the affidavit of service did not exist. Therefore defendant was entitled to a hearing. There was no need for defendant to demonstrate a reasonable excuse for the default.

OCTOBER 6, 2023

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DEFAULT JUDGEMENT, MOTION TO VACATE, DEBTOR-CREDITOR, USURY.

THE MOTION TO VACATE THE DEFAULT SHOULD HAVE BEEN GRANTED IN THE INTEREST OF JUSTICE, NO NEED TO DEMONSTRATE A REASONABLE EXCUSE; THE LOAN AGREEMENT WAS CRIMINALLY USURIOUS; THE MOTION TO DISIMISS BASED ON DOCUMENTARY EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the default judgment should have been vacated in the interest of justice and the complaint dismissed based on documentary evidence. The loan which was the basis of the action was criminally usurious:

"CPLR 5015(a) 'does not provide an exhaustive list as to when a default judgment may be vacated'" … . "In addition to the grounds set forth in section 5015(a), a court may vacate a default 'for sufficient reason and in the interests of substantial justice'" … . "[A] party is not necessarily required to establish a reasonable excuse in order to be entitled to vacatur in the interest of justice" … . * * *

The plaintiff does not dispute that the agreement effected an annual interest rate exceeding the criminally usurious threshold of 25% (see Penal Law § 190.40).

… "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" … . Here, … the defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan … . Crystal Springs Capital, Inc. v Big Thicket Coin, LLC, 2023 NY Slip Op 05121, Second Dept 10-11-23

Practice Point: A motion to vacate a default in the interest of justice does not require a reasonable excuse.

Practice Point: The usurious loan agreement justified dismissal based on documentary evidence.

OCTOBER 11, 2023

DISMISS, MOTION TO, FAILURE TO ENTER DEFAULT JUDGMENT, FORECLOSURE.

PLAINTIFF BANK DID NOT START PROCEEDINGS TO ENTER A DEFAULT JUDGMENT WITHIN ONE YEAR AND DID NOT PRESENT AN ADEQUATE EXCUSE FOR THE DELAY; THE MOTION TO DISIMISS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not seek a default judgment within one year and did not offer a reasonable excuse for the delay. Therefore there was no need for the court to consider whether plaintiff had a meritorious cause of action. The complaint should have been dismissed:

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." "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" … . …

… [T]his matter was released from the settlement conference part in December 2011, and that the plaintiff failed to take steps to initiate proceedings for the entry of a default judgment by moving for leave to enter a default judgment and for an order of reference until March 2013, "which was too late for the plaintiff to 'manifest an intent not to abandon the case'" … . … [Plaintiff] offered only vague, conclusory, and unsubstantiated assertions which were insufficient to excuse the plaintiff's delay in moving for leave to enter a default judgment … .

Since [plaintiff] failed to proffer a reasonable excuse for the plaintiff's delay, this Court need not consider whether the plaintiff had a potentially meritorious cause of action … . Citimortgage, Inc. v Kimmerling, 2023 NY Slip Op 05246, Second Dept 10-18-23

Practice Point: Pursuant to CPLR 3215(c). if the plaintiff does not start proceedings to enter a default judgment within a year and does not offer an

adequate excuse for the delay, the complaint must be dismissed. There is no need for the court to consider whether plaintiff has a meritorious cause of action.

OCTOBER 18, 2023

FORECLOSURE, INTEREST ON JUDGMENT.

ALTHOUGH THE TEN-YEAR DELAY BETWEEN THE JUDGMENT OF FORECLOSURE AND THE SALE OF THE PROPERTY WAS NOT WRONGFUL, THE DEFENDANT SHOULD NOT BE REQUIRED TO PAY THE INTEREST ACCRUED DURING THE DELAY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this foreclosure action was not entitled to interest for the ten years between the judgment of foreclosure and the sale of the property:

… [T]he plaintiff explained that his delay in proceeding with the sale of the subject property was based upon his opinion that it was not worthwhile to pursue a foreclosure sale due to market conditions and his belief that there was "no significant equity in the property" beyond the amount of the first mortgage on the property, which had priority over that held by the plaintiff. While the plaintiff's failure to conduct the sale based on a potential financial benefit to him was not wrongful conduct, per se, his inaction was the sole cause of the accrual of more than 10 years of postjudgment interest, which is roughly equivalent to the principal amount awarded in the order and judgment of foreclosure and sale in the first instance (see CPLR 5004). Under these circumstances, it would be inequitable to charge Romano [defendant] with such accrued interest … . Krupnick v Romano, 2023 NY Slip Op 05398, Second Dept 10-25-23

Practice Point: Here the plaintiff did not sell the property until ten years after the judgment of foreclosure due to market conditions. Although the delay was not wrongful, the defendant should not be required to the pay the interest on the judgment accrued during the ten-year delay.

OCTOBER 25, 2023

FORECLOSURE, STATUTE OF LIMITATIONS, ACTIONS DISMISSED FOR LACK OF STANDING.

PRIOR FORECLOSURE ACTIONS DISMISSED FOR LACK OF STANDING DO NOT ACCELERATE THE DEBT AND THEREFORE DO NOT START THE RUNNING OF THE STATUTE OF LIMITATIONS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the prior foreclosure actions had been dismissed for lack of standing and therefore did not accelerate the debt and did not start the running of the statute of limitations. Here the plaintiffs sought discharge and cancellation of the mortgage on the ground the statute of limitations for a foreclosure action had expired:

Because the 2009 and the 2012 actions were dismissed due to lack of standing by defendant, the debt was not validly accelerated when those actions were commenced. As such, the statute of limitations to foreclose on the mortgage did not start to run. Stated differently, the statute of limitations has not expired. Caprotti v Deutsche Bank Natl. Trust Co., 2023 NY Slip Op 05428m Third Dept 10-26-23

Practice Point: Foreclosure actions dismissed for lack of standing do not accelerate the debt and do not start the running of the statute of limitations.

OCTOBER 26, 2023

FORECLOSURE, VOLUNTARY DISCONTINUANCE, STATUTE OF LIMITATIONS.

A VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION NO LONGER STOPS THE STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that a voluntary discontinuance of a foreclosure action no longer stops the running of the statute of limitations:

… [T]he six-year statute of limitations began to run on the entire debt in July 2011, when the plaintiff's predecessor in interest commenced the 2011 action and elected to call due the entire amount secured by the mortgage … . The instant action was commenced in October 2017, more than six years later (see CPLR 213[4] …). Under the recently enacted Foreclosure Abuse Prevention Act (L 2022, ch 821, § 8

[eff Dec. 30, 2022]), the voluntary discontinuance of the 2011 action did not "in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" (CPLR 3217[e]; see CPLR 203[h] …). Under these new legal principles, the plaintiff cannot rely upon the voluntary discontinuance of the 2011 action to establish entitlement to judgment as a matter of law on the issue of whether enforcement of the mortgage loan is barred by the statute of limitations. CIT Bank, N.A. v Byers, 2023 NY Slip Op 04978, Second Dept 10-4-23

Practice Point: Pursuant to the Foreclosure Abuse Prevention Act (2022) the bank can no longer stop the running of the statute of limitations by voluntarily discontinuing the foreclosure action.

OCTOBER 4, 2023

INQUEST, MOTION TO REOPEN, EVIDENCE, JUDGES.

IT WAS AN ABUSE OF DISCRETION TO DENY PLAINTIFF'S MOTION TO REOPEN THE INQUEST ON DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined it was an abuse of discretion to deny plaintiff's motion to reopen the inquest on damages. Although the motion was untimely, there was no prejudice to the defendants:

… [T]he Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was, in effect, to reopen the inquest in order to permit the plaintiff to submit what the court had indicated was crucial evidence … . Moreover, there was no evidence that the defendants would be prejudiced … . Although the plaintiff's motion was not made in a timely fashion, a factor which ordinarily weighs against granting such relief … , the record here reflects that the delay may have been due in part to the plaintiff's confusion regarding the court's directive as to how to proceed … . Commonwealth Land Title Ins. Co. v Islam, 2023 NY Slip Op 05119, Second Dept 10-11-23

Practice Point: Here plaintiff sought to reopen the inquest on damages to present crucial evidence which had been requested by the judge. Although the request was untimely, there was no prejudice to the defendants. It was an abuse of discretion to deny the motion.

OCTOBER 11, 2023

JUDGES, JUDGMENT MUST CONFORM TO THE ORDER.

A JUDGE CANNOT ENTER A JUDGMENT WHICH DOES NOT CONFORM TO THE ORDER; HERE THE JUDGMENT ELIMINATED MILLIONS OF DOLLARS IN DAMAGES AND EXTINGUISHED A DEFENDANT'S LIABILITY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the judge did not have the power to, sua sponte, enter an judgment which did not conform to its order. The judgment eliminated millions of dollars in damages and extinguished liability with respect to a defendant:

"A written order [or judgment] must conform strictly to the court's decision, and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls" … . A court exceeds its authority when it sua sponte vacates its prior order, as it "has no revisory or appellate jurisdiction, sua sponte, to vacate its own order" … . Here, the court exceeded its authority in entering the judgment, which effectively reversed or vacated its prior confirmation order without notice. Accordingly, the court is directed to enter a revised judgment that conforms to the confirmation order with respect to damages and liability. Magna Equities II, LLC v Writ Media Group Inc., 2023 NY Slip Op 05320, First Dept 10-19-23

Practice Point: A judge cannot effectively vacate a prior order by entering a judgment which does not conform to the order.

OCTOBER 19, 2023

JUDGES, MOTION TO DISMISS.

TO CONSIDER A LATE MOTION TO DISMISS, THE PARTIES MUST FIRST BE PUT ON NOTICE THE MOTION WILL BE TREATED AS A SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the post answer motion to dismiss should not have been heard because there was no notice the motion would be treated as a summary judgment:

By summons and complaint dated July 8, 2021, plaintiff commenced this action against defendant to recover approximately $360,000 in unpaid counsel fees. Defendant answered on or about August 18, 2021 and asserted the statute of limitations as an affirmative defense. On September 1, 2022, defendant moved under CPLR 3211(a)(5) to dismiss the complaint as barred by the statute of limitations. Defendant's post-answer motion to dismiss was not timely (CPLR 3211 [e] …). Thus, the motion could not be properly considered unless the parties were given adequate prior notice that the motion would be treated as a motion for summary judgment under CPLR 3212 or unless an exception to the notice requirement applied (see CPLR 3211[c] …). Because defendant does not argue that adequate notice was given or that an exception to the notice requirement applied, we reverse and remand for consideration after the parties are given the requisite notice … Smith, Gambrell & Russell, LLP v 3 W. 16th St., LLC, 2023 NY Slip Op 04952, First Dept 10-3-23

Practice Point: A late (post answer) motion to dismiss should not be considered unless the parties have been notified the motion will be treated as a summary judgment motion, or unless some exception to the notice requirement applies.

OCTOBER 3, 2023

NEGLIGENCE, BIFURCATE LIABILITY AND DAMAGES.

THE MOTION TO BIFURCATE THE LIABILITY AND DAMAGES ASPECTS OF THE TRIAL IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED; STATEMENTS MADE TO HEALTHCARE PERSONNEL AND MEDICAL RECORDS WERE RELEVANT TO LIABILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's motion to bifurcate the trial (liability versus damages) in this slip and fall case should not have been granted. Plaintiff made statements to medical personnel which were relevant to liability:

Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he fell from an "upper patio or balcony" of an apartment building … . We agree with plaintiff that Supreme Court abused its discretion in granting defendants-respondents' motion to bifurcate the trial with respect to the issues of liability and damages. "As a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately" … . Here, however, we conclude that the issue of liability is not distinct from the issue of plaintiff's injuries because plaintiff made statements to several of his medical care providers following his fall that render the testimony of several medical witnesses as well as hospital and medical records relevant to the liability phase of the trial. Plaintiff has thus established that bifurcation would not "assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" … . Bogumil v Greenbaum Family Holdings, LP, 2023 NY Slip Op 05069, Fourth Dept 10-6-23

Practice Point: It is usual to bifurcate the liability and damages aspects of negligence trials. Here plaintiff's statements to medical personnel and his medical records were relevant to liability as well as damages. The motion to bifurcate should not, therefore, have been granted.

OCTOBER 6, 2023

SERVICE OF PROCESS, "NAIL AND MAIL," FORECLOSURE.

THE FACT THAT THE HOME WAS ILLUMINATED WHEN THE PROCESS SERVER ATTEMPTED SERVICE DID NOT DEMONSTRATE DEFENDANT WAS EVADING SERVICE; THE PROCESS SERVER DID NOT ATTEMPT SERVICE AT DEFENDANT'S PLACE OF EMPLOYMENT; THE "NAIL AND MAIL" SERVICE WAS INVALID (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "nail and mail" service of process was invalid because the process server's affidavit did not demonstrate "due diligence" in attempting other methods of personal service:

"Service of process must be made in strict compliance with [the] statutory 'methods for effecting personal service upon a natural person' pursuant to CPLR 308" … . Here, the plaintiff purportedly served the defendant by the "affix and mail" method pursuant to CPLR 308(4). Service pursuant to CPLR 308(4) may be used only where service pursuant to CPLR 308(1) or (2) cannot be made with "due diligence" … . "The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" … .

Here, … the process server made prior attempts at personal delivery of the summons and complaint at the defendant's residence at different times of the day between Thursday, December 21, 2017, and Friday, December 29, 2017. Although one of those times was on December 23, 2017, a Saturday, the attempts at service occurred at the height of the holiday season, when the defendant may have had reasons not to be home … . The process server noted that holiday lights were on in the windows of the residence on December 23, 2017, and that both floors of the residence were illuminated on December 26, 2017. Nevertheless, considering the holiday season, the process server's observations were not a sufficient basis to believe that the defendant was evading service. Moreover, the process server stated that he was "unable" to speak to a neighbor regarding the defendant's whereabouts.

In addition, in the year prior to the commencement of this action, the defendant was granted a loan modification, and as part of his application for a loan modification, the defendant was required to and did, in fact, disclose his employer and address of employment to the plaintiff. No attempts were made to serve the defendant at his place of employment. Bank of Am., N.A. v Fischer, 2023 NY Slip Op 05112, Second Dept 10-11-23

Practice Point: Here the process server's affidavit did not demonstrate "due diligence" in attempting service at defendant's home and there was no attempt to serve defendant at his place of employment. The "nail and mail" service was deemed invalid.

OCTOBER 11, 2023

STATUTE OF LIMITATIONS, RELATION-BACK.

HERE THE RELATION-BACK DOCTRINE APPLIED TO ALLOW ADDING A PARTY TO THE LAWSUIT AFTER THE STATUTE OF LIMITATIONS HAD RUN; CRITERIA EXPLAINED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined the relation-back doctrine applied to add a party to a lawsuit after the statute of limitations had run:

The relation back doctrine applies when (1) the claims arise out of the same conduct, transaction or occurrence; (2) the new party is "united in interest" with an original defendant and thus can be charged with such notice of the commencement of the action such that a court concludes that the party will not be prejudiced in defending against the action; and (3) the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading (see Buran v Coupal, 87 NY2d 173, 178 [1995]).

The doctrine focuses on the notice and prejudice to the added party. However, the doctrine does not apply when a plaintiff "intentionally decides not to assert a claim against a party known to be potentially liable" or when the new party was omitted "to obtain a tactical advantage in the litigation" (id. at 181). These exceptions minimize gamesmanship and manipulation of the CPLR (see id.).

Here, petitioners established that they satisfied the Buran test and that their omission of a necessary party was not a deliberate, informed litigation strategy to gain tactical advantage. The relation back doctrine applies, and petitioners' claims against the newly added party were timely interposed under CPLR 203 (c). Matter of Nemeth v K-Tooling, 2023 NY Slip Op 05349, CtApp 10-24-23

Practice Point: If the criteria laid out in Buran, 87 NY2d 173, are met, the relation-back doctrine can be applied to allow adding a party to the lawsuit after the statute of limitations has run.

OCTOBER 24, 2023

TAX LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW, REAL PROPERTY TAX LAW.

THE DECLARATORY JUDGMENT ACTION ALLEGING THE COUNTY TAX MAP VERIFICATION FEES CONSTITUTED UNAUTHORIZED TAXES SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the plaintiffs' declaratory judgment action should not have been dismissed. Plaintiffs alleged that certain fees (tax map verification fees) charged by the county's Real Property Tax Service Agency constituted taxes which were not legislatively authorized:

… [T]he tax map verification fees were not expressly authorized by the State Legislature through the 2019 revisions to CPLR 8019 and 8021. A tax is exacted from a citizen to "defray the general costs of government unrelated to any particular benefit received by that citizen" … . "The State Constitution vests the taxing power in the state legislature and authorizes the legislature to delegate that power to local governments" (… see NY Const, art XVI, § 1). "'[T]he delegation of any part of [the] power [of taxation] to a subdivision of the State must be made in express terms,' and the delegation of any form of taxation authority 'cannot be inferred'" … .. "The legislature must describe with specificity the taxes authorized by any enabling statute. In turn, local governments can only levy and collect taxes within the expressed limitations of specific enabling legislation" … .

Here, while the revisions to CPLR 8019 and 8021 reference the County's authority to collect tax map verification fees … , the revisions do not provide an express delegation of taxing authority, nor do they provide for a review mechanism, as is constitutionally required … . Cella v Suffolk County, 2023 NY Slip Op 05387, Second Dept 10-25-23

Practice Point: Fees imposed by a county which are not justified by the related expenses may constitute unauthorized taxes.

OCTOBER 25, 2023

TRUSTS AND ESTATES ADMINISTRATOR, SUBSTITUTION OF, NEGLIGENCE.

THE FIVE-YEAR DELAY BETWEEN PLAINTIFF-DECEDENT'S DEATH AND THE MOTION TO SUBSTITUTE AN ADMINISTRATOR DID NOT WARRANT DISMISSAL OF THE ACTION; DECEDENT HAD BEEN AWARDED SUMMARY JUDGMENT ON LIABILITY IN THIS TRAFFIC-ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the four year delay in appointment of an administrator and the addition one year in moving for substitution in this traffic accident case did not warrant dismissal of the action:

… [T]he approximately four-year delay in obtaining letters of administration followed by an approximately one-year delay in moving for substitution shows a lack of diligence … . However, even if the "explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits" … .

Here, where the decedent was awarded summary judgment on the issue of liability against the defendants, the action has potential merit … . Further, the defendants provided mere "conclusory allegations of prejudice based solely on the passage of time" … . This record reflects that the defendants will suffer little or no prejudice as a result of the delay, particularly because this case, which is set for a trial on damages only, is likely to turn on medical records and an extant deposition transcript … . Hemmings v Rolling Frito-Lay Sales, LP, 2023 NY Slip Op 05125, Second Dept 10-11-23

Practice Point: Plaintiff had been awarded summary judgment on liability in this traffic accident case. Plaintiff died and there was a five-year delay before the motion to substitute an administrator. The action should not have been dismissed.

OCTOBER 11, 2023

TRUSTS AND ESTATES, GUARDIANS, DISCOVERY IN SPECIAL PROCEEDING.

THE EXECUTOR WAS ENTITLED TO A HEARING ON HIS OBJECTIONS TO THE FEES AND DISBURSEMENTS AWARDED THE GUARDIAN OF DECEDENT'S PERSON AND PROPERTY; THE EXECUTOR WAS ENTITLED TO DISCOVERY PURSUANT TO CPLR 408 IN THE SPECIAL PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the executor of decedent's estate (Oppedisano) was entitled to a hearing and discovery with respect to the fess and disbursements awarded to the guardian of decedent's person and property:

… [T]here are disputed issues of fact as to the accuracy and completeness of the guardian's final account, and whether the guardian failed to adequately investigate the alleged misappropriation of the decedent's assets and should be denied fees and/or surcharged for breaching his fiduciary duties. Under such circumstances, the Supreme Court erred in denying Oppedisano's objections to the guardian's final account without conducting a hearing … .

Pursuant to CPLR 408, leave of court generally is required for disclosure in a special proceeding … . Insofar as discovery tends to prolong a case, and therefore is inconsistent with the summary nature of a special proceeding, such disclosure is granted only where it is demonstrated that there is need for such relief … . When leave of court is granted, disclosure takes place in accordance with CPLR 3101(a), which generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" … . The Court of Appeals has interpreted the phrase "material and necessary" liberally as requiring, upon request, disclosure "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" … . * * *

Oppedisano demonstrated that the requested disclosure was material and necessary to establishing his objections that the guardian's final account was inaccurate and/or incomplete and that the guardian breached his fiduciary duties and should be denied fees and/or surcharged, and there was no contravening demonstration that the proposed discovery would be prejudicial or unduly burdensome, would

violate confidentiality, or would unduly delay the case. Matter of Giuliana M. (DeCarolis), 2023 NY Slip Op 05262, Second Dept 10-18-23

Practice Point: Here the executor was entitled to a hearing on his objections to the fees and disbursements awarded decedent's guardian and was entitled to discovery pursuant to CPLR 408. In a special proceeding discovery is by leave of court.

OCTOBER 18, 2023