NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
January 1 – 12, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 1 -12, 2024, and Posted on the New York Appellate Digest Website on January 2, 2024 and January 8, 2024. 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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ARBITRATION, CONTRACT LAW, MUNICIPAL LAW.

THE ARBITRATION AWARD WAS "IRRATIONAL;" THE CORRECTIONS OFFICERS WERE TREATED ONLY ON THE DAY OF THEIR INJURIES, LOST NO WORK AND HAD NO OUT-OF-POCKET EXPENSES; THEY WERE NOT ENTITLED TO MEDICAL BENEFITS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT (CBA) AND THE GENERAL MUNICIPAL LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration award which found that the county corrections officers were entitled to medical benefits for work-related injuries pursuant to the collective bargaining agreement (CBA) and the General Municipal Law, was "irrational." The officers were treated on the day of their injuries, received no further treatment, lost no work, and had no out-of-pocket expenses:

"An award is irrational only where there is no proof whatever to justify the award" … . Here, the union asserted that the County violated the CBA by improperly denying General Municipal Law § 207-c benefits to the claimants, and the parties agreed that the arbitrator would decide whether this [*3]assertion was correct. "General Municipal Law § 207-c(1) entitles corrections officers to certain enumerated benefits, including the payment of salary or wages and the cost of medical treatment and hospital care, where the officer 'is injured in the performance of his [or her] duties or . . . is taken sick as a result of the performance of his [or her] duties'"… . By definition, an officer seeking benefits under the statute must demonstrate, among other things, that he or she requires payment of salary or wages, or payment for the cost of medical treatment, whether in the form of reimbursement for funds expended or direct payment to an unpaid provider … . Here, the claimants did not seek payment of salary or wages pursuant to the statute, since they were each paid their regular salary or wages for the time spent visiting a medical provider on the date of the occurrence and missed no time thereafter. The claimants also did not seek payment of, or reimbursement for, the cost of the medical treatment they each received on the day of their respective occurrences, conceding that they did not sustain any out-of-pocket medical expenses. The arbitrator's decision to award the claimants a designation that their injuries or illnesses qualified for statutory benefits was therefore irrational, considering that there was no proof that any such benefits were required … . Matter of County of

Nassau v Nassau County Sheriff's Corr. Officers' Benevolent Assn., 2024 NY Slip Op 00069, Second Dept 1-11-24

Practice Point: This case is rare example of a judicial finding that an arbitration award was "irrational."

JANUARY 11, 2024

CONTRACT LAW, TORTIOUS INTERFERENCE WITH CONTRACT, UNFAIR COMPETITION.

PURSUANT TO THE ALCOHOLIC BEVERAGE CONTROL LAW THE DEFENDANT BEER IMPORTER IS OBLIGATED TO HONOR THE WHOLESALE DISTRIBUTION CONTRACT ENTERED INTO BY PLAINTIFF AND THE PRIOR BEER IMPORTER (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Chambers, reversing Supreme Court, in a matter of first impression, determined defendant beer importer was obligated, pursuant to Alcoholic Beverage Control Act section 55-c, to honor the wholesale distribution contract entered into by the plaintiff and the prior beer importer:

We are asked on this appeal to determine whether section 55-c of the Alcoholic Beverage Control Law obligates a beer importer, which acquired its importation rights relating to a particular beer brand directly from the manufacturer, to honor a wholesale distribution agreement entered into by the prior importer of the same beer brand. Additionally, we note that this appeal presents a question of first impression.

We conclude that the generous protections afforded to beer wholesalers under Alcoholic Beverage Control Law § 55-c extend to circumstances such as the present one, and obligate an importer to honor a wholesale distribution agreement entered into by the prior importer of the same brand, even where, as here, there is no relationship or privity of contract between the prior importer and the new importer. For the reasons that follow, under the specific language of New York's law, the defendant importer in this action is a "successor to a brewer" within the meaning of Alcoholic Beverage Control Law § 55-c, and the plaintiff wholesaler

has demonstrated as a matter of law that the defendant importer failed to honor, without good cause, the wholesale distribution agreement entered into by the plaintiff and the prior importer. JRC Beverage, Inc. v K.P. Global, Inc., 2024 NY Slip Op 00067, Second Dept 11-11-24

Practice Point: Here the Alcoholic Beverage Control Law obligated the new beer importer to honor a wholesale distribution contract plaintiff entered into with the prior beer importer.

JANUARY 11, 2024

CIVIL PROCEDURE, CONSTITUTIONAL LAW, FORECLOSURE.

THE NEW JERSEY ORDER AND JUDGMENT SHOULD HAVE BEEN ACCORDED FULL FAITH AND CREDIT IN THE NEW YORK FORECLOSURE ACTION; CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined a New Jersey order and judgment should have been accorded full faith and credit in this foreclosure action:

"A judgment rendered by a court of a sister State is accorded 'the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced' " … . Our review of the foreign judgment at issue is "limited to determining whether the rendering court had jurisdiction" … . It is undisputed that the New Jersey court had jurisdiction as the defendants appeared in the action and vigorously litigated the matter for years, thus, "inquiry into the merits of the underlying dispute is foreclosed" … and "the merits of [the] judgment of a sister state may not be collaterally attacked" … . Accordingly, a "decree of a sister [s]tate in which [the] parties were subject to personal jurisdiction in that [s]tate is entitled to full faith and credit in the courts of New York" … . Sjogren v Land Assoc., LLC, 2024 NY Slip Op 00009, Third Dept 1-4-24

Practice Point: A New York court's only function in determining whether a foreign state's order and judgment should be accorded full faith and credit is assessing whether the foreign court had jurisdiction over the matter.

JANUARY 4, 2024

CRIMINAL LAW, EVIDENCE.

THE DRUGS IN DEFENDANT'S CAR MAY NOT HAVE BEEN IN "PLAIN VIEW" IF THE POLICE HAD NOT ILLEGALLY DETAINED DEFENDANT OUTSIDE THE CAR BEFORE LOOKING INSIDE THE CAR; SUPPRESSION GRANTED AND INDICTMENT DISMISSED; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, reversing the Appellate Division and dismissing the indictment, over a three-judge dissent, determined defendant's motion to suppress evidence seized from his car should have been granted. The proof at the suppression hearing demonstrated the police observed innocent behavior in a parking lot which which was interpreted to be a drug transaction. As an officer approached, defendant got out of his car and walked toward the officer. The officer frisked the defendant and had him stand at the back of the car. The officer then looked in the car and saw cocaine on the seat. The car was then searched. The Fourth Department, over a two-judge dissent, held that the cocaine was in plain view and would have been seen had the officer simply walked up to the car without detaining the defendant. But the Court of Appeals held that the "plain view" exception to the warrant requirement only applies if the police are acting lawfully at the time the observation was made. Here the police had illegally detained defendant before the observation:

The Appellate Division reasoned that, even if [Officer] Young had not detained defendant, he could have observed the contraband in plain view simply by walking up to the driver's seat and looking into the vehicle … . However, this conclusion is unsupported because, had the officers not unlawfully detained defendant behind the car, defendant could have walked back, opened the car door and sat on the driver's seat—actions that, contrary to the dissent's unsupported assertions … , would have blocked Young's view of the contraband…. Therefore, the prosecution failed to meet its burden to establish at the suppression hearing that the unlawful detention of defendant was not the reason that Young had an "unobstructed view of the driver's seat" … . People v Messano, 2024 NY Slip Op 00097, CtApp 1-11-24

Practice Point: The "plain view" exception to the warrant requirement only applies if the police are acting lawfully at the time the observation is made—not the case here.

JANUARY 11, 2024

CRIMINAL LAW.

ALL AGREED A MULTIPLICITOUS COUNT SHOULD BE DISMISSED; THE CONCURRENCE ARGUED THE PROSECUTION HERE WAS UNNECESSARY AND A RESTORATIVE-JUSTICE APPROACH WOULD HAVE BEEN BEST (CT APP).

The Court of Appeals dismissed a multiplicitous count of the indictment. The concurrence by Judge Wilson argued that the underlying prosecution would have been better replaced by a restorative-justice approach. The grand larceny and perjury charges stemmed from what all parties agreed was a "dumb argument" on the street:

A multiplicitous indictment "creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than [they] actually committed" … . Even when the multiplicitous convictions do not increase the defendant's sentence, the stigma of impermissible convictions endures and must be remedied. Thus, when a defendant is convicted of multiplicitous charges, the proper remedy is vacatur of all but one of the multiplicitous convictions and dismissal of those counts of the indictment, regardless of whether that corrective action has any effect on the defendant's sentence. Here, there is no dispute regarding the Appellate Division's conclusion that the two counts of perjury of which defendant was ultimately convicted were multiplicitous. As the People concede, the proper remedy is therefore dismissal of one of the convictions. People v Greene, 2024 NY Slip Op 00096, CtApp 1-11-24

Practice Point: It is entirely proper to dismiss a multiplicitous indictment-count after trial.

Practice Point: Here Judge Wilson, in a concurrence, argued that this prosecution, which arose from a "dumb argument" on the street, was unnecessary. The case should have been handled with a restorative-justice approach.

JANUARY 11, 2024

INSURANCE LAW.

DEFENDANT INSURER DID NOT TIMELY DISCLAIM COVERAGE AND IS THEREFORE OBLIGATED TO DEFEND THE INSURED; A DISCLAIMER-NOTIFICATION MUST BE SPECIFIC AND UNAMBIGUOUS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant Navigators Insurance Company, did not timely notify plaintiff Titan that Navigators was disclaiming coverage. Therefore Navigators was required to defend Titan:

Because Navigators sought to deny coverage based on that policy exclusion, it was required under Insurance Law § 3420(d)(2) to provide written notice of the disclaimer as soon as reasonably possible after receiving Titan's tender in which it sought coverage under as an additional insured … . Furthermore, the application of this exclusion was obvious and did not require an investigation … . We therefore find that Navigators' unexplained delay in disclaiming coverage – seven months after the first tender and almost three months after the second was unreasonable as a matter of law … .

We reject Navigators' contention that it did, in fact, disclaim coverage in an email to Titan's insurance broker. Although the email mentioned the exclusion, it did not unequivocally state that Navigators was disclaiming coverage (Insurance Law § 3420[d][2] …). Nor did the email apprise Titan, with the high degree of specificity required, of the ground or grounds on which the disclaimer was predicated … . Titan Indus. Servs. Corp. v Navigators Ins. Co., 2024 NY Slip Op 00041, First Dept 1-4-24

Practice Point: An insurer must notify the insured it is disclaiming coverage as soon as possible and in specific, unambiguous language.

JANUARY 4, 2024

JUDGES, ATTORNEYS.

THE JUDGE PRESIDING OVER THIS TRAFFIC ACCIDENT CASE SHOULD HAVE GRANTED PLAINTIFFS' RECUSAL MOTION; DEFENSE COUNSEL WAS ACTIVE IN THE JUDGE'S ELECTION CAMPAIGN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the judge in a traffic accident case should have granted plaintiffs' recusal motion. Plaintiffs had learned defense counsel was active in the judge's election campaign and had failed to disclose that information to the parties:

…Justice Muller did not disclose to the parties that defense counsel and his law firm were providing assistance to his judicial campaign. Plaintiffs independently learned of the fundraiser, prompting them to raise the issue and seek the judge's recusal. The record establishes that the law firm hosted a fundraising event for Justice Muller, that the names of defense counsel and five other attorneys from his firm appeared as supporters on Justice Muller's campaign website and that defense counsel wrote a favorable opinion letter endorsing Justice Muller's candidacy which appeared in several news publications throughout the Fourth Judicial District. Furthermore, the JCEC's [Judicial Campaign Ethics Center's] … letter clearly states that Justice Muller was "disqualified, subject to remittal, from presiding over matters involving defense counsel and his law firm, including partners and associates, during the course of [his] judicial campaign" … . Although we have no way of knowing Justice Muller's reasons or intentions, it is undisputed that he did not disclose the JCEC letter to the parties until a month after receiving it, when his campaign results became official, and he was elected to a new term of office. As judges need to avoid even the appearance of impropriety, Justice Muller should have disclosed the JCEC letter upon receipt and recused from the matter as soon as possible (see Rules Governing Jud Conduct [22 NYCRR] §100.3 [E] [1]; Advisory Comm on Jud Ethics Op 03-64 [2003]). Therefore, Justice Muller abused his discretion in denying plaintiffs' motion for recusal. Minckler v D'Ella, Inc., 2024 NY Slip Op 00017, Third Dept 1-4-24

Practice Point: Here the judge's failure to disclose to the parties defense counsel's involvement in the judge's election campaign required recusal.

JANUARY 4, 2024

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS STRUCK BY A CABLE WHICH WHIPLASHED WHEN A TRUCK RAN INTO IT; THE INDUSTRIAL CODE PROVISION REQUIRING SAFETY MEASURES WHEN WORKING NEAR TRAFFIC APPLIED; THE LABOR LAW 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 241(6) cause of action should not have been dismissed. Plaintiff was injured when a truck struck a cable which whiplashed and struck plaintiff. It was alleged Industrial Code section 12 NYCRR 23-1.29(a) was violated. That Code provision reads: "Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons:"

… [T]here is no dispute that the Industrial Code section upon which plaintiff relies is sufficiently specific to support a Labor Law § 241 (6) claim. In addition, the facts show plaintiff was still engaged in construction, aloft in a lift bucket and tightening a newly installed steel cable wire, in close proximity to public vehicular traffic on a roadway, when a moving truck struck the cable that was installed in an underpass area and caused the cable to whiplash and strike plaintiff. At the time, there was no flag person or erected barricades to control traffic in the work area. Accordingly, the evidence established that 12 NYCRR 23-1.29(a) was violated and that this violation was a proximate cause of plaintiff's injuries. Thus, the court should have granted plaintiff's motion for partial summary judgment on the Labor Law § 241(6) claim, as plaintiff was not required to demonstrate freedom from comparative fault in order to be awarded summary judgment on that claim … . Bucci v City of New York, 2024 NY Slip Op 00124, First Dept 1-11-24

Practice Point: Here a truck ran into a cable which whiplashed and struck plaintiff. The Industrial Code provision requiring safety measures, such as flagmen or

barriers, when working in the vicinity of traffic applied and supported the Labor Law 241(6) cause of action.

JANUARY 11, 2024

LANDLORD-TENANT, MUNICIPAL LAW, DEBTOR-CREDITOR.

THE GUARANTOR OF RENT DUE UNDER A LEASE FOR A BARBERSHOP FORCED TO CLOSE BY THE NYS GOVERNOR DURING COVID WAS RELIEVED OF LIABILITY FOR ONLY THE COVID-PERIOD COVERED BY NYC'S GUARANTY LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined the guarantor of a lease for a barbershop that was forced to close by the Governor of New York during COVID was relieved of liability for unpaid rent only for the period covered by NYC's Guaranty Law:

As part of its declarations of intent and findings for the amendments extending the closing of the period of the Guaranty Law (first from September 30, 2020 to March 31, 2021, then from March 31, 2021 to June 30, 2021), the City Council made plain that the protections were "temporary," and designed to provide businesses covered by the law with "a reasonable recovery period with a duration that is comparable to the period of time that [the] businesses were forced to close or operate with significant limitations on indoor occupancy" (New York City Local Laws 98/2020 and 50/2021, §§ 1[a][7], [9]).

In light of the language of the Guaranty Law and its legislative history, we conclude that the law "bars only those claims against guarantors seeking rent that came due within the [law's] protection period" … . Tamar Equities Corp. v Signature Barbershop 33 Inc., 2024 NY Slip Op 00039, First Dept 1-4-24

Practice Point: New York City's Guaranty Law relieves a guarantor of its liability for unpaid rent during a COVID-related business closure only for the "COVID" period described in the Guaranty Law.

JANUARY 4, 2024

MENTAL HYGIENE LAW, APPEALS.

IF A PATIENT DOES NOT REQUEST A COMBINED HEARING UNDER THE MENTAL HYGIENE LAW ON AN "EMERGENCY" HOSPITAL ADMISSION AND AN "INVOLUNTARY" HOSPITAL ADMISSION, IT IS ERROR TO COMBINE THEM; HOWEVER A PATIENT COULD REQUEST A COMBINED HEARING AND RESPONDENT WAS NOT PREJUDICED BY THE COMBINED HEARING IN THIS CASE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined that the combined hearing pursuant to Mental Hygiene Law sections 9.31 and 9.39 was improper but the patient was not prejudiced by the procedure. The respondent had been released from the hospital, so the appeal was moot. But the Third Department heard the case because the issue was likely to otherwise evade review:

As we understand respondent's position, she maintains that in the context presented — where a patient is admitted on an emergency basis under Mental Hygiene Law § 9.39 and has demanded a hearing, but whose status is converted to an involuntary admission on medical certification under Mental Hygiene Law § 9.27 prior to the hearing — the ensuing hearing must be limited to a section 9.39 format. Respondent emphasizes that she never requested a hearing under section 9.31 to challenge her involuntary admission. By holding a combined hearing, respondent contends that County Court deprived her of her statutory right to demand a later hearing under section 9.31. * * *

The … question is whether County Court improperly combined the hearings … to conclusively resolve whether respondent was entitled to release that day, assuming the proof fell short under either standard. That question is resolved by the procedures outlined in Mental Hygiene Law §§ 9.31 (a) and 9.39 (a) (2), which vest in the patient — not the court or hospital — the right to request a hearing under each section. In that regard, we agree with respondent that, because she never requested a hearing under section 9.31, the court erred in holding a combined hearing and she retained the right to later request a hearing under section 9.31. On the other hand, had respondent also requested a section 9.31 hearing, we see no reason why a combined hearing could not be held by the court, provided it did so within the applicable statutory deadlines and considered both statutory standards in

rendering its decision. Matter of Julie O., 2024 NY Slip Op 00015, Third Dept 1-4-24

Practice Point: Here an "emergency" hospital admission under the Mental Hygiene Law and an "involuntary" admission were pending at the same the time. The admissions have different standards. Therefore, if the patient does not request a combined hearing the court should not hold one. However a patient could request a combined hearing.

Practice Point: Here the patient had been released from the hospital and the appeal of the patient's admission was moot. However the Third Department considered the case because the issue was likely to evade review.

JANUARY 4, 2024

NEGLIGENCE, LANDLORD-TENANT.

PLAINTIFF FELL THROUGH THE DECK OF HER APRARTMENT; DEFENDANTS DID NOT SHOW A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE; THERE WAS NO CERTIFICATE OF OCCUPANCY ON FILE; THERE WAS A QUESTION OF FACT WHETHER THE DOCTRINE OF RES IPSA LOQUITUR APPLIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant-landlord did not demonstrate a lack of actual or constructive notice of the condition of the deck which plaintiff fell through. In addition there was a question of fact whether the doctrine of res ipsa loquitur applied:

Defendants testified that they inspected the deck before purchasing the property and also obtained the services of an unidentified inspector. However, they failed to produce the inspection report or any evidence of its contents, nor did they establish that the defect in the deck could not have been discovered upon a diligent inspection … . In light of defendants' failure to show lack of actual or constructive notice, it is of no moment that they did not create the defective condition of the deck.

… Plaintiff's expert engineer opined that the lack of a certificate of occupancy for the property, including the deck, should have put defendants on notice that the deck was not compliant with applicable building codes and that an inspection would have uncovered weakened plywood under the deck's tile surface.

… The doctrine of res ipsa loquitur allows an inference of negligence to be drawn where (1) the event is of a type that does not normally occur in the absence of negligence, (2) it was caused by an instrumentality within the exclusive control of the defendants, and (3) plaintiff's actions did not contribute in any way to the occurrence … . The first and third elements are established here because "a deck being put to its regular and intended use does not ordinarily collapse in the absence of negligence," and there is no claim that any contributory negligence by plaintiff caused the collapse … . The second element of exclusive control may be established to the extent that plaintiff's claim is based on defendants' failure to maintain the deck since their acquisition of the property, rather than on the illegal construction of the deck at some earlier date … . Rosario v Cao, 2024 NY Slip Op 00154, First Dept 1-11-24

Practice Point: Here the deck of plaintiff's apartment collapsed and she fell through it. There was no certificate of occupancy on file. The elements of res ipsa loquitur were present. Defendants therefore did not demonstrate a lack of actual or constructive notice of the condition of the deck.

JANUARY 11, 2024