NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
February 26 – March 1, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts February 26 – March 1, 2024, and Posted on the New York Appellate Digest Website on Monday, March 4, 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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CIVIL PROCEDURE, DISCOVERY, TAX RETURNS.

PLAINTIFF DID NOT MAKE A SUFFICIENTLY STRONG SHOWING TO SUPPORT DISCOVERY OF DEFENDANT'S PERSONAL TAX RETURNS; PLAINTIFF'S ATTORNEY'S FAILURE TO SUBMIT A GOOD FAITH AFFIRMATION WARRANTS DENIAL OF THE DISCOVERY MOTION; THE IMPOSITION OF SANCTIONS WAS NOT SUPPORTED BY EVIIDENCE OF DEFENDANT'S WILLFUL AND CONTUMACIOUS FAILURE TO COMPLY WITH A DISCOVERY ORDER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) plaintiff did not make an adequate showing to warrant discovery of defendant's personal tax returns; (2) plaintiff's attorney's affirmation did not meet the requirements of the "good faith" affirmation required by 22 NYCRR 202.7 (a), and (3) plaintiff did not make a showing sufficient to warrant discovery sanctions:

"Tax returns generally are not discoverable 'in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources'" … . Here, [defendant] admitted that she deposited some of the rent money she collected into a personal account, which she claimed that she then used to pay expenses on the properties, whereas the plaintiff claimed that [she] used the money to pay her own personal expenses. The plaintiff failed to make a "strong showing" that [defendant's] personal tax returns are indispensable to proving his claims and that evidence cannot be obtained from other sources, such as bank records … .

Pursuant to 22 NYCRR 202.7(a), all motions relating to disclosure must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" … . * * * "Failure to provide an affirmation of good faith which substantively complies with 22 NYCRR 202.7(c) warrants denial of the motion" … . …

"Before a court invokes the drastic remedy of precluding a party from offering evidence at trial, there must be a clear showing that the failure to comply with

court-ordered discovery was willful and contumacious" … . Here, the plaintiff failed to make a clear showing of a willful and contumacious failure to comply with discovery demands. Cyngiel v Krigsman, 2024 NY Slip Op 00996, Second Dept 2-28-24

Practice Point. Before a court will order discovery of personal tax returns, the moving party must make a strong showing the information cannot be provided by other sources (not the case here).

FEBRUARY 28, 2024

CIVIL PROCEDURE, FORECLOSURE.

SUPREME COURT PROPERLY ALLOWED DEFENDANT IN THIS FORECLOSURE ACTION TO SERVE A 10-MONTHS-LATE ANSWER, CRITERIA EXPLAINED; IN ADDITION, SUPREME COURT PROPERLY DISMISSED THE FORECLOSURE ACTION AS TIME-BARRED, CRITERIA EXPLAINED (THIIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Egan, determined the judge properly granted leave to serve a late answer raising the statute-of-limitations defense to the foreclosure action. The motion for leave to serve a late answer was made 10 months after the expiration of the time to serve an answer. The Third Department affirmed the dismissal of the complaint as time-barred.

… [D]efendant did not seek leave to serve a late answer until approximately 10 months after the expiration of his time to serve an answer, but there is no indication that the failure to serve an answer was willful. Defense counsel … attributed the delay to defendant's unsuccessful pro se negotiations with plaintiff — of which little detail was given, but which plaintiff also notably failed to deny had occurred — after which defendant promptly sought legal assistance upon receiving plaintiff's motion for a default judgment … . Plaintiff further offered no explanation as to how it would be prejudiced by allowing defendant to serve a late answer. * * *

As the first [foreclosure] action was dismissed for neglect to prosecute, neither CPLR 205 (a) nor CPLR 205-a afforded plaintiff a six-month grace period in which to commence this action following the termination of that action upon dismissal of plaintiff's appeal from the 2016 order … Supreme Court … , as a result, properly dismissed this action as time-barred. Deutsche Bank Natl. Trust Co. v Deluca, 2024 NY Slip Op 01132, Third Dept 2-29-24

Practice Point: The criteria for allowing leave to serve a late answer is explained in some depth.

Practice Point: The unique criteria for dismissal of a foreclosure action as time-barred is explained in some depth.

FEBRUARY 29, 2024

CIVIL PROCEDURE, FORUM NON CONVENIENS.

DENYING A MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS WAS NOT AN ABUSE OF DISCRETION DESPITE THE PRIOR GRANTING OF AN IDENTICAL MOTION BY ANOTHER DEFENDANT; HOWEVER PLAINTIFF BANK DID NOT DEMONSTRATE NEW YORK'S PERSONAL JURISDICTION OVER SEVERAL DEFENDANTS IN THIS INTERNATIONAL BANK-FRAUD AND MONEY-LAUNDERING CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Pitt-Burke, determined the denial of a defendant's motion to dismiss on forum-non-conveniens grounds was a proper exercise of discretion, despite the fact that the identical motion by another defendant had already been granted. The case stems from an elaborate international fraud and money-laundering scheme which allegedly resulted in the theft by hackers of $81 million from plaintiff bank. The opinion addresses forum non conveniens, long-arm "conspiracy" jurisdiction and conversion but is too complex and detailed to fairly summarize here. With respect to forum non conveniens, the court wrote:

Forum non conveniens is a common-law doctrine that presumes jurisdiction … . … [T]the initial question before this Court is whether Supreme Court had the discretion to deny the … defendants' motion to dismiss the complaint on forum non conveniens grounds when it had already granted another defendant's motion to dismiss under the same doctrine. We answer this question in the affirmative and find that the … defendants have not demonstrated that Supreme Court's denial was an improvident use of discretion. * * *

… [W]e find Supreme Court's determination to deny each defendant's motion to dismiss on forum non conveniens grounds was not an abuse of discretion. However, this determination only represents half of our inquiry, as a finding that it was proper for Supreme Court to deny defendants' motions to dismiss on forum non conveniens grounds does not equate to a finding that Supreme Court had personal jurisdiction over all … defendants. Indeed … , plaintiff has failed to establish personal jurisdiction over Reyes, Pineda, Capina, and Agarrado. Bangladesh Bank v Rizal Commercial Banking Corp. 2024 NY Slip Op 01112, 2-29-24

Practice Point: Whether to grant a motion to dismiss on forum non conveniens grounds is discretionary. Here the denial of the motion was not an abuse of discretion despite the prior granting of an identical motion brought by another defendant.

FEBRUARY 29, 2024

CIVIL RIGHTS LAW, CHILD VICTIMS ACT.

THE ALLEGATIONS OF DEFENDANTS' CONDUCT DURING PHOTO SHOOTS OF PLAINTIFF-MODEL WHEN SHE WAS 16 AND 17 YEARS OLD MET THE "SEXUAL CONDUCT" CRITERIA FOR THE EXTENDED STATUTE OF LIMITATIONS UNDER THE CHILD VICTIMS ACT (CVA), THE COMPLAINT STATED CAUSES OF ACTION FOR INVASION OF PRIVACY PURSUANT TO CIVIL RIGHTS LAW SECTION 50 (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, modifying Supreme Court in this Child Victims Act (CVA) action, determined: (1) the conduct alleged to have been committed by defendant modeling agency (Wilhelmina) and defendant-seller of sun tan products (Cal Tan) during photo shoots of plaintiff-model when she was 16 and 17 years old met the criteria for "sexual conduct" within the meaning of the extended statute of limitations under the CVA (CPLR 214-g); (2) New York has jurisdiction over the case against Cal Tan, even though the Cal Tan photo shoot took place in Mexico (plaintiff was a New York resident); (3) the negligent supervision and breach of fiduciary causes of action against Cal Tan were properly dismissed because no allegations supported a duty to supervise; (4) the negligent supervision and breach of fiduciary duty causes of action against Wilhelmina should not have been dismissed because no arguments in opposition were interposed; and (5) the invasion of privacy causes of action (Civil Rights Law section 50) against both defendants survived the motions to dismiss. The following allegations were deemed sufficient to meet the "sexual conduct" criteria for the applicability of the CVA's extended statute of limitations:

Plaintiff's allegations as to Cal Tan include that she was "instructed . . . to arch her back and look at the camera 'sexy,' 'like a lover,' and think about doing 'naughty things with your boyfriend,'" and that the photographs generated from the photoshoot "included ones in which Doe was depicted topless with her back arched in a sexually suggestive pose; looking out to the sea in a sultry manner; in which she was completely topless and 'naked in the water'; where she is posed suggesting a willingness to engage in sexual activity; and where Doe is standing on a roof, semi- or totally naked."

As to Wilhelmina, plaintiff alleged that at one photoshoot, "[s]he was photographed in [see-through lingerie] with another girl, also wearing see-through lingerie, together in bed. Doe and the other underage model wore coy expressions, as if together they had been doing something naughty, or sexual;" at another photoshoot, where plaintiff was unclothed, she was "instructed . . . to look 'innocent, but sexy' for some photos, and like a 'bad girl' for others"; and that at a third photoshoot she "was made to sit nude on a bed with a white sheet covering part, but not all, of her breast and buttocks." Doe v Wilhelmina Models, Inc., 2024 NY Slip Op 00969, First Dept 2-27-24\

Practice Point: This comprehensive opinion lays out the criteria for "sexual conduct" within the meaning of the extended statute of limitations under the Child Victims Act (CVA). Here allegations of defendants' conduct during photo shoots of plaintiff-model when she was 16 and 17 years old met the CVA sexual-conduct criteria.

FEBRUARY 27, 2024

CONTRACT LAW, LANDLORD-TENANT.

THE PURPORTED ORAL ASSIGNMENT OF A SUBLEASE FOR MORE THAN A YEAR VIOLATED THE STATUTE OF FRAUDS; THE CRITERIA FOR AN ASSIGNMENT "BY OPERATION OF LAW" WERE NOT MET (FIRST DEPARTMENT).

The First Department, reversing (modifying) Supreme Court, determined the oral assignment of a sublease was invalid under the statute of frauds and there was no assignment "by operation of law:"

An oral assignment of the sublease here would have to satisfy the statute of frauds, which requires the assignment of such a sublease (for more than one year) to be in writing (see General Obligations Law § 5-703[2] …). Although, in the absence of a written assignment, a presumption of "assignment by operation of law" sufficient to satisfy the statute of frauds may be created by a "tenant in possession" paying rent … , such as where a tenant pays the full rent for some extended period of time … , no such presumption applies in the circumstances here. The terms of the

sublease allowed for a sublease/occupation but expressly forbade oral assignments and included a "no waiver" clause, and the occupancy and payments by [defendant] here was not conduct "unequivocally referrable" to any purported agreement by the parties to orally modify the no oral assignment term … . Innerworkings, Inc. v Arik Eshel CPA & Assoc. P.C., 2024 NY Slip Op 00972, First Dept 2-27-24

Practice Point: An oral assignment of a sublease for more than a year violates the statute of frauds.

Practice Point: Payment of rent for an extended period of time may satisfy the statute of frauds "by operation of law" (not the case here).

FEBRUARY 27, 2024

FAMILY LAW, CORROBORATION OF CHILDREN'S ALLEGATIONS.

THE ALLEGATIONS BY THE CHILDREN WERE SUFFICIENTLY CORROBORATED TO SUPPORT A FINDING FATHER COMMITTED DOMESTIC ABUSE AND THEREBY NEGLECTED THE CHILDREN (SECOND DEPT).

The Second Department, reversing Family Court, determined the allegations made by the children about father's violence against mother were sufficiently corroborated to support a neglect finding against father:

… [A] preponderance of the evidence established that the father neglected the children by perpetrating acts of domestic violence against the mother in their presence … .. The out-of-court statement of the oldest child, Roland M., was sufficiently corroborated. "The out-of-court statements of siblings may properly be used to cross-corroborate one another" … . "However, such out-of-court statements must describe similar incidents in order to sufficiently corroborate the sibling's out-of-court allegations" … "and be independent from and consistent with the other sibling's out-of-court statement" (Matter of Ashley G. [Eggar T.], 163 AD3d at 965). Roland M.'s statement was corroborated by the out-of-court statement of his sister, Rosalee M., that she witnessed the father drag the mother

out the door and choke her. Roland M.'s statement was also corroborated by the ORT received by the petitioner, which reported that Roland M. called the authorities during the domestic violence incident, that during the incident the father strangled the mother with his hands, that Roland M. had to intervene, and that the father was being charged with strangulation in the second degree … …

… [T]he evidence was sufficient to establish that the father's acts of domestic violence against the mother in the children's presence impaired, or created an imminent danger of impairing, the children's physical, mental, or emotional condition … . Matter of Roland M. (Manuel M.), 2024 NY Slip Op 01011, Second Dept 2-28-24

Practice Point: The issue here was whether the domestic abuse allegations by the children were sufficiently corroborated. The Appellate Division held that they were, giving some insight into what constitutes sufficient corroboration in this context.

FEBRUARY 28, 2024

FORECLOSURE, EVIDENCE.

THE FAILURE TO SUBMIT THE RECORDS UPON WHICH THE REFEREE'S CALCULATIONS WERE BASED RENDERED THE REPORT INADMISSBILE HEARSAY IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing the confirmation of the referee's report in this foreclosure action, determined the absence of the records relied upon for the referee's computations rendered the report inadmissible hearsay:

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . "However, computations based on the review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value" … .

… [T]he referee's report was improperly premised upon unproduced business records. In support of its motion, the plaintiff submitted an affidavit from an employee of the plaintiff, An Dang, which the referee relied upon in computing the amount due to the plaintiff. However, the record does not reflect that the plaintiff submitted the business records upon which An Dang or the referee relied in computing the total amount due on the mortgage, as well as payments for taxes, insurance, and other advances. Therefore, the referee's findings were not substantially supported by the record … . U.S. Bank N.A. v Jong Shin, 2024 NY Slip Op 01029, Second Dept 2-28-24

Practice Point: In a foreclosure action, a referee's report based upon records which were not submitted to the court is inadmissible hearsay.

FEBRUARY 28, 2024

MEDICAL MALPRACTICE, EXPERT OPINION.

IN A MEDICAL MALPRACTICE CASE, CONFLICTING EXPERT OPINIONS WHICH ARE EVIDENCE-BASED (I.E., NOT MERELY "CONCLUSORY") REQUIRE DENIAL OF SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court in this medical malpractice case, determined plaintiff's expert raised questions of fact about whether defendant surgeon failed to diagnose and treat a post-operative infection of plaintiff's knee. Therefore, defendant's motion for summary judgment should not have been granted. The decision is fact-specific and cannot be fairly summarized here. But the simple issue is: if experts on both sides of a med mal case come to conflicting conclusions which are evidence-based, summary judgment is inappropriate:

Based on the conflicting expert proof, plaintiff raised triable issues of fact … . Accordingly, defendants were not entitled to summary judgment. Kelly v Herzog, 2024 NY Slip Op 01137, Third Dept 2-29-24

Practice Point: In a med mal case, conflicting expert affidavits which are not "conclusory," but rather are supported by evidence, preclude summary judgment.

FEBRUARY 29, 2024

NEGLIGENCE, CHILD VICTIMS ACT.

IN THIS CHILD VICTIM'S ACT (CVA) ACTION, THE COMPLAINT ADEQUATELY ALLEGED CAUSES OF ACTION FOR NEGLIGENT SUPERVISION, NEGLIGENT RECRUITMENT AND NEGLIGENT FAILURE TO WARN AGAINST BIG BROTHERS BIG SISTERS OF AMERICA (BBBS) AND FAMILY SERVICES OF WESTCHESTER (FSW) BASED ON THE ALLEGED SEXUAL CONDUCT BY A VOLUNTEER MENTOR (SECOND DEPT).

The Second Department determined defendant Big Brothers Big Sisters of America (BBBS)'s and defendant Family Services of Westchester (FSW)'s motions to dismiss the negligent supervision, negligent recruitment and negligent failure to warn causes of action were properly denied in this Child Victims Act (CVA) lawsuit. Plaintiff alleged he was sexually abused by a mentor associated with defendants:

… [T]he amended complaint adequately alleged that the defendants owed a duty of care to the plaintiff and that the sexual abuse by the mentor was foreseeable. Specifically, the amended complaint alleged that the mentor groomed and sexually abused the plaintiff "in connection with [the mentor's] position as a volunteer with BBBS and FSW" and "in connection with BBBS and FSW sponsored activities." During all relevant times, BBBS and FSW had allegedly assumed custody and control over the plaintiff "as a minor child in their care." The amended complaint alleged that the defendants had a duty to "take reasonable measures to guard against child sexual abuse by volunteers" and that the defendants failed to ensure that there were reasonable screening or recruitment measures in place to prevent such abuse. The amended complaint further alleged that BBBS published two reports demonstrating that, while the plaintiff's abuse was ongoing, BBBS was aware that the services it offered "attract[ed] child sexual abusers," that the clients of BBBS were at "high risk" for potential abuse, and that the selection process used to match mentors with mentees did not appropriately incorporate child sexual abuse prevention training (internal quotation marks omitted). Moreover, the

amended complaint alleged that the mentor had "dangerous propensities," that the defendants "should have known" that the mentor had a propensity to sexually abuse children, and that oversight and monitoring of the mentor's interactions with his prior mentees "would have revealed [the mentor's] pattern of predatory behavior." At the pleading stage of the litigation, where the plaintiff's allegations are accepted as true and are accorded the benefit of every possible favorable inference, the plaintiff adequately alleged that the defendants owed the plaintiff a duty of care and that the sexual abuse by the mentor was foreseeable … . Brophy v Big Bros. Big Sisters of Am., Inc., 2024 NY Slip Op 00993, Second Dept 2-28-24

Practice Point: Here in this Child Victims Act (CVA) case, the complaint adequately alleged negligent supervision, negligent recruitment and negligent failure to warn.

FEBRUARY 28, 2024

NEGLIGENCE, CONTRACTOR-LIABILITY, OWNER-LIABILITY.

THE CONTRACTOR WHICH UNDERTOOK THE DUTY TO INSTALL FLOORING WAS REQUIRED TO PERFORM THAT DUTY WITH REASONABLE CARE; THE OWNER OF THE PROPERTY HAD A SEPARATE NONDELEGABLE DUTY TO KEEP THE PROPERTY SAFE WHICH MAY ALLOW THE CONTRACTOR'S NEGLIGENCE TO BE IMPUTED TO THE OWNER; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS TRIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) defendant contractor (AW&S) undertook the duty to install flooring and was therefore required to perform that duty with reasonable care, and (2) the owner of the property (UJA) had a separate, nondelegable duty to keep the premises safe. There was evidence AW&S failed to secure portions of the flooring it installed and that failure was the proximate cause of plaintiff's trip and fall. Defendants did not

present any evidence of when the floor was last inspected prior to the fall and therefore did not demonstrate the absence of constructive notice of the defect:

Defendants failed to establish prima facie that they were not negligent in the installation and maintenance of the Masonite flooring on which plaintiff tripped and fell … . Although defendants claim that they neither created nor had actual or constructive notice of the condition that caused plaintiff's injuries, the record establishes that defendant owner … (UJA) requested that defendant … (AW&S) protect the floors during a renovation project in its building for which AW&S served as general contractor. … AW&S specifically undertook responsibility for the installation, maintenance, and inspection of the protective Masonite flooring while it was on site, and the project superintendent noted that there were sections of Masonite that lacked duct tape securing it to the floor in the area where plaintiff tripped and fell. Based on this testimony, there are questions of fact as to whether AW&S's failure to secure the Masonite, or to note that it was not secured upon inspection, was the proximate cause of plaintiff's injuries … . … [W]here a defendant has undertaken a specific duty, it is obligated to perform that duty with reasonable care or be liable for any hazards it creates … . UJA, as owner, has a separate, nondelegable duty to maintain its premises, and AW&S's negligent maintenance of the Masonite, if established, could be imputed to UJA …

Defendants also failed to make a prima facie showing that they lacked constructive notice of the condition. Neither defendant offered evidence of maintenance and inspection records despite testimony that the duct tape on the Masonite required routine replacement when it became curled or wet … . …[P]laintiff was not required to establish how long the condition existed … . Bolson v UJA-FED Props. Inc., Ltd., 2024 NY Slip Op 00966, First Dept 2-27-24

Practice Point: A contractor which assumes the duty to do work, here floor-installation, is required to do so with reasonable care.

Practice Point: The property owner which hires a contractor to do work has a separate nondelegable duty to keep the premises safe such that a contractor's negligence may be imputed to the owner.

FEBRUARY 27, 2024

NEGLIGENCE, INDEMNIFICATION VERSUS CONTRIBUTION.

INDEMNIFICATION IS ONLY AVAILABLE IF THE PARTY SEEKING IT IS NOT NEGLIGENT (VICARIOUS LIABILITY); A PARTY WHO IS PARTIALLY NEGLIGENT MAY ONLY SEEK CONTRIBUTION, NOT INDEMNIFICATION, FROM OTHER TORT-FEASORS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the third-party complaint against defendant seeking indemnification should have been dismissed because the third-party plaintiff could not be vicariously liable for the negligence of the defendant. Where a party is partially liable based on its own negligence, only contribution from other tort-feasors, not indemnification, is available:

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" … . "The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" … . However, "where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy" … . De Heras v Avant Gardner, LLC, 2024 NY Slip Op 00999, Second Dept 2-28-24

Practice Point: Indemnification is only available to a party who is vicariously liable for the negligence of another. A party who is partially negligence can only seek contribution, not indemnification, from other tort-feasors.

FEBRUARY 28, 2024

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PETITIONER SOUGHT A TEMPORARY LICENSE PURSUANT TO RPAPL 881 TO ENTER RESPONDENT'S ADJOINING PROPERTY TO INSTALL PROTECTIONS PRIOR TO DEMOLITION WORK ON PETITIONER'S BUILDINGS; RESPONDENT WAS ENTITLED TO FULL INDEMNIFICATION FOR ANY DAMAGE (AS OPPOSED TO INDEMNIFICATION "TO THE EXTENT COVERED BY INSURANCE") AND TO REASONABLE EXPERT'S AND ATTORNEY'S FEES (SECOND DEPT).

The First Department, modifying Supreme Court, determined the respondent adjoining property owner was entitled to unrestricted indemnification from petitioner for damage to respondent's property plus reasonable expert's and attorney's fees in this action by petitioner pursuant to RPAPL 881 for a temporary license to enter respondent's property. Petitioner was doing demolition work on petitioner's buildings and sought the license to install protections on respondent's property. Supreme Court should not have limited respondent's indemnification "to the extent covered by insurance." And Supreme Court should have awarded respondent expert's and attorney's fee to the extent the fees are deemed reasonable:

RPAPL 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owners have refused access. The statute is designed to strike a balance between the petitioner's interest in improving its property and the harm to the adjoining property owner's enjoyment of its property … , and it gives the motion court the discretion to craft an appropriate remedy in connection with license and access "upon such terms as justice requires" … . Since a respondent compelled to grant access under RPAPL 881 does not seek out the intrusion and does not derive any benefit from it, equity requires that the respondent should not have to bear any costs resulting from the access … .

… [T]he judgment's indemnity provision provides indemnification for third-party damage claims only "to the extent covered by insurance," which unreasonably fails to shift the full risk to petitioner as is appropriate under RPAPL 881. Matter of 1643 First LLC v 1645 1st Ave. LLC, 2024 NY Slip Op 01111, First Dept 2-29-24

Practice Point: When a property owner seeks a temporary license to enter an adjoining property pursuant to RPAPL 881 in connection with construction work, the adjoining property owner is entitled to full indemnification for any damage as well as reasonable expert's and attorney's fees incurred because of the temporary license.

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