NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report October 30 – November 3, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts October 30 – November 3, 2023, and Posted on the New York Appellate Digest Website on Monday, November 6, 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, CRIMINAL LAW.

ON APPEAL DEFENDANT CHALLENGED THE VOLUNTARINESS OF HIS GUILTY PLEA BUT THE PLEA MINUTES WERE NOT AVAILABLE; DEFENDANT DID NOT SHOW THAT RECONSTRUCTION OF THE 2013 PLEA PROCEEDING WAS IMPOSSIBLE; THEREFORE THE MATTER WAS REMITTED FOR A RECONSTRUCTION HEARING (SECOND DEPT),

The Third Department determined a reconstruction hearing, rather than reversal of defendant’s conviction by guilty plea in 2013, was required before the appellate court could rule on the voluntariness of the plea. The transcript of the plea proceeding was not available:

Defendant also challenges the voluntariness of his guilty plea, which he claims was defective in several respects. However, the transcript of the … plea proceeding is unavailable, and we are therefore unable to determine whether defendant’s plea was knowing and voluntary. Without the plea minutes, we are also unable to conclusively determine whether defendant preserved his claim with an appropriate postallocution motion or “whether his claim falls within the narrow exception to the preservation doctrine”. We therefore hold the case in abeyance, reserve decision, and remit the matter to County Court for a reconstruction hearing with respect to the plea proceedings … . Contrary to his claim, defendant is not entitled to summary reversal as he has not demonstrated that reconstruction is impossible … . People v Cox, 2023 NY Slip Op 05552, Second Dept 11-1-23

Practice Point: Here defendant pled guilty in 2013 and challenged the voluntariness of his plea on appeal. The minutes of the plea proceeding were not available and defendant argued he was entitled to reversal. Because the defendant did not show that reconstruction of the plea proceeding was impossible, the matter was remitted for a reconstruction hearing.

NOVEMBER 1, 2023

CIVIL PROCEDURE, CRIMINAL LAW, DEBTOR-CREDITOR.

PURSUANT TO THE MANDATORY VICTIMS RESTITUTION ACT (MVRA), A LIEN BASED UPON A RESTITUTION ORDER IN A CRIMINAL CASE CAN BE ENFORCED BY THE PRIVATE CRIME VICTIM (SECOND DEPT).

The Second Department, reversing Supreme Court, in a comprehensive full-fledged opinion by Justice Christopher, determined that a lien based on a restitution order pursuant to the Mandatory Victims Restitution Act (MVRA) can be enforced by the crime victim. Here an insurance company (National Union), which presumably paid the restitution to the crime victim, was substituted for the victim:

This appeal provides an opportunity to examine 18 USC § 3664(m)(1)(B) of the Mandatory Victims Restitution Act of 1996 (hereinafter the MVRA), wherein we determine that a crime victim named in a restitution order who has obtained an abstract of judgment and, as in this case, has docketed and recorded that abstract in accordance with the rules of this state may enforce that lien pursuant to this state's laws. For the reasons that follow, we hold that section 3664(m)(1)(B) provides a mechanism by which a private victim may enforce such a lien, and that the Supreme Court erred when it … determined that the victim was limited to only recording the abstract of judgment as a lien and dismissed the petition of National Union Fire Insurance Company … (hereinafter National Union) … pursuant to CPLR 404(a) and 3211(a)(7) for failure to state a cause of action. * * *

Our review of the legislative history of the MVRA … supports our conclusion that pursuant to 18 USC § 3664(m)(1)(B), once a victim named in a restitution order has obtained a lien on the property of the defendant, the victim may enforce that lien. * * *

The petition and documentary evidence demonstrated that in accordance with 18 USC § 3664(m)(1)(B), National Union obtained an abstract of judgment of the restitution order at issue from the Clerk of the United States District Court for the Southern District of New York, which was docketed with the Westchester County Clerk (see CPLR 5018[c]), and thus, had an enforceable lien on [the criminal defendant's] property … . Therefore, the petition sufficiently alleges that National Union is a judgment creditor permitted to commence this proceeding pursuant to CPLR 5206(e). Matter of National Union Fire Ins. Co. of Pittsburgh, Pa, 2023 NY Slip Op 05503, Second Dept 11-1-23

Practice Point: A lien against a criminal defendant's property based on a restitution order can, pursuant to the Mandatory Victims Restitution Act (MVRA), be enforced by the crime victim.

NOVEMBER 1, 2023

CIVIL PROCEDURE, PUBLIC HEALTH LAW.

RESIDENTS OF A NURSING HOME ALLEGING INADEQUATE STAFFING, UNPALATABLE FOOD, MEDICATION DELAYS, INJURIES DUE TO INSUFFICIENT SUPERVISION, AND ALLOWING RESIDENTS TO SIT IN THEIR OWN WASTE, WERE PROPERY CERTIFIED AS A CLASS IN THIS PUBLIC HEALTH LAW 2801-D ACTION (SECOND DEPT).

The Second Department, in an extensive full-fledged opinion by Justice Ford, distinguishing a prior ruling involving similar issues, determined Supreme Court properly certified nursing-home patients at defendant's facility as a class in this suit alleging substandard care:

The issue presented on this appeal is whether the Supreme Court properly granted the plaintiffs' motion for class certification in this putative class action alleging a violation of Public Health Law § 2801-d. … [W]e distinguish our precedent in Olmann v Willoughby Rehabilitation & Health Care Ctr., LLC (186 AD3d 837) and determine that the court properly held … that the plaintiffs established the commonality and superiority requirements of CPLR 901(a) and, thus, correctly granted plaintiffs' motion for class certification. * * *

… [T]he New York State Department of Health issued a report that revealed multiple issues within Sapphire, including rooms in disrepair, improper food monitoring, late medications, and insufficient staffing. Specifically, the report found, inter alia, that "[b]ased on observation, interview and record review during a recertification survey, the facility did not ensure that sufficient nursing staff were available to provide the services necessary to attain the highest practicable physical, mental and psychosocial well-being of the resident population . . . in accordance with resident needs identified in the facility assessment." …

The plaintiffs' motion … included multiple affidavits of family members of residents and former residents …, as well as the affidavit of a former resident, in support of the allegation that [the facility] was insufficiently staffed. These affidavits contained … allegations of unpalatable food, medication delays, injuries due to insufficient supervision, and instances of residents sitting in their own waste for hours at a time. Jenack v Goshen Operations, LLC, 2023 NY Slip Op 05495, First Dept 11-1-23

Practice Point: Here residents of a nursing home alleging substandard care in violation of Public Health Law 2801-d were properly certified as a class. The court distinguished a prior ruling where the action sounded in both negligence and violation of the Public Health Law.

NOVEMBER 1, 2023

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE PEOPLE WERE ALLOWED TO PRESENT EXPERT TESTIMONY ON CHILD PSYCHOLOGY AND CHILD ABUSE; DEFENDANT WAS DEPRIVED OF HIS RIGHT TO PRESENT A DEFENSE WHEN THE REQUEST TO PRESENT A REBUTTAL WITNESS WAS DENIED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined defendant should have been allowed to present a witness to rebut the People's expert testimony on child psychology and child abuse. Failure to allow the rebuttal witness deprived defendant of his right to a fair trial:

… Supreme Court did not err in permitting the People to call an expert witness in the field of child psychology and child sex abuse, notwithstanding any alleged

delay in the People's disclosure of the contents of the witness's testimony, as the defendant failed to establish that he was prejudiced by the alleged delay … .

… Supreme Court improperly precluded the defendant from calling a rebuttal witness. The right to present a defense is a fundamental element of due process of law … , and, in the instant case, calling a rebuttal expert to testify was central to the defense case. … [T]here is no evidence that the People were prejudiced by the timing of the notice or that the delay was willfully motivated, inasmuch as the content of the People's expert testimony was disclosed approximately one week prior. People v Neustadt, 2023 NY Slip Op 05519, Second Dept 11-1-23

Practice Point: Here the denial of defendant's request to present testimony rebutting the People's expert denied defendant his right to present a defense (due process).

NOVEMBER 1, 2023

CRIMINAL LAW, EVIDENCE.

THE DETECTIVE'S TESTIMONY, WITHOUT EVIDENCE FROM THE CONFIDENTIAL INFORMANT WHO MADE THE DRUG PURCHASES, WAS NOT ENOUGH TO DEMONSTRATE PROBABLE CAUSE FOR THE SEARCH WARRANT; MATTER REMITTED FOR A DARDEN HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, held a Darden hearing was required to determine whether there was probable cause to justify the issuance of a search warrant. The testimony of the defective alone, without the evidence provided by the confidential informant (CI), did not demonstrate probable cause. Therefore the the matter was remitted and the appeal was held in abeyance pending the results of the Darden hearing:

"[A] Darden rule is necessary in order to fulfill the underlying purpose of Darden: insuring that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity. The surest way to accomplish this task is to produce the informant for an in camera examination" … . …

… [T]he detective's on-the-scene observations during the two controlled drug buys fell short of probable cause without the information provided to him by the CI. Although the detective saw the CI walk toward the subject building and later return to the predesignated meeting location, he was unable to confirm that the CI had actually purchased the narcotics from the subject apartment … . … [W]e remit the matter … for an in camera hearing and inquiry in accordance with the guidelines set forth in Darden, and thereafter a report to this Court containing the Supreme Court's findings following the hearing and inquiry. People v Huginnie, 2023 NY Slip Op 05516, Second Dept 11-1-23

Practice Point: Here evidence from the confidential informant who allegedly made the drug purchases was required to demonstrate probable cause for the search warrant. The appeal was held in abeyance and the matter was remitted for a Darden hearing.

NOVEMBER 1, 2023

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SUPREME COURT SHOULD NOT HAVE BASED AN UPWARD DEPARTURE IN THIS SORA RISK-ASSESSMENT PROCEEDING ON GROUNDS NOT RAISED BY THE PEOPLE WHERE THE DEFENDANT WAS NOT GIVEN THE OPPORTUNITY TO CONTEST THOSE GROUNDS (SECOND DEPT).

The Second Department, reversing the SORA risk level assessment, determined defendant should have been given the opportunity to contest the grounds for an upward department not raised by the People:

A "SORA court deprive[s a] defendant of those basic procedural guarantees when it upwardly depart[s] from the presumptive risk level without affording [the] defendant notice or an opportunity to contest the basis for the departure" … .

Here, the Supreme Court erred in basing its decision to depart from the presumptive risk level, in part, upon grounds that were not raised by the People and of which the defendant had no notice or an opportunity to contest ,,, , People v Cutting, 2023 NY Slip Op 05524, Second Dept 11-1-23

Practice Point: A SORA risk-level assessment cannot be based on grounds of which the defendant was not given notice or the opportunity to contest.

NOVEMBER 1, 2023

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE CRITERIA FOR "A CONTINUING COURSE OF SEXUAL CONTACT" WERE NOT MET; DEFENDANT'S SORA RISK-LEVEL REDUCED TO LEVEL ONE (SECOND DEPT).

The Second Department, reducing defendant's SORA risk-level assessment to level one, determined the People did not demonstrate "a continuing course of sexual contact:"

The Guidelines provide, in part, regarding risk factor 4, that "an offender has engaged in a continuing course of sexual contact when he [or she] engages in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" … .

In this proceeding, the People failed to meet their burden of proof on risk factor 4 since they failed to establish, by clear and convincing evidence, that the two acts of sexual contact the defendant committed against the victim were separated in time by at least 24 hours … . People v Parez, 2023 NY Slip Op 05526, Second Dept 11-1-23

Practice Point: There must be 24 hours between acts of sexual contact to constitute "a continuing course of sexual contact" under the SORA risk-level guidelines; not the case here.

NOVEMBER 1, 2023

EVIDENCE, JUDGES, APPEALS.

AFTER FINDING SPOLIATION OF EVIDENCE BY DEFENDANTS, THE JUDGE FASHIONED AN ADVERSE INFERENCE JURY INSTRUCTION TO BE GIVEN AT TRIAL; THE CHARGE IMPROPERLY REQUIRED, RATHER THAN PERMITTED, THE JURY TO FIND SPOLIATION; THE JUDGE WAS ORDERED TO REVISE THE CHARGE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the adverse inference jury charge was inappropriate because it requires, rather than permits, the jury to draw an adverse inference from the spoliation of evidence. The appeal was from the judge's ruling on plaintiff's motion for an adverse inference charge. The judge was directed to fashion a new adverse inference charge:

Upon its determination that defendants' spoliation of evidence amounted to gross negligence, the court directed that the jury be instructed that "had the evidence been preserved the evidence would have been against defendants' position that [defendant] Marom and/or his workers did not cut down branches or trees or inserted rotting garbage in the barriers on [plaintiff's] property." This adverse inference charge is inappropriate because it "requires, rather than permits, the jury to draw an adverse inference" … . In any event, because the conflicting testimony in the record raises questions concerning the existence of the purportedly spoliated evidence, the issues of whether any spoliation had occurred and whether any adverse inference is warranted should be presented to the jury in the first instance … . Children's Magical Garden, Inc. v Marom, 2023 NY Slip Op 05464, First Dept 10-31-23

Practice Point: With respect to spoliation of evidence, an adverse inference charge should permit, rather than require, the jury to find spoliation.

Practice Point: It appears that this appeal was brought before trial to address the erroneous adverse inference charge fashioned by the judge. The appeal successfully required the revision of the erroneous charge before the jury heard it.

OCTOBER 31, 2023

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW, APPEALS.

THE QUESTIONNAIRES FILLED OUT BY APPLICANTS FOR CITY JUDICIAL POSITIONS WERE PROTECTED FROM THE FOIL REQUEST BY THE PERSONAL PRIVACY EXEMPTION; AN APPELLATE COURT DOES NOT HAVE THE AUTHORITY TO CONSIDER AN UNPRESERVED ISSUE IN AN ARTICLE 78 PROCEEDING (FIRST DEPT).

The First Department, reversing Supreme Court, determined judicial questionnaires filled out by applicants for city judicial positions were protected from the FOIL request by the personal privacy exemption. The First Department noted that it did not have the authority in an article 78 proceeding to consider an unpreserved issue in the interest of justice:

… [T]he City properly applied the personal privacy exemption (Public Officer's Law § 89[2][a]) to deny petitioner's FOIL request in its entirety, as the City sustained its burden of establishing that disclosure of the records sought in this case — "all Uniform Judicial Questionnaires for applicants . . . under review by the Mayor's Advisory Committee on the Judiciary" as of October 21, 2020 — would "constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b] …). Disclosure of the questionnaire, which states the word "CONFIDENTIAL" in upper-case letters and boldface near the top of its first page, would undermine the assurances of confidentiality provided to candidates for judicial office … .

Moreover, disclosure would create a chilling effect, thus potentially diminishing the candor of applicants and causing others to decide against applying for judicial positions. The questionnaire contains extensive questions touching on highly personal and sensitive matters, such as personal relationships, reasons for leaving jobs, reasons for periods of unemployment, substance abuse, arrests, criminal convictions, testifying as a witness in criminal cases, and reasons for anticipated difficulty in handling the stresses involved in being a judge, as well as a catch-all question at the end of the questionnaire asking for any other information, specifically including unfavorable information, that could bear on the evaluation of the judicial candidate. In addition to the particular contents of the questionnaires, disclosure of the very fact that certain candidates submitted the questionnaires could harm those persons' reputations by revealing that they sought to leave their jobs, or were unsuccessful in their applications for judicial positions … . Matter of

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Fisher v City of N.Y. Off. of the Mayor, 2023 NY Slip Op 05468, First Dept 10-31-23

Practice Point: Here the questionnaires filled out by applicants for city judicial positions were protected from the FOIL request by the personal privacy exemption.

Practice Point: In an article 78 proceeding an appellate court cannot consider an unpreserved issue in the interest of justice.

OCTOBER 31, 2023

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

THE AVAILABILTY OF GOVERNMENT RECORDS ON A PUBLIC WEBSITE DOES NOT SATISFY A FOIL REQUEST; HERE THERE WERE QUESTIONS OF FACT WHETHER THE VILLAGE SHOULD HAVE WORKED WITH THE PETITIONER TO IDENTIFY THE REQUESTED DOCUMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court, in a comprehensive full-fledged opinion by Justice Iannacci, determined the article 78 petition seeking to compel the village to release documents about recusals and conflict-of-interests disclosures by village officials should not have been dismissed. The availability of government records on a public website was deemed insufficient to satisfy a FOIL request. There were questions of fact about whether the requested documents were sufficiently described:

The principal questions presented on appeal are whether the requested records were "reasonably described" (… [Public Officers Law] § 89[3][a]) so as to allow the Village to locate and identify them, and whether the Village satisfied its obligations under FOIL by maintaining a public website, on which much of the information sought by the petitioner could be found. We hold that the mere availability of government records on a public website is insufficient to satisfy a request under FOIL for reproduction of such materials. However, we further conclude that questions of fact exist as to the Village's ability to locate, identify, and produce the records requested by the petitioner, thereby precluding summary determination of the petition. * * *

… [T]here is no evidence that, before denying the petitioner's request in its entirety, the Village made any effort to work with her to more precisely define the

information desired … , if possible, or to "attempt to reasonably reduce the volume of the records requested" … . * * *

Holding that an agency satisfies a FOIL request for reproduction of records merely by referring the requestor to a public website does not adequately safeguard the public right of all of this State's citizens. Matter of Goldstein v Incorporated Vil. of Mamaroneck, 2023 NY Slip Op 05500, Second Dept 11-1-23

Practice Point: The availability of government records on a government website does not satisfy a FOIL request for documents.

Practice Point: The municipality may have an obligation to work with the party making a FOIL request to identify the requested documents.

NOVEMBER 1, 2023

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