NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
March 18 – 22, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts March 18 – 22, 2024, and Posted on the New York Appellate Digest Website on Monday, March 25, 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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ATTORNEYS, CIVIL PROCEDURE, FRAUD.

JUDICIARY LAW 487 CREATES A PRIVATE RIGHT OF ACTION AGAINST AN ATTORNEY FOR DECEIT OR FRAUD ON THE COURT OR ANY PARTY TO A LAWSUIT; HERE THE PROOF OF DECEIT OR FRAUD WAS LACKING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, determined Judiciary Law section 487 creates a private right of action seeking damages for deceit by an attorney, Here plaintiff alleged her attorney in a medical malpractice action defrauded the court in the calculation of attorney's fees. The Court of Appeals sided with plaintiff in finding a private right of action under Judiciary Law 487, but found plaintiff's evidence of deceit or fraud on the defendant-attorney's part was lacking:

We conclude … that section 487 authorizes a plenary action for attorney deceit under these circumstances. The text of the statute allows recovery of treble damages "in a civil action" where "[a]n attorney . . . [i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party." The phrase "in a civil action" is most naturally read to include a plenary action. Notably, the provision does not differentiate between an action that might undermine or undo a final judgment and one that does not, or between allegations of fraud that are intrinsic to the underlying action, as opposed to extrinsic. Interpreting the statute to permit a plenary action where the remedy would not entail undermining a final judgment (for example, when the deceit harms a prevailing party), but deny one where a final judgment could be impaired, would require us to rewrite the statute. That we cannot do. * * *

Plaintiff has not identified a material issue of fact as to whether [defendant-attorney's] representations that the fee calculations comport with the statutory schedule amounted to false statements. Urias v Daniel P. Buttafuoco & Assoc., PLLC, 2024 NY Slip Op 01497, CtApp 3-19-24

Practice Point: Judiciary Law 487 creates a private right of action against an attorney for fraud upon the court or any party to a lawsuit.

MARCH 19, 2024

CIVIL PROCEDURE, COURT OF CLAIMS, JUDGES.

A RULING ON A MOTION TO DISMISS DEALS ONLY WITH THE SUFFICIENCY OF THE PLEADINGS AND DOES NOT CONSTITUTE THE LAW OF THE CASE WITH RESPECT TO A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined the judge improperly refused to consider evidence submitted by defendants in opposition to claimant's summary judgment motion citing the law of the case doctrine. The judge's "law of the case" ruling, however, was based on her prior ruling on a motion to dismiss. Because a motion to dismiss addresses only the sufficiency of the pleadings, a ruling on a motion to dismiss is not the law of the case with respect to a subsequent summary judgment motion:

It is well settled that the law of the case doctrine "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" … , and that a court's order denying a motion to dismiss is "addressed to the sufficiency of the pleadings" and does not "establish the law of the case for the purpose of" motions for summary judgment … . We thus agree with defendants that the court erred in refusing to consider defendants' proof in opposition to the motion … . Riley v State of New York, 2024 NY Slip Op 01647, Fourth Dept 3-22-24

Practice Point: A ruling on a motion to dismiss is not the law of the case for a subsequent summary judgment motion.

MARCH 22, 2024

CIVIL PROCEDURE, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S DEMAND FOR MONETARY DAMAGES AND EQUITABLE RELIEF IN THIS EMPLOYMENT DISCRIMINATION CASE DID NOT WAIVE THE RIGHT TO A JURY TRIAL; PLAINTIFF COULD BE MADE WHOLE ENTIRELY BY A MONETARY AWARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the demand for both money damages and equitable relief in this employment discrimination case did not waive plaintiff's right to a jury trial. The plaintiff could be made whole entirely with money damages:

CPLR 4101(1) provides, in pertinent part, that "issues of fact shall be tried by a jury, unless a jury trial is waived," in any action "in which a party demands and sets forth facts which would permit a judgment for a sum of money only." The "deliberate joinder of claims for legal and equitable relief arising out of the same transaction" may constitute a waiver of the right to a jury trial … . However, the right to a jury trial must be determined by the facts alleged in the complaint and not by the prayer for relief … , and "[w]here a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial" … . A jury trial will not be waived if the equitable relief sought by the plaintiff is "incidental to [his or her] demand for money damages" … .

Here, the gravamen of the plaintiff's action is to recover damages for employment discrimination. Therefore, the character of the action is essentially legal, and even though the prayer for relief in the complaint contains demands for equitable relief, only an award of monetary damages would afford the plaintiff a full and complete remedy … . Blackman v Metropolitan Tr. Auth., 2024 NY Slip Op 01530, Second Dept 3-20-24

Practice Point: Although a demand for equitable relief may waive the right to a jury trial, here there was no waiver because plaintiff could be made whole with a monetary award.

MARCH 20, 2024

CIVIL PROCEDURE, EVIDENCE, JUDGES.

A PRIOR RULING IN A PRIOR ACTION FINDING THAT THE WITHHELD DOCUMENTS WERE PROTECTED FROM DISCLOSURE DID NOT INDICATE THE SPECIFIC PRIVILEGE WHICH APPLIED TO EACH DOCUMENT; THEREFORE THE PRIOR RULING DID NOT TRIGGER THE COLLATERAL ESTOPPEL DOCTRINE AND THE DISCLOSURE OF DOCUMENTS MUST BE DETERMINED ANEW IN THE INSTANT ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined a prior ruling in a prior action finding that withheld documents were protected from disclosure did not trigger the collateral estoppel doctrine in the instant action because the prior ruling did not indicate the specific privilege invoked for each document:

… [T]he court abused its discretion in summarily denying the motion on the basis that it had previously ruled that the withheld documents were protected from disclosure in a prior action involving the parties. Collateral estoppel bars relitigation of an issue when "the identical issue necessarily [was] decided in the prior action and [is] decisive of the present action, and . . . the party to be precluded from relitigating the issue [had] a full and fair opportunity to contest the prior determination" … . Preclusion of an issue occurs only if that issue was " 'actually litigated, squarely addressed and specifically decided' " in the prior action … . While in the prior action the court denied a motion to compel the identical documents contained in the privilege log, the court did not specifically address whether the withheld documents were protected and which protection, such as attorney-client privilege, applied to each document. Thus, there is no evidence that the identical issue, decisive in this action, was necessarily decided in the prior action … . Wiltberger v Allen, 2024 NY Slip Op 01635, Fourth Dept 3-22-24

Practice Point: Collateral estoppel applies only when the issues are identical. Here, even though the documents at issue were found to be privileged in the prior action, the precise privilege applied to each document was not described in the prior order. Therefore it is not clear the issues are identical in the instant proceeding, so the application of collateral estoppel to preclude disclosure is not available.

MARCH 22, 2024

CIVIL PROCEDURE, JUDGES, APPEALS.

THE MAJORITY HELD SUPREME COURT PROPERLY ALLOWED PLAINTIFFS TO FILE AN AMENDED COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED WITHOUT PREJUDICE BY THE APPELLATE DIVISION BECAUSE COUNTERCLAIMS WERE STILL BEFORE THE COURT (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Wilson, over a three-judge dissenting opinion, determined that plaintiffs were properly allowed to amend their complaint, which had been dismissed without prejudice, because counterclaims were still before the court:

… [T]he Appellate Division dismissal of the second amended complaint due to lack of standing or capacity was without prejudice …. . The order contemplated that the company could "in theory, be revived," but simply stated that [plaintiff] had done so improperly. Therefore, there is nothing in the Appellate Division's order or opinion that would prevent plaintiffs from pursuing their claims after curing the standing or capacity issue. …

The question on appeal, then, is whether the Appellate Division's decision required the plaintiffs to commence a separate action instead of seeking leave to file an amended complaint. Whatever the answer to that question might be in a case in which no action remained between the parties in Supreme Court, … here the action remained pending in Supreme Court because of the [defendants'] counterclaims. Therefore, Supreme Court retained control over the parties and continued to adjudicate claims related to the same transactions that formed the subject-matter of the complaint. For that reason, the Appellate Division order also did not render the case final for purposes of appealability, as no appeal to the Court of Appeals may be taken from an order which leaves claims pending in the action between the same parties … .

Because the original action remained pending in Supreme Court even after the complaint was dismissed, Supreme Court retained the power to grant leave to plaintiffs to file another amended complaint. Favourite Ltd. v Cico, 2024 NY Slip Op 01496, CtApp 3-19-24

Practice Point: Here the appellate court had dismissed the complaint without prejudice and the issue was whether plaintiffs could file an amended complaint, or whether plaintiffs had to start a new lawsuit. The Court of Appeals held Supreme Court retained the power to allow an amended complaint because counterclaims were still before the court.

MARCH 19, 2024

CONSTITUTIONAL LAW, CIVIL PROCEDURE, EXTREME RISK ORDERS.

AFTER RESPONDENT-STUDENT THREATENED TO "SHOOT... UP THE SCHOOL," PETITIONER-POLICE-DEPARTMENT FILED A PETITION FOR AN EXTREME RISK PROTECTION ORDER PURSUANT TO CPLR ARTICLE 63-A WHICH SUPREME COURT DENIED ON THE GROUND THE STATUTE VIOLATES THE SECOND AMENDMENT; THE APPELLATE DIVISION REVERSED FINDING THE STATUTE CONSTITUTIONAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that petitioner-police-department's petition for an extreme risk protection order re: a 16-year-old student who had threatened to "shoot up the school" should not have been dismissed on the ground that the controlling statute, CPLR article 63-A, is unconstitutional:

… [T]he respondent, born in 2009, told other students on his school bus that "they shouldn't come to school tomorrow" after they criticized the cleanliness of his hands. After the words "gun" and "shooting up the school" were mentioned, the respondent said that he was joking, but later said that he "may be serious" in carrying out his threat. School officials reported previous incidents involving

violence by the respondent against other students, suicidal ideation and behavior by the respondent, and evidence that the respondent may have a mental illness.

The petitioner [police department] filed a petition for an extreme risk protection order pursuant to CPLR article 63-A. The Supreme Court dismissed the petition [on the ground that] CPLR article 63-A is unconstitutional. …

The respondent is a minor less than 16 years old, who … is not allowed to possess guns …, … [T]he Supreme Court of the United States stated that the Second Amendment of the United States Constitution protects "law-abiding, adult citizens." The respondent in this case is not an adult and has no general right to keep and bear arms. Therefore, he lacks standing to challenge CPLR article 63-A as a violation of the Second Amendment … .

Further, … CPLR article 63-A is constitutional and does not deprive the respondent of due process of law. Accordingly, the petition should be determined on the merits. Matter of Gallagher Town of New Windsor Police Dept. v D.M., 2024 NY Slip Op 01539, Second Dept 3-20-24

Practice Point: Here the police department sought an extreme risk protection order re: a 16-year-old student who threatened to shoot up the school Supreme Court dismissed the petition for the extreme risk order, finding the controlling statute, CPLR article 63-A, unconstitutional. The First Department reversed noting its opinion dated March 20, 2024, Matter of R.M. v C.M., 2024 NY Slip Op 01545, finding the statute constitutional.

MARCH 20, 2024

CONSTITUTIONAL LAW, CIVIL PROCEDURE, EXTREME RISK ORDERS.

CPLR ARTICLE 63-A IS CONSTITUTIONAL; THE STATUTE ALLOWS ISSUANCE OF AN EXTREME RISK ORDER PROHIBITING A RESPONDENT FROM POSSESSING A FIREARM BASED UPON EVIDENCE RESPONDENT IS LIKELY TO CAUSE SERIOUS HARM (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Barros, determined the statute which allows the issuance of an extreme risk order prohibiting a person from possessing a firearm is constitutional. The statute is CPLR article 63-A:

CPLR 6342(1) provides, in pertinent part, that upon an application for an extreme risk protection order: "the court may issue a temporary extreme risk protection order, ex parte or otherwise, to prohibit the respondent from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun, upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law. Such application for a temporary order shall be determined in writing on the same day the application is filed."

In determining whether there are grounds for a temporary extreme risk protection order, the court "shall consider any relevant factors," including a nonexhaustive list of conduct by the respondent: "(a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person; "(b) a violation or alleged violation of an order of protection; "(c) any pending charge or conviction for an offense involving the use of a weapon; "(d) the reckless use, display or brandishing of a firearm, rifle or shotgun; "(e) any history of a violation of an extreme risk protection order; "(f) evidence of recent or ongoing abuse of controlled substances or alcohol; or "(g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor. Matter of R.M. v C.M., 2024 NY Slip Op 01545, Second Dept 3-20-24

Practice Point: Overruling lower court precedent to the contrary, the Second Department held CPLR article 62-A, which allows issuance of an order prohibiting a respondent from possessing a firearm based upon an extreme risk of serious harm to the respondent or others is constitutional.

MARCH 20, 2024

CONTRACT LAW, REAL ESTATE.

A SELLER WHO BREACHES OR SABOTAGES A REAL ESTATE PURCHASE AGREEMENT CANNOT RELY ON REMEDY LIMITATION CLAUSES TO PRECLUDE A BUYER'S ACTION FOR SPECIFIC PERFORMANCE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that remedy limitation clauses in contracts will not be enforced on behalf of a party who breaches the contract,, acts in bad faith or deliberately sabotages the contract. Here the defendant argued the remedy limitation clause precluded plaintiff's action for specific performance. But the complaint alleged defendant failed to appear at the closing and otherwise acted prevented the sale bad faith:

"Where . . . a seller sabotages efforts to close the deal, remedy limitation clauses in the contract of sale do not bar a buyer from obtaining specific performance" … . Further, "[a] vendor of real property who breaches the contract of sale in bad faith cannot limit the damages recoverable by the injured purchaser by relying on a contractual limitation" … . Saadia v National Socy. of Hebrew Day Schs., Inc., 2024 NY Slip Op 01571, Second Dept 3-20-24

Practice Point: In a real estate deal, a seller who deliberately sabotages the contract cannot rely on remedy limitation clauses to preclude a buyer's action for specific performance.

MARCH 20, 2024

CRIMINAL LAW, POSTREADINESS DELAY.

CONSULT THIS OPINION FOR IN-DEPTH DISCUSSIONS OF WHEN POSTREADINESS DELAY SHOULD BE ATTRIBUTED TO THE PEOPLE; THE DISSENT ARGUED THIS RULING UPENDS DECADES OF PRECEDENT BY ATTRIBUTING A DELAY ATTRIBUTABLE TO THE COURT TO THE PEOPLE, RESULTING IN A SPEEDY-TRIAL VIOLATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over an extensive three-judge dissenting opinion, reversed defendant's misdemeanor (reckless driving) conviction on speedy-trial grounds. The majority and dissenting opinions are comprehensive and cannot be fairly summarized here. The opinions should be consulted for in depth discussions of how postreadiness delays should be calculated. The dissent argued that decades of precedent have been upended by the majority's ruling because postreadiness delay which was attributable to the court (the People asked for a 12-day adjournment and the court imposed a 43-day adjournment) was attributed to the People:

Here … the People filed an off-calendar statement of readiness, were not ready on three successive trial dates, and failed to provide any explanation despite the court's invitation to do so, and despite the opportunity to provide an explanation in their opposition to [defendant's] 30.30 motion. Indeed, even in their papers to this Court, the People offered no explanation for any of the times they were not ready on a previously scheduled trial date to which they had assented. Surely that conduct does not serve the legislature's intended purpose of "discourag[ing] prosecutorial inaction" … . Instead, the People's conduct fits squarely within our dissenting colleagues understanding of postreadiness delays—they are "charged to the People only when the delay is attributable to their inaction and directly implicates their ability to proceed to trial" … .

From the dissent:

The majority's opinion upends [the] common-sense understanding that courts and parties have relied on for decades by attributing the court's postreadiness delay to the People. Applied here, this new rule means the People are held responsible for 43 days of postreadiness delay when they requested only a 12-day adjournment

and the additional 31 days were undisputedly caused by court—all because the prosecutor appearing did not know the underlying reason for the People's 12-day adjournment request. People v Labate, 2024 NY Slip Op 01582, CtApp 3-21-24

Practice Point: This opinion should be consulted for in-depth discussions of when postreadiness delay is attributed to the People. The dissent argued decades of precedent have been upended by this ruling because postreadiness delay which should have been attributed to the court was attributed to the People, resulting in a speedy-trial violation.

MARCH 21, 2024

CRIMINAL LAW, EVIDENCE.

EVIDENCE THE DEFENDANT ACTED OUT OF ANGER WAS NOT INCOMPATIBLE WITH THE FINDNG THAT DEFENDANT "RELISHED" THE INFLICTION OF EXTREME PAIN WITHIN THE MEANING OF THE FIRST DEGREE MURDER STATUTE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, affirming defendant's first degree murder conviction, determined the evidence demonstrated defendant "relished" the infliction of extreme pain within the meaning of the first degree murder statute. The defendant argued the evidence demonstrated he acted out of anger, and did not demonstrate he relished or enjoyed inflicting pain. But the Court of Appeals found proof of both anger and enjoyment, noting that the two emotions are not mutually exclusive:

We reject defendant's argument that he acted only out of anger or a desire to get information from the victim. … [W]here the requisite motivation is at least a "substantial factor" in the murder, the statute is satisfied, even if the defendant "may have had mixed motives" … . Certainly, the goal of extracting information is not incompatible with relishing the infliction of extreme pain, and proof that a defendant acted out of anger in harming the victim does not preclude the jury from finding that defendant took pleasure in doing so. Here, defendant is heard on the recording continuing to attack the victim even after stating that her response was "good enough." On this record, there was sufficient evidence for the jury to find

that while defendant may have also acted in anger or sought information from the victim, taking pleasure in inflicting extreme pain upon her was a substantial motivation. People v Bohn, 2024 NY Slip Op 01500, Ct App 3-19-24

Practice Point: Here the defendant argued his actions which resulted in the death of the victim were motivated solely by anger, and that there was no proof he "relished" the infliction of extreme pain as required by the first degree murder statute. The Court of Appeals held that the two emotional states, anger and relishing or enjoying the infliction of pain, are not mutually exclusive.

MARCH 19, 2024

CRIMINAL LAW, EVIDENCE.

THE APPELLATE DIVISION'S VACATION OF DEFENDANT'S FIRST DEGREE MURDER CONVICTION WAS AFFIRMED; THE PEOPLE DID NOT PROVE THE "RELISHING THE INFLICTION OF EXTREME PAIN" ELEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two concurring opinions, affirmed the appellate division's vacation of the defendant's first degree murder conviction. The appellate division concluded two elements of first degree murder had not been proven: (1) a "course of conduct" which inflicted extreme physical pain; and (2) defendant's "relishing" the infliction of extreme physical pain upon the victim. The majority agreed with the People that the "course of conduct" element had been proven. But the majority agreed with the appellate division that the "relishing the infliction of extreme pain" element was not proven. The victim was attacked and stabbed multiple times by a group of gang members, including defendant. Defendant inflicted the fatal stab wound to the victim's neck which caused him to bleed to death. The stab wounds inflicted by others in the gang were deemed "superficial:"

A rational jury could have concluded that [the victim's] other wounds, inflicted pursuant to a course of conduct during which [the victim] was dragged from the store to the street, and then while on the ground subjected to several stab wounds

of varying degrees from multiple assailants, caused him extreme physical pain before his death. * * *

The People's evidence with respect to this mens rea element consisted of testimony that, shortly after attacking [the victim], defendant stated in a boastful tone that [the victim] was "not gonna eat for a good long time because [defendant] hit him in the neck." The People also presented evidence that defendant sought out [gang] leadership after the attack to claim responsibility for stabbing [the victim] in the neck.

This evidence demonstrates, at most, that defendant took pride in having killed [the victim], not that he took pleasure in causing [the victim] extreme physical pain before his death. The statute is clear that the defendant must relish or take pleasure in inflicting extreme physical pain, not simply in killing the victim … . People v Estrella, 2024 NY Slip Op 01499, CtApp 3-19-24

Practice Point: The "course of conduct" to inflict extreme pain and the "relishing" the infliction of extreme pain elements of first degree murder explained and debated. Here the "relishing" element was not proven.

MARCH 19, 2024

CRIMINAL LAW, EVIDENCE.

THE TRIAL TESTIMONY RENDERED THE COUNT DUPLICITOUS, NEW TRIAL REQUIRED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the trial testimony rendered the count duplicitous:

"Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" … . Here, count 2 of the indictment charged defendant with sexual abuse in the first degree regarding an alleged instance, occurring between July 2012 and January 2013, in which she subjected the victim to sexual contact when he was less than 11 years old. At trial, however, the victim testified to

multiple acts of sexual contact during the relevant time frame, any one of which could serve as the sexual contact necessary to prove defendant's guilt of count 2.

Because each act of alleged sexual contact constitutes "a separate and distinct offense" … , the victim's testimony that numerous such acts occurred during the relevant time frame rendered count 2 of the indictment duplicitous. Indeed, " 'it is impossible to verify that each member of the jury convicted defendant for the same criminal act' " in connection with count 2 … . People v Zona, 2024 NY Slip Op 01652, Fourth Dept 3-22-24

Practice Point: If the indictment charges one incident during the described time-frame and the trial testimony reveals more than one incident, it is impossible to know whether the jury reached a unanimous verdict on any one incident.

MARCH 22, 2024

CRIMINAL LAW, JUDGES, APPEALS.

IT WAS NOT CLEAR FROM THE RECORD WHETHER THE JUDGE IMPROPERLY DEEMED YOUTHFUL OFFENDER STATUS TO HAVE BEEN WAIVED BY THE PLEA, OR WHETHER THE JUDGE REJECTED YOUTHFUL OFFENDER STATUS AFTER CONSIDERING IT AS REQUIRED; MATTER REMITTED (FIRST DEPT).

The First Department, remanding the matter for consideration of youthful offender status, determined it was not clear from the record whether the judge improperly denied youthful offender status because it has been waived by the plea or whether youthful offender status had been considered and rejected:

Although the court stated at sentencing that it would not grant defendant youthful offender status with regard to Indictment Nos. 3801/16 and 583/17, "there is nothing in the record to indicate that it actually independently considered youthful offender treatment," as required by CPL 720.20(1) and People v Rudolph (21 NY3d 497 [2013]), "instead of denying such treatment because it was not part of the plea agreement" … . While a court need not set forth its reasons for denying youthful offender treatment … , it is still required to "clarify expressly whether it

had ‘actually consider[ed] youthful offender treatment’ or whether it had improperly ‘ruled it out on the ground that it had been waived as part of defendant’s negotiated plea’” … . Because the court did not satisfy this obligation, we remand the matter for a determination of whether defendant should be afforded youthful offender treatment as to the promoting prison contraband and attempted criminal sale of a controlled substance convictions. People v J.G., 2024 NY Slip Op 01520, First Dept 3-19-24

Practice Point: In rejecting youthful offender status, the judge need not give the reasons but the record must reflect the judge considered the issue and did not improperly consider it waived by the plea.

MARCH 19, 2024

CRIMINAL LAW, JUDGES.

A SIROIS HEARING TO DETERMINE WHETHER WITNESSES ARE UNAVAILABLE TO TESTIFY BECAUSE OF INTIMIDATION IS A MATERIAL STAGE OF A TRIAL; DEFENDANT AND DEFENSE COUNSEL WERE EXCLUDED FROM THE HEARING; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the judge should not have conducted the Sirois hearing, which is a material stage of a trial, in the absence of defendant and defense counsel. The hearing determined two witnesses were unavailable to testify because of intimidation. Defense counsel was allowed to submit questions to be posed during the hearing:

… [A] new trial is warranted with respect to the criminal possession of a weapon count because he was denied his right to be present at a material stage of the trial (… see generally CPL 260.20). During the suppression hearing, allegations were made that defendant, or people acting at his behest, had threatened two witnesses to the underlying incident about testifying against defendant. The People, therefore, requested a Sirois hearing and sought a determination that the witnesses

had been made constructively unavailable to testify at trial by threats attributable to defendant, allowing them to introduce at trial statements made by the witnesses that would otherwise constitute inadmissible hearsay … . * * *

The court erred in conducting the Sirois hearing without defendant or defense counsel present. "[A] defendant's absence at a Sirois hearing has a substantial effect on [their] ability to defend the charges against [them] and, thus, a Sirois hearing constitutes a material stage of the trial" … . A "[d]efendant [is] entitled to confront the witness[es] against [them] at [such a] hearing and also to be present so that [the defendant can] advise counsel of any errors or falsities in the witness[es]' testimony which could have an impact on guilt or innocence" … . People v Steele, 2024 NY Slip Op 01642, Fourth Dept 3-22-24

Practice Point; Here defendant and defense counsel were excluded from the Sirois hearing which determined two prosecution witnesses were unavailable to testify because of intimidation. Because the hearing is a material stage of the trial, defendant must be present. Allowing defense counsel to submit written questions was insufficient. A new trial was required.

MARCH 22, 2024

CRIMINAL LAW, JUDGES.

THE MAJORITY CONCLUDED THE TRIAL JUDGE PROPERLY HANDLED ALLEGATIONS OF RACIAL BIAS WHICH INVOLVED HALF THE JURORS IN THIS MURDER CASE; TWO JUSTICES DISSENTED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the trial judge correctly and adequately handled allegations of racial bias among the jurors. The decision is detailed and comprehensive and cannot be fairly summarized here:

From the dissent:

We recognize that "a trial court's investigation of juror misconduct or bias is a delicate and complex task" … . On this record, however, the disclosure of alleged racial bias harbored by approximately half of the members of the jury warranted, at the very least, a question posed to each of the members of the panel of whether

they could perform their duties as jurors without bias or prejudice. We also conclude that, in its voir dire of juror No. 10, the court did not explore whether juror No. 10 harbored any racial prejudice toward Black people, a prerequisite to determining whether she, in fact, could be unequivocally fair and impartial in deliberations. Under these circumstances, the court should also have determined on the record "whether the juror's statements created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own" … . People v Wiggins, 2024 NY Slip Op 01659, Fourth Dept 3-22-24

Practice Pont: Here a juror alleged half the jurors exhibited racial bias. The majority held the judge properly handled the question and properly determined defendant would get a fair trial. There was a two-justice dissent which argued further questioning of the jurors was required.

MARCH 22, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), JUDGES.

DEFENDANT WAS NOT GIVEN PRIOR NOTICE OF THE JUDGE'S SUA SPONTE DECISION TO ASSESS 25 POINTS FOR A RISK FACTOR WHEN THE SORA BOARD SUGGESTED FIVE AND THE PEOPLE AGREED TO FIVE; NEW HEARING ORDERED (FOURTH DEPT).

The Fourth Department, vacating the SORA risk-level assessment and remitting the matter for a new hearing, determined the defendant did not have notice of the judge's sua sponte assessment of 25 points for risk factor 2, when both the SORA Board and the People recommended a five point assessment:

… [T]he court assessed 25 points under risk factor 2 even though the Board had recommended that five points be assessed and the People requested five points. Although the court stated during an appearance prior to the SORA hearing that "it does appear that the upward modification [sic] that was requested [in writing] by the People may be warranted in regards to the sexual intercourse factor," the court misapprehended the nature of the People's request for an upward departure, which plainly was not based on a disagreement with the Board's recommendation under risk factor 2. In any event, the court did not grant an upward departure; instead,

after determining at the hearing that only five points should be assessed under risk factor 2, the court later assessed 25 points based on an indication in the case summary that defendant stated at sentencing on the qualifying offense that he had consensual sexual intercourse with the victim.

Because defendant did not have notice that the court was considering a sua sponte assessment of additional points under risk factor 2, we "reverse the order, vacate defendant's risk level determination, and remit the matter to [Supreme] Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights" … . People v Acosta, 2024 NY Slip Op 01626, Fourth Dept 3-22-24

Practice Point: The judge in a SORA risk-level hearing cannot, sua sponte, increase the number of points assessed for a risk factor without prior notice to the defendant. Notice that the People will seek an upward departure does not constitute notice of increased points for a specific risk factor.

Similar issue and result where the People did not give notice of their intent to request a 10 point assessment for risk factor 12. People v Lostumbo, 2024 NY Slip Op 01639, Fourth Dept 3-22-24

MARCH 22, 2024

DEFAMATION.

TO STATE A CAUSE OF ACTION FOR DEFAMATION THE COMPLAINT MUST ALLEGE THE ACTUAL WORDS, WHEN THE STATEMENTS WERE MADE AND TO WHOM THE STATEMENTS WERE MADE; ALLEGING THE "GENERAL CONTENT" OF THE STATEMENTS WITHOUT SPECIFYING WHEN AND TO WHOM THEY WERE MADE IS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint in this defamation action was deficient in that the actual words alleged to have been defamatory, the dates the statements were made, and the persons to whom the statements were made were not described.

…[T]he complaint fails to state a viable defamation claim, since it does not set forth, inter alia, the actual words complained of, the dates of the alleged statements, or the persons to whom the statements were allegedly made. Rather, the complaint sets forth only the general content of the alleged defamatory statements, which were made at unspecified times to unnamed members of the community and unnamed persons at a business entity. Under such circumstances, the allegations failed to satisfy the pleading requirements of CPLR 3016(a) … . Sternberg v Wiederman, 2024 NY Slip Op 01576, Second Dept 3-20-24

Practice Point: A complaint sounding in defamation must allege the actual words, when the statements were made and to whom they were made. A description of the "general content" of the statements is not enough.

MARCH 20, 2024

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE COURT HAD, IN 2018, GRANTED MOTHER'S APPLICATION TO RELOCATE WITH THE CHILD TO CONNECTICUT, THE COURT SHOULD NOT HAVE DECIDED IT DID NOT HAVE JURISDICTION TO DETERMINE FATHER'S PETITION TO MODIFY THE CUSTODY ORDER WITHOUT HOLDING A HEARING ABOUT THE CHILD'S CONNECTIONS TO NEW YORK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have determined New York courts no longer had jurisdiction over this modification of custody case without holding a hearing:

In November 2018, the Supreme Court granted the mother's application to relocate with the child from New York to Connecticut. In an order dated May 31, 2022, the court awarded sole custody of the child to the mother and suspended the father's parental access upon the father's default in appearing at a scheduled court appearance. The father subsequently filed a petition to modify the order dated May 31, 2022, so as to award him sole physical custody of the child. At a court appearance on December 5, 2022, the court stated, inter alia, that the mother had

"relocated to Connecticut years ago" and that "[t]he [c]ourt no longer has jurisdiction." …

The Supreme Court should not have summarily determined, without a hearing, that it lacked jurisdiction on the ground that the child had been residing in Connecticut. The court made previous custody determinations in relation to the child in conformity with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act and, therefore, would ordinarily retain exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a … . In order to determine whether it lacked exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1)(a), the court should have afforded the parties an opportunity to present evidence as to whether the child had maintained a significant connection with New York and whether substantial evidence was available in New York concerning the child's "care, protection, training, and personal relationships" … . Matter of Holley v Mills, 2024 NY Slip Op 01542, Second Dept 3-20-24

Practice Point: Although the court in 2018 granted mother's application to relocate to Connecticut with the child, it may have continuing jurisdiction. Therefore the court should not have decided it did not have jurisdiction over father's petition to modify the custody order without holding a hearing about the child's connections to New York.

Similar jurisdiction issue in a child support modification proceeding (governed by Family Court Act 580-205(a)) in Matter of Sherman v Killian, 2024 NY Slip Op 01550, Second Dept 3-20-24

MARCH 20, 2024

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) RELIED SOLELY ON PRIOR NEGLECT FINDINGS FROM 2007 AND 2009 TO PROVE DERIVATIVE NEGLECT; NEGLECT FINDING REVERSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Administration for Children's Services (ACS) did not demonstrate mother had derivatively neglected the child. ACS had brought a motion for summary judgment which the court granted. The Second Department noted that motions for summary judgment pursuant to CPLR 3212 can be appropriate in a Family Court proceeding:

While proof of the abuse or neglect of one child is admissible evidence on the issue of the abuse or neglect of any other child of the parent (see Family Ct Act § 1046[b]), "there is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings. The focus of the inquiry . . . is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood" … . In determining whether a child born after the underlying acts of abuse or neglect should be adjudicated derivatively neglected, the "determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists" … .

Here, ACS failed to establish, prima facie, that the mother derivatively neglected the children based upon her alleged failure to address certain mental health issues underlying the 2007 and 2009 findings of neglect … . In support of its motion, ACS relied solely on the prior neglect findings and failed to include an affidavit from anyone with personal knowledge of the events alleged in the neglect petitions or any other evidentiary material (see CPLR 3212[b]). The prior neglect findings were not so proximate in time to establish, as a matter of law, that the conditions that formed the basis therefor continued to exist … . Matter of Kiarah V.R. (Virginia V.), 2024 NY Slip Op 01552, Second Dept 3-20-24

Practice Point: Here reliance on 2007 and 2009 neglect findings to demonstrate derivative neglect was deemed insufficient.

Practice Point: The court noted that summary judgment motions pursuant to CPLR 3212 can be brought in Family Court.

MARCH 20, 2024

FAMILY LAW, EVIDENCE.

NEGLECT FINDINGS BASED ON MOTHER'S MENTAL ILLNESS AND INADEQUATE SHELTER, EDUCATION, HYGIENE OR CLOTHING NOT SUPPORTED BY THE EVIDENCE; CRITERIA EXPLAINED IN SOME DEPTH (FOURTH DEPT).

The Fourth Department, reversing Family Court, in a fact-specific decision which cannot be fairly summarized here, determined the proof did not support the finding mother neglected the child by providing inadequate shelter, education, hygiene or clothing. In addition, the finding mother neglected the child based on mental illness was not proven. The decision explains the level of proof needed for finding neglect in these contexts:

… [T]he Family Court Act defines a neglected child as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, [or] shelter . . . though financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]). The statute also provides that a parent is responsible for educational neglect when, under the same requisite conditions, the parent fails to supply the child with "adequate . . . education in accordance with the provisions of [the compulsory education part of Education Law article 65] . . . notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition" … .

"The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence" (… see Family Ct Act § 1046 [b] [i]). "First, there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' " … . "In order for danger to be 'imminent,' it must be 'near or impending, not merely possible' " … . "This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" … . "Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances . . . Critically, however, the statutory test is minimum degree of care—not maximum, not best, not ideal—and the failure must be actual, not threatened" … .**Matter of Justice H.M. (Julia S.), 2024 NY Slip Op 01653, Fourth Dept 3-22-24**

Practice Point: The criteria for a neglect finding are explained in some depth. Here the proof did not support a finding of neglect based on mother's mental illness or inadequate shelter, education, hygiene or clothing.

MARCH 22, 2024

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

THE NYPD'S FAILURE TO TIMELY COMPLY WITH A COURT ORDER REQUIRING THE RELEASE OF DOCUMENTS PURSUANT TO A FOIL REQUEST WARRANTED THE AWARD OF ATTORNEY'S FEES TO PETITIONER; RESPONDENT NYPD'S ABANDONING AN ISSUE IN A PRIOR APPEAL PRECLUDED APPELLATE REVIEW OF THAT ISSUE IN A SUBSEQUENT APPEAL (FIRST DEPT).

The First Department determined the NYPD's failure to timely comply with a court order mandating a response to petitioner's FOIL request warranted the award of attorney's fees to petitioner:

… [T]he court properly granted attorney's fees and costs arising from NYPD's noncompliance with this Court's prior order. NYPD's argument, that this noncompliance was justified because some of the records were sealed after NYPD's final administrative determination, was abandoned in the prior appeal … , and this Court has "no discretionary authority" to reach this unpreserved issue in the interest of justice in this article 78 proceeding challenging an administrative determination … . The court providently exercised its discretion in holding NYPD in civil contempt, given that NYPD waited several months before disclosing a video and 407 heavily redacted pages of responsive records, after which petitioner was forced to continue litigating its entitlement to complete disclosure of unredacted copies of the records. After this Court's January 2021 order, NYPD should have disclosed all records responsive to petitioner's FOIL request, without the need for any further proceedings. "Once the court has issued a valid order, it is not for the recipient of that order to fashion its own remedy" … . The "lengthy delay" caused by NYPD "was unreasonable under the particular circumstances of this case," warranting an award of attorney's fees and costs pursuant to FOIL … . Matter of Jewish Press, Inc. v New York City Police Dept., 2024 NY Slip Op 01511, First Dept 3-19-24

Practice Point: Failure to timely respond to a court order requiring the release of documents pursuant to a FOIL request, necessitating further litigation by the petitioner, warrants the award of attorney's fees to petitioner.

MARCH 19, 2024

FREEDOM OF INFORMATION LAW (FOIL), CIVIL PROCEDURE.

BECAUSE THE RESPONDENT CREATED AMBIGUITY ABOUT WHETHER IT WAS STILL CONSIDERING PETITIONER'S FOIL REQUEST AFTER EXPIRATION OF THE 10-DAY CONSTRUCTIVE-DENIAL PERIOD, THE FOUR-MONTH PERIOD FOR COMMENCING AN ARTICLE 78 PROCEEDING DID NOT START ON THE CONSTRUCTIVE-DENIAL DATE; THE ARTICLE 78 PROCEEDING WAS TIMELY COMMENCED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the respondent Office of Court Administration (OCA) gave petitioner the impression it was still considering petitioner's FOIL request after the 10-day period for a response from the OCA expired on May 27, 2022. The OCA produced some documents on June 27, 2022. Therefore, the four-month period for commencing an Article 78 proceeding did not start on May 27, but rather on June 27, rendering the Article 78 commenced on November 8, 2022, timely:

… OCA's ongoing consideration of the request created an ambiguity and the impression of nonfinality regarding its May 27 constructive denial … . Twice, on June 16 and August 5, 2022, OCA issued substantive rulings on the FOIL request, stating that petitioner had 30 days to take a written appeal of the determination. OCA's treatment of its May 27 constructive denial as a final agency determination is inconsistent with its statements notifying petitioner that it had opportunities for further administrative appeals … . Thus, petitioner was justified in pursuing the administrative appeals that OCA appeared to offer rather than commencing what would have been a timely article 78 proceeding.

OCA created further doubt about the finality of its May 27 constructive denial when it wrote in its June 23, 2022 email that its substantive response to the FOIL request rendered the appeal of the constructive denial moot and issued a ruling on petitioner's appeal. OCA's contention that petitioner's May 13, 2022 appeal was denied with finality on May 27 is incompatible with its later characterization of that appeal as moot. Similarly, the July 27, 2022 production letter from OCA stated that OCA was producing records in response to petitioner's FOIL request, which,

according to OCA, had been "remanded back . . . in response" to petitioner's appeal. Petitioner was justified in its understanding that its request had not been denied with finality on May 27, as it could not have been both conclusively denied and simultaneously "remanded back . . . in response" to petitioner's June 23, 2022 appeal.

Because OCA created an ambiguity, it is resolved against the agency, and the petition is deemed timely … . Matter of Portfolio Media, Inc. v New York State Off. of Ct. Admin., 2024 NY Slip Op 01523, First Dept 3-19-24

Practice Point: Here the respondent did not respond to petitioner's FOIL request within 10 days. But because the respondent created ambiguity about whether it was still considering the request after the constructive-denial date, the constructive-denial date should not have been used to calculate the four-month period for commencing an Article 78 proceeding. Therefore the Article 78 was timely commenced.

MARCH 19, 2024

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THE PLAINTIFF WAS STANDING ON A LADDER WHEN THE DEFECTIVE GRINDER INJURED HIM, THE LADDER DID NOT FAIL AND THE LABOR LAW 240(1) ACTION WAS PROPERLY DISMISSED; HOWEVER THE DEFECTIVE GRINDER PRESENTED A SAFETY ISSUE COVERED BY LABOR LAW 241(6) AND THE OWNER AND GENERAL CONTRACTOR MAY BE LIABLE EVEN IF THEY DID NOT SUPERVISE THE WORKSITE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 240(1) cause of action was properly dismissed because the ladder did not malfunction, but the Labor Law 241(6) cause of action based upon the defective grinder which kicked back and injured plaintiff should not have been dismissed. The court noted defendants had notice of the defective grinder and the property

owner and the general contractor may be liable even if they did not control the worksite:

Defendants established their entitlement to summary judgment on plaintiff's Labor Law § 240(1) cause of action by submitting evidence that plaintiff's injury was caused by the grinder and that he did not fall from the ladder. Because plaintiff's injury did not arise from any elevation-related risk presented by the ladder, Labor Law § 240(1) does not apply … .

However, Supreme Court should have denied defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim insofar as it was predicated on a violation of Industrial Code (12 NYCRR) § 23-1.5(c)(3). Despite defendants' assertion otherwise, the section is a sufficiently specific safety standard to support a Labor Law § 241(6) claim, and the deposition testimony established that plaintiff's grinder had no guard, thus violating the mandate of the regulation … . Plaintiff also proffered evidence that defendants had notice of a defect in the grinder, as he testified that he complained to his supervisor that the grinder shook and lacked a guard and the owner and general contractor bear the ultimate responsibility for safety practices at building construction sites even where they do not control or supervise the worksite … . Desprez v United Prime Broadway, LLC, 2024 NY Slip Op 01607, First Dept 3-19-24

Practice Point: Although plaintiff was standing on a ladder when he was injured by a defective grinder, because the ladder did not fail the incident was not elevation-related within the meaning of Labor Law 240(1).

Practice Point: Because the defective grinder raised a safety issue about which the defendants had notice, the owner and general contractor may be liable pursuant to Labor Law 241(6) even if they did not supervise the worksite.

MARCH 21, 2024

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL THROUGH AN UNPROTECTED HOLE IN THE ATTIC FLOOR AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action. Plaintiff fell through an uncovered hole in the attic floor:

The plaintiffs' evidence established that the injured plaintiff was exposed to an elevation risk within the ambit of Labor Law § 240(1) by virtue of the uncovered, unguarded opening in the attic floor … , that he was not provided with any safety devices to protect him from that hazard, and that the failure to provide him proper protection from the uncovered, unguarded opening was a proximate cause of his injuries … . * * *

… [T]he defendants violated Labor Law § 241(6) by failing to provide a substantial cover or safety railing for the opening in the floor in accordance with 12 NYCRR 23-1.7(b)(1)(i) and that this violation was a proximate cause of the accident … . Fuentes v 257 Toppings Path, LLC, 2024 NY Slip Op 01535, Second Dept 3-20-24

Practice Point: Plaintiff, who fell through an unprotected hole in the floor,, was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action.

MARCH 20, 2024

MUNICIPAL LAW, CIVIL PROCEDURE, BATTERY, CIVIL RIGHTS LAW, FALSE ARREST, MALICIOUS PROSECUTION. RECORDS ASSOCIATED WITH AN ARREST AND PROSECUTION AND PRISON MEDICAL RECORDS ALLEGEDLY RELATING TO AN ATTACK BY CORRECTION OFFICERS WERE NOT SUFFICIENT TO DEMONSTRATE THE RESPONDENT CITY HAD ACTUAL TIMELY NOTICE OF THE ASSOCIATED CLAIMS; LEAVE TO FILE LATE NOTICES OF CLAIM SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the Appellate Division, over a two-judge dissent in one case (Jaime) and concurrences in the other (Orozco), determined that the petitions for leave to file a late notice of claim, brought by the same attorney for the two petitioners, should not have been granted. Orozco alleged false arrest and malicious prosecution and Jaime alleged an attack by corrections officers. In neither case was the petition supported by an affidavit from the petitioner. The records associated with Orozco's arrest and prosecution did not prove the respondent (NYC) had timely actual knowledge of the claim. Because Jaime did not file a grievance about the alleged attack by correction officers and did not provide an affidavit in support of the petition for leave to file late notice, there was no proof the City had actual timely knowledge of the claim:

Insofar as Orozco argued that the City would not be substantially prejudiced by the late filing because it acquired timely actual knowledge, Orozco's failure to establish actual knowledge is fatal. Orozco's further argument—that the City would not be substantially prejudiced because it will have to expend resources to defend against his 42 USC § 1983 claims—misapprehends the purpose served by the notice of claim requirement. … [T]he purpose is to afford the municipality the opportunity to investigate the claims and preserve evidence … , not simply to shield municipalities from litigation costs. Moreover, this argument understates the advantage of facing only a section 1983 claim that can be defended on qualified immunity grounds … , as opposed to facing that claim plus additional state law claims. * * *

The City conceded at oral argument that an incarcerated person might not file a grievance concerning a violent attack by a correction officer for fear of reprisal, a fear that may constitute a reasonable excuse for late service of a notice of claim. It would, however, be entirely speculative for us to consider that possibility here given the absence of any relevant evidence. Were Jaime in fact operating under such a fear, he could have submitted an affidavit attesting to the fact. That affidavit would have constituted evidence supporting an arguably reasonable excuse, which might provide at least some support for a court's discretionary determination to allow late service.

Neither the allegation that Jaime sustained injuries in the attacks for which he sought medical attention in the infirmary, nor the allegation that the DOC created or maintained records relating to those injuries, establishes that the City acquired actual knowledge of the essential facts constituting the claim … . Matter of Jaime v City of New York, 2024 NY Slip Op 01581, CtApp 3-21-24

Practice Point: In these two cases the evidence of an arrest and prosecution in one case and an attack by correction officers in the other was insufficient to demonstrate the respondent City had actual timely knowledge of the facts underlying the claims against the City. The petitioners should not have been granted leave to file late notices of claim.

MARCH 21, 2024

MUNICIPAL LAW, LANDLORD-TENANT.

THE CITY OF KINGSTON PROPERLY DECLARED A RENTAL-UNIT SHORTAGE-EMERGENCY AND PROPERLY IMPOSED LIMITATIONS ON RENT INCREASES DURING THE EMERGENCY PERIOD (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, reversing (modifying) Supreme Court, determined the respondent City of Kingston properly declared a rental-unit shortage emergency and properly imposed limits on rent increases during the emergency period. Apparently the City of Kingston experienced an influx of new residents moving from New York City during the COVID pandemic. The opinion is too detailed to fairly summarize here:

The Emergency Tenant Protection Act of 1974 (ETPA) … was enacted to "permit[ ] regulation of residential rents [for many living accommodations] upon the declaration of a housing emergency in New York City" or a similar declaration by municipalities in Nassau County, Westchester County or Rockland County … . The ETPA specifically provided, in relevant part, that the governing body of a municipality in Nassau County, Westchester County or Rockland County could make "[a] declaration of emergency . . . as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent" …. Thereafter, a county rent guidelines board, "consist[ing] of nine members appointed by the commissioner of housing and community renewal upon recommendation of the county legislature," would, among other things, establish annual guidelines for rent adjustments at the impacted accommodations until the housing emergency had abated or ended … .

Pursuant to the Housing Stability and Tenant Protection Act of 2019 … [hereinafter HSTPA]), the Legislature allowed municipalities statewide to opt in to the rent adjustment scheme created by the ETPA upon a declaration of emergency due to a housing vacancy rate of 5% or less … . Matter of Hudson Val. Prop. Owners Assn. Inc. v City of Kingston N.Y., 2024 NY Slip Op 01593, Third Dept 3-21-24

Practice Point: Because of an influx of new residents during the COVID pandemic, the City of Kingston properly declared a rental-unit-shortage emergency and properly imposed limitations on rent increases during the emergency.

MARCH 21, 2024

NEGLIGENCE, SLIP AND FALL, EVIDENCE.

A DEFECT IN THE TOP STEP OF A STAIRWAY WAS ALLEGED TO HAVE CAUSED THE TRIP AND FALL; THERE WERE QUESTIONS OF FACT WHETHER THE DEFECT WAS OPEN AND OBVIOUS AND WHETHER THE DEFECT WAS A DANGEROUS CONDITION; THE COURT NOTED THAT AN OPEN AND OBVIOUS CONDITION MAY STILL BE DANGEROUS AND THE QUESTION IS USUALLY FOR A JURY TO DECIDE (SECOND DEPT).

The Second Department,, reversing Supreme Court, determined defendant's motion for summary judgment in this stairway trip and fall case should not have been granted. The court noted that a condition which is open and obvious may still be dangerous. Here it was alleged a defect on the edge of the top step caused the fall:

While there is "no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" … , when a dangerous condition exists on the premises, proof that the dangerous condition is open and obvious "does not preclude a finding of liability against an owner for failure to maintain property in a safe condition" … . "The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" … . "The issue of whether a condition is open and obvious and not inherently dangerous is case-specific, and usually a question of fact for a jury" … .

Here, the defendants' submissions, including photographs of the alleged defect, failed to eliminate all triable issues of fact as to whether the allegedly defective condition was open and obvious … . While the plaintiff testified at her deposition that she had previously used the stairway and observed the allegedly defective condition, she also testified that she did not inspect the condition each time that she had used the stairway and that she had not noticed that the condition had worsened since she last observed it. Johnson v 1451 Assoc., L.P., 2024 NY Slip Op 01537, Second Dept 3-20-24

Practice Point: An open and obvious condition can still be a dangerous condition. Whether a condition is open and obvious and whether it is inherently dangerous are usually fact-specific questions for a jury.

MARCH 20, 2024

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE REAR DRIVER IN A REAR-END COLLISION IS NOT ALWAYS NEGLIGENT, THE ALLEGATION THE FRONT DRIVER SUDDENLY STOPPED FOR A YELLOW LIGHT WAS NOT ENOUGH TO AVOID SUMMARY JUDGMENT IN FAVOR OF THE FRONT DRIVER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff should have been awarded summary judgment in this rear-end collision case. The defendant rear driver alleged plaintiff stopped for a yellow light, which did not raise a question of fact about plaintiff's negligence:

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . "A sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision" … . "But 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows'" … .

Here, in support of his motion, the plaintiff submitted his own affidavit that established, prima facie, that the defendant driver was negligent when he struck the rear of the plaintiff's stopped vehicle, and that the defendant driver's negligence was the sole proximate cause of the accident … . In opposition, the defendants failed to raise a triable issue of fact. The defendant driver's explanation for striking the plaintiff's vehicle in the rear, set forth in his affidavit in opposition to the plaintiff's motion, that the plaintiff's vehicle stopped abruptly at a yellow light in front of the intersection's thick white stop line, was insufficient to raise a triable

issue of fact as to the defendant driver's negligence or whether the plaintiff's actions contributed to the happening of the accident … . Yawagyentsang v Safeway Constr. Enters., LLC, 2024 NY Slip Op 01580, Second Dept 3-20-24

Practice Point: There are more appellate decisions of late finding questions of fact about whether the rear-driver is negligent in a rear-end collision based upon the allegation the front-driver stopped suddenly for no apparent reason. Here the rear driver alleged the front driver stopped suddenly for a yellow light. That was not enough to raise a question of fact.

MARCH 20, 2024

NEGLIGENCE, TRAFFIC ACCIENTS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE REAR-DRIVER IN A REAR-END COLLISION IS NOT ALWAYS NEGLIGENT; HERE THERE IS A QUESTION OF FACT WHETHER THE FRONT DRIVER STOPPED SUDDENLY FOR NO APPARENT REASON (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact about whether the rear driver in this rear-end collision case was negligent. The rear-driver alleged plaintiff's vehicle stopped for no apparent reason when no cars were in front of it:

"'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle'" (… see Vehicle and Traffic Law § 1129[a]). "'There can be more than one proximate cause of an accident, and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident'" …. "'[N]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision'" … . Laureano v EAN Holdings, LLC, 2024 NY Slip Op 01538, Second Dept 3-20-24

Practice Point: The rear driver in a rear-end collision case is not always negligent. Here there was a question of fact whether the front driver stopped suddenly for no apparent reason.

MARCH 20, 2024

REAL PROPERTY TAX LAW (RPATL), MUNICIPAL LAW, CONSTITUTIONAL LAW.

THE COMPLAINT STATED CAUSES OF ACTION AGAINST NYC ALLEGING CONSTITUTIONAL AND STATUTORY VIOLATIONS STEMMING FROM AN UNEQUAL AND DISCRIMINATORY PROPERTY TAX SCHEME (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge partial dissent and a one-judge partial dissent, reversing (modifying) the appellate division, determined the complaint stated causes action for constitutional and statutory violations of the Real Property Tax Law (RPTL) and the federal Fair Housing Act (FHA) relating to an unequal property-tax scheme:

Plaintiff Tax Equity Now NY, LLC (TENNY) challenges New York City's property-tax system, alleging that the system imposes substantially unequal tax bills on similarly-valued properties that bear little relationship to the properties' fair market value. According to the complaint, the result is staggering inequities and a regressive tax system that hurts those who can least afford to pay heavy taxes. The complaint further alleges that multi-million-dollar properties are taxed at similar or lower rates than less valuable properties and that real property in majority-people-of-color districts are overassessed and subjected to higher taxes compared to properties in majority-white districts. TENNY seeks declaratory and injunctive relief against City and State defendants for alleged constitutional and statutory violations caused by the City's tax scheme. Despite the comprehensive, detailed allegations and legal precedent supporting the causes of action, the Appellate Division dismissed the complaint in its entirety at the pleading stage for failure to state any claim. That was error. * * *

… [T]he complaint's allegations, supported with independent studies and the City's own data of widening disparities resulting from its annually-repeated assessment methodology to Class One and Two properties, sufficiently plead violations of RPTL 305 (2) against the City. * * *

The FHA's legislative goals are twofold: elimination of discrimination in housing and the promotion of residential integration * * *

… [U]nder our State's liberal pleading standards, TENNY's allegation that the City's tax system perpetuates segregation suffices … . Tax Equity Now NY LLC v City of New York, 2024 NY Slip Op 01498, CtApp 3-19-24

Practice Point: Under New York's liberal pleading standards, the complaint stated causes of action against NYC for violations of the Real Property Tax Law and the federal Fair Housing Act stemming from an unequal and discriminatory property tax scheme.

MARCH 19, 2024

REAL PROPERTY TAX LAW.

ALTHOUGH THE BUILDING IS OWNED BY A NOT-FOR-PROFIT CORPORATION WHICH RAISES FUNDS FOR HEALTHCARE SERVICES, THE BUILDING IS LEASED TO A FOR-PROFIT CORPORATION WHICH PROVIDES DIALYSIS; THE LEASED BUILDING, THEREFORE IS NOT EXEMPT FROM PROPERTY TAX PURSUANT TO RPTL 420-A (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissenting opinion, determined the property at issue, which is leased by a for-profit corporation, is not entitled to exemption from property taxes pursuant to Real Property Tax Law (RPTL) 420-a:

Petitioner Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. (Schulman), is a federally tax-exempt, New York not-for-profit corporation, which fundraises and manages assets in support of the healthcare purpose of non-parties Schulman and Schachne Institute for Nursing and

Rehabilitation, Inc., and Brookdale Hospital Medical Center. Starting in 1995, Schulman leased to petitioner Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis) portions of a building Schulman owns in New York City. Brookdale Dialysis is a for-profit New York corporation that used the building to provide dialysis services for a fee. Under the lease Brookdale Dialysis paid $24,217.08 per month in rent to Schulman and was responsible for any property taxes that might become due during the tenancy. * * *

Petitioners argue that the property is exempt under RPTL 420-a (1) (a) because the building is used exclusively for its intended charitable purposes in that its dialysis services are vital and necessary to the charitable missions of Schulman and non-parties Brookdale Hospital and the Nursing Institute. However, the exempt purpose at issue here is that of the property owner—Schulman—and its purpose is to raise funds, not to provide dialysis services, or even medical services more generally. It is true that Brookdale Hospital and the Nursing Institute provide health care services, but still, the exemption is for Schulman's property. And to the extent Schulman supports the health care efforts of these two entities it does so by fundraising, not by providing direct health care services. If Schulman engaged in its fundraising efforts in the building, then the exemption would apply to any portion so used, but Schulman vacated the premises during Brookdale Dialysis' tenancy. Matter of Brookdale Physicians' Dialysis Assoc., Inc. v Department of Fin. of the City of N.Y., 2024 NY Slip Op 01583, CtApp 3-21-24

Practice Point: A building owned by a not-for-profit corporation but leased to a for-profit corporation is not exempt from property tax pursuant to RPLT 420-a.

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