NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
April 1 – 5, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released April 1 -5, 2024, by the First, Second and Third Departments and Posted on the New York Appellate Digest on Monday, April 8, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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THE COMPLAINT STATED CAUSES OF ACTION AGAINST AN ACCOUNTING FIRM FOR MALPRACTICE, FRAUD AND AIDING AND ABETTING BREACH OF A FIDUCIARY DUTY; BOTH MOTHER AND SON ARE OWNERS OF A RESTAURANT; IT WAS ALLEGED THE SON'S TAKING A LARGE SALARY AND RECEIVING MILLIONS IN LOANS AGAINST THE BUSINESS WERE DOCUMENTED BY THE ACCOUNTING FIRM BUT NOT DISCLOSED TO MOTHER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined the malpractice, fraud and breach of fiduciary duty causes of action against defendant accounting firm should not have been dismissed. Both plaintiff Ellen and her son Kenneth are owners of a restaurant. The complaint alleged Kenneth was looting the restaurant by taking a large salary and talking out loans against the business without Ellen's knowledge. It was alleged defendant accounting firm had a duty to inform Ellen of Kenneth's financial dealings but did not. The accounting firm argued there was no duty-breach and no fraud because all of Kenneth's financial activities were documented in the accountant's records and in the business tax returns. The First Department simply held the complaint stated causes of action for accountant malpractice, fraud and aiding an abetting a breach of fiduciary duty:

Plaintiffs' claims … are not that defendant was hired to discover Kenneth's wrongdoing, but rather that information obtained by defendant during its business interactions with Kenneth and information used by defendant in order to prepare tax returns and financial statements put defendant on notice about the impropriety of Kenneth's loans to himself such that defendant had a duty to inform plaintiffs of the questionable payments. The law is very clear that an agreement to perform unaudited services does not shield an accountant from liability because an accountant must perform all services in accordance with the standard of a reasonable accountant under similar circumstances, which includes reporting fraud that is or should be apparent … .

In addition, "[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" … 1650 Broadway Assoc., Inc. v Sturm, 2024 NY Slip Op 01864, First Dept 4-4-24

Practice Point: An accounting firm has a duty to disclose fraud. Here the firm documented the potentially fraudulent financial activities of one of the owners of the restaurant but did not disclose those activities to the other owner. The allegations stated causes of action for accountant malpractice, fraud and aiding and abetting breach of a fiduciary duty.

APRIL 4, 2024

ATTORNEYS, JUDGES.

HERE DEFENDANT ASHKENAZY'S COUNSEL TOOK POSITIONS WHICH WERE BASED UPON AN INTERPRETATION OF THE EVIDENCE; THE FACT THAT THE JUDGE DISAGREED WITH THE INTERPRETATION DID NOT WARRANT A FINDING COUNSEL ENGAGED IN FRIVOLOUS CONDUCT OR ACTED IN BAD FAITH; THE IMPOSITION OF SANCTIONS WAS REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the attorney's (defendant Ashkenazy's counsel's) actions did not amount to "frivolous conduct" and did not warrant the imposition of sanctions:

Conduct is frivolous if it is "completely without merit in law," "undertaken primarily to delay or prolong the resolution of the litigation," or "asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). Here, the record does not support an award of sanctions under any of the prongs. The conduct that Supreme Court found sanctionable does not rise to the level of being frivolous. Supreme Court took issue with counsel's statement that a document squarely addressing the question of timing did not exist. According to Supreme Court, based

on its in camera review of documents, there were communications in which the timing of the payment would have been mentioned if it were in fact due on a date other than the five-year paydown date. Supreme Court disagreed with Ashkenazy's counsel's interpretation of the documents, and did so by relying on the absence of a statement in the documents rather than an overt statement contained in the documents. Counsel put forth its interpretation of the documents exchanged during discovery — namely, among other things, Ashkenazy's personal interpretation of the contract, Ashkenazy's deposition testimony, and the deposition testimony of Ashkenazy's drafting counsel — and then made arguments based on its interpretation. Those arguments were not completely devoid of merit. Nor is there any indication in the record that counsel's interpretation and arguments were made in bad faith ,,, , The fact that the court took a different view of the evidence is not grounds for sanctions…. . Talos Capital Designated Activity Co. v 257 Church Holdings LLC, 2024 NY Slip Op 01786, First Dept 4-2-24

Practice Point: As long as an attorney's argument is based upon an interpretation of the evidence which is not meritless, the attorney's argument is not frivolous or made in bad faith such that sanctions are warranted.

APRIL 2, 2024

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

IF THE STATUTE OF LIMITATIONS DEFENSE IS NOT RAISED BY A PARTY IT IS WAIVED AND CANNOT BE ASSERTED, SUA SPONTE, BY A JUDGE; IN ADDITION, A JUDGE CANNOT DECIDE A MOTION ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a judge, sua sponte, cannot raise the statute of limitations defense. If it is not raised by the parties, it is waived:

The statute of limitations is an affirmative defense that is waived by a party unless it is raised either in a responsive pleading or by motion prior to the submission of a responsive pleading … . "'A court may not take judicial notice, sua sponte, of the applicability of a statute of limitations if that defense has not been raised'" … .

Here, none of the defendants answered the complaint, and the record does not show that any defendant made a pre-answer motion that raised the statute of limitations … . Therefore, a statute of limitations defense was waived. Moreover, even if the defense was not waived, no defendant opposed the instant motion, and the issue of the statute of limitations was not raised on the motion. Thus, the Supreme Court improperly determined the motion on a ground not raised by the parties … . Associates First Capital Corp. v Roth, 2024 NY Slip Op 01789, Second Dept 4-4-24

Practice Point: The stature of limitations defense cannot be raised, sua sponte, by a judge. If it is not raised by a party it is waived.

Practice Point: A judge cannot not based a motion-decision on a ground not raised by the parties.

APRIL 3, 2024

CONTRACT LAW, CORPORATION LAW.

HERE PLAINTIFF CORPORATION, RC, DID NOT EXIST WHEN THE REAL ESTATE CONTRACT WAS ENTERED AND WAS NOT FORMED FOR SEVERAL YEARS UNTIL JUST BEFORE THE INSTANT LITIGATION; BECAUSE DEFENDANT DEALT WITH RC AS A CORPORATION FOR YEARS AND RECEIVED SOME BENEFIT FROM THE CONTRACT, THE DOCTRINE OF "CORPORATION BY ESTOPPEL" PROHIBITED DEFENDANT FROM AVOIDING ITS OBLIGATIONS UNDER THE CONTRACT BY ARGUING A NONEXISTENT CORPORATION CANNOT ENTER A CONTRACT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the "corporation by estoppel" doctrine prevented defendant from arguing the real estate purchase agreement was invalid because the corporate plaintiff (RC) did not exist at the time the contract was executed. RC was eventually formed years later just before this action commenced. The defendant had dealt with RC as an incorporated entity for

several years. Therefore defendant was estopped from denying RC's validity to avoid their obligations under the contract:

Generally, it is true that "'[s]ince a nonexistent entity cannot acquire rights or assume liabilities, a corporation which has not yet been formed normally lacks capacity to enter into a contract'" … . However, under the doctrine of corporation by estoppel, "one who has recognized [an] organization as a corporation in business dealings should not be allowed to quibble or raise immaterial issues which do not concern him or her in the slightest degree or affect his or her substantial rights" …. Thus, "parties who deal with an entity holding itself out as a corporation and who receive performance from such entity are estopped from avoiding their obligations to it" … . Teva Realty, LLC v Cornaga Holding Corp., 2024 NY Slip Op 01833, Second Dept 4-3-24

Practice Point: Here plaintiff corporation did not exist when the real estate contract was entered but was formed years later just before the instant litigation was commenced. Defendant dealt with plaintiff as a corporation for years and received a benefit from the contract. The doctrine of "corporation by estoppel" prohibited defendant from arguing the contract was not valid because the corporation was not formed at the time the contract was entered.

APRIL 3, 2024

CONTRACT LAW.

A 2021 BUYBACK AGEEMENT BETWEEN A NATURAL GAS PRODUCER AND A NATURAL GAS SELLER WHICH WAS ENTERED IN ANTICIPATION OF A WINTER STORM WHICH WOULD REDUCE THE PRODUCER'S ABILITY TO DELIVER THE USUAL AMOUNT OF GAS IS VALID AND ENFORCEABLE AND CANNOT BE CANCELLED BASED UPON THE "FORCE MAJEURE" CLAUSE IN THE ORIGINAL 2019 CONTRACT BETWEEN THE PARTIES (FIRST DEPT).

The First Department, affirming Supreme Court, in a full-fledged opinion by Justice Mendez, determined a buyback agreement between Vaquero, a natural gas

producer, and Hartree, a natural gas seller, which was entered in anticipation of an imminent winter storm during which Vaquero would be unable to meet its gas-delivery requirements under the 2019 contract, was valid and enforceable. The buyback contract could not be cancelled by asserting the "force majeure" clause in the original delivery and sales contract entered in 2019:

To the extent that Vaquero argues that its force majeure declaration eliminated its obligations under the buyback, the argument fails. The parties agree that the buyback did not require any physical delivery of gas, and created only a financial obligation. Indeed, Vaquero's witnesses conceded at their depositions that the February 12, 2021, buyback was a purely financial agreement, with no physical delivery expected from either party. The mere fact that Vaquero had no gas to sell did not relieve it of its financial obligation to Hartree under the February 12, 2021 buyback agreement which did not contain a force majeure provision … . Moreover, the parties are sophisticated entities familiar with the natural gas industry and had a prior history of buyback arrangements. The February 12, 2021, buyback agreement, similar to the parties' other buyback agreements, created an independent carve out that, because no physical delivery of gas was required, is not affected by the force majeure provisions of the base agreement … . Hartree Partners, LP v Vaquero Permian Processing LLC, 2024 NY Slip Op 01779, First Dept 4-2-24

Practice Point: Here a 2021 contract entered into in anticipation of the natural gas producer's inability to deliver the required amount of gas during an imminent winter storm could not be cancelled under the "force majeure" clause in the original 2019 contract between the parties. The 2021 buyback agreement was an independent, enforceable contract which did not include a "force majeure" clause.

APRIL 2, 2024

CRIMINAL LAW, ATTORNEYS, JUDGES, MUNICIPAL LAW.

THE TRANSFER OF DEFENDANT'S CASE TO A SPECIAL PROSECUTOR WAS JUSTIFIED BY THE EXPLANATION OF A CONFLICT WITHIN THE DA'S OFFICE; HOWEVER, THE TRANSFER BACK TO THE DA'S OFFICE WAS NOT BASED ON AN EXPLANATION WHY THE CONFLICT WAS NO LONGER A PROBLEM; THE TRANSFER BACK TO THE DA'S OFFICE WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing County Court, determined the prosecution of defendant's case should not have been transferred from the special prosecutor, appointed two months before because of a conflict within the DA's office, back to the DA's office. The Third Department noted that the initial decision to appoint a special prosecutor based on a conflict was supported by the application, but there was no explanation why that conflict no longer existed such that the DA's office could ultimately handle the case:

County Law § 701 does not specifically detail the procedure to be followed when a special prosecutor is relieved of his or her appointment, and there is little case law relevant to this issue …; however, it is apparent that the only options are to either appoint another special prosecutor or to return the matter, if appropriate, to the DA's office. Indeed, certain policy considerations weigh in favor of allowing the DA's office to prosecute the case, namely, a "public interest in having prosecutorial duties performed, where possible, by the constitutional officer chosen by the electorate" … . Here, however, the DA's office had, less than two months prior, sought appointment of a special prosecutor based upon a conflict. Based upon this sworn assertion of a conflict, County Court (Lambert, J.) entered an order disqualifying the DA's office and appointing the special prosecutor. Then, when subsequently returning the matter to the disqualified DA's office, no record was made as to why disqualification was no longer necessary. From the scant record of what occurred here, it is clear that defendant's concerns regarding the DA's office's prior disqualification and possible conflict fell on deaf ears. Thus, because on this record we cannot determine why County Court (Burns, J.) deemed it appropriate to no longer disqualify the DA's office, we find that the court committed reversible

error in returning the matter to the DA's office … . People v Faison, 2024 NY Slip Op 01836, Third Dept 4-4-24

Practice Point: Just as the transfer of a criminal prosecution from the DA's office to a special prosecutor based upon a conflict within the DA's office requires a valid explanation, the transfer of the criminal prosecution from the special prosecutor back to the DA's office requires a valid explanation why the conflict is no longer a problem. Here the absence of an explanation rendered the transfer back to the DA's office reversible error.

APRIL 4, 2024

CRIMINAL LAW, EVIDENCE, JUDGES, ATTORNEYS.

BRADY MATERIAL TURNED OVER TO DEFENDANT AFTER HE PLED GUILTY MAY HAVE AFFECTED HIS DECISIONS ABOUT WHAT PLEA OFFER TO ACCEPT AND WHETHER TO MOVE TO DISMISS CERTAIN CHARGES; THEREFORE DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS MOTION TO VACATE THE CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction by guilty plea. After the plea a new prosecutor turned over Brady material which had not been disclosed prior to the plea. Under the facts of the case, defendant's awareness of the Brady material may have affected his decision to plead guilty to criminal possession of a weapon, a C felony. Therefore a hearing on the 440 motion should have been held:

… [T]he [Brady] evidence may have had an impact on the other charges that may have had an effect on what defendant was allowed to plead to — specifically, the attempted murder in the second degree and assault in the first degree counts … . … [T]hese charges meant that because defendant was indicted with a class B armed felony offense, his plea of guilty was required to be at least to a class C violent felony offense (see CPL 220.10 [5] [d] [i]). The lowest charge that satisfied this requirement was criminal possession of a weapon in the second degree, meaning

that, based on the evidence before defendant at the time of his plea and sentencing, this was the most favorable charge that he could obtain — a point acknowledged at sentencing. Assuming, without deciding, that such evidence constituted Brady materials that were not disclosed, and further recognizing that the gravamen of the People's main argument suggests that this evidence does impact the other charges against defendant, the record is unclear what impact the disclosure of this evidence may have had on defendant's decision to accept or reject the plea offer — particularly in the context of CPL 220.10 (5) (d) (i) and a potential motion to dismiss certain charges (see CPL 245.25 [2]; see also CPL 440.10 [1] [b], [h] …). Therefore, under the unique circumstances of this case … it was an error for County Court to decide the motion without an evidentiary hearing … . People v Harries, 2024 NY Slip Op 01843, Third Dept 4-4-24

Practice Point: Where the Brady material turned over to the defendant after he pled guilty may have affected his decisions about what plea offer to accept and whether to move to dismiss certain charges, defendant's motion to vacate his conviction should not have been denied without first holding an evidentiary hearing.

APRIL 4, 2024

CRIMINAL LAW, EVIDENCE.

ABSENT EXIGENT CIRCUMSTANCES, A MANUAL BODY-CAVITY SEARCH MUST BE SPECIFICALLY AUTHORIZED BY A WARRANT; THE DRUGS REMOVED FROM DEFENDANT'S BODY SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing County Court, determined the drugs were removed from defendant's body during a manual body-cavity search, which requires a warrant specifically allowing it absent exigent circumstances. The warrant allowing the search of defendant's person did not specifically authorize a manual body-cavity search and no exigent circumstances were alleged. The drugs should have been suppressed:

"There are three distinct and increasingly intrusive types of bodily examinations undertaken by law enforcement after certain arrests"; namely, a strip search, a

visual body cavity inspection, and a manual body cavity search … . As relevant here, "[a] 'strip search' requires the arrestee to disrobe so that a police officer can visually inspect the person's body" … , whereas "a visual body cavity inspection involves the inspection of the subject's anal or genital areas without any physical contact by the officer and, in contrast, a manual body cavity search includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" … . * * *

Here, the search warrant that had been previously obtained authorized the search of defendant's person but did not authorize a manual body cavity search. Notably, the warrant application made no such request. Moreover, although exigent circumstances bypassing the warrant requirement may be shown where "the drugs were in imminent danger of being destroyed, disseminated or lost, or that defendant was in medical distress" .. , no such showing has been made here. People v Chase, 2024 NY Slip Op 01837, Third Dept 4-4-24

Practice Point; Here there were no exigent circumstances and the warrant permitting a search of defendant's person did not specifically authorize a manual body-cavity search. The drugs removed from defendant's person during a manual body-cavity search should have been suppressed.

APRIL 4, 2024

CRIMINAL LAW, JUDGES.

HERE THE JUDGE'S DECISION TO EMPANEL AN ANONYMOUS JURY WAS NOT SUPPORTED BY SUFFICIENT REASONS; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's convictions and ordering a new trial, determined the judge had not set forth sufficient reasons for withholding the identities of the jurors. The jury remained anonymous throughout the trial. Jurors were referred to solely by their juror numbers:

… County Court did not cite any threats to this jury and instead based its refusal to disclose the identities of prospective jurors upon a ground that the Court of

Appeals has specifically found to be inadequate, namely, "anecdotal accounts from jurors in unrelated cases" … . The People concede that County Court erred in empaneling an anonymous jury, in fact, but argue that reversal is not required because the issue is unpreserved and the error is, in any event, harmless. We disagree on both counts. First, when County Court announced that it would not disclose the names of the prospective jurors, defense counsel immediately "object[ed] to that" and argued that no factual showing of a need for anonymity had been made in this matter. County Court then "den[ied] [the] application" and "note[d] [the] exception." Defendant therefore preserved the argument for our review by registering an objection to County Court's refusal to disclose the identities of the jurors in a manner that permitted the trial court to address the issue (see CPL 470.05 [2] …). Second, for the reasons set forth in People v Flores (153 AD3d at 193-195), we are unpersuaded that harmless error analysis is applicable to such an error. Thus, reversal and remittal for a new trial is required. People v Heidrich, 2024 NY Slip Op 01841, Third Dept 4-4-24

Practice Point: Although an anonymous jury may be appropriate is some circumstances, the failure to support the decision to withhold the identities of the jurors must be justified by sufficient reasons. Here the reasons (anecdotal account from jurors in other cases) were deemed insufficient and a new trial was ordered.

APRIL 4, 2024

DEBTOR-CREDITOR, FRAUD, CIVIL PROCEDURE.

THE TURNOVER PETITION SEEKING REAL PROPERTY AND FUNDS TRANSFERRED TO DEFRAUD JUDGMENT CREDITORS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the turnover petition seeking real property and funds transferred by judgment debtors to defraud judgment creditors should have been granted:

CPLR 5225(b) "'provides for an expedited special proceeding by a judgment creditor to recover money or other personal property belonging to a judgment debtor against a person in possession or custody of money or other personal

property in which the judgment debtor has an interest in order to satisfy a judgment'" … . A proceeding pursuant to CPLR 5225(b) "may also be maintained 'against a person who is a transferee of money or other personal property from the judgment debtor'" …

Pursuant to CPLR 5227, "a special proceeding may be commenced by a judgment creditor 'against any person who it is shown is or will become indebted to the judgment debtor'" … . In a proceeding pursuant to CPLR 5227, the "judgment creditor stands in the judgment debtor's shoes, and may enforce the obligations owed to the judgment debtor by the indemnifying party" … .

… [T]he judgment creditors offered sufficient evidence to establish that [respondent] Nancy Barrick transferred the Barrick estate to the Barrick Trust with actual intent to hinder, delay, and defraud present or future creditors pursuant to Debtor and Creditor Law former § 276 … …. Nancy Barrick transferred title to the Barrick estate without adequate consideration to a trust for which she and her brother served as the trustees while retaining control over and possession of the property.

… [T]he judgment creditors also offered sufficient evidence to establish that the conveyances from the RMP judgment debtors to the RMP transferees were made with actual intent to defraud present and future creditors pursuant to Debtor and Creditor Law former § 276. … [T]he transfers were made without adequate consideration and evinced a distinct course of conduct after incurring large debts to the judgment creditors to render the RMP judgment debtors insolvent … . Matter of Argyle Funds SPC, Inc. v Barrick, 2024 NY Slip Op 01806, Second Dept 4-3-24

Practice Point: The CPLR provides a mechanism called a turnover petition which allows a judgment creditor to obtain property fraudulently transferred by the judgment debtor.

APRIL 3, 2024

FAMILY LAW, EVIDENCE.

ALTHOUGH THERE WAS ADMISSIBLE EVIDENCE OF DOMESTIC VIOLENCE BY FATHER, THERE WAS NO ADMISSIBLE EVIDENCE THE CHILD WAS PRESENT; NEGLECT FINDING REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined the admissible evidence did not support the finding that father neglected the child based on an act of domestic violence. Mother's 911 call constituted admissible evidence of the domestic violence. But, although evidence the child was present apparently existed, it was never admitted in evidence:

A recording of a 911 call made by the mother, which was admitted into evidence without objection, was the only admissible evidence offered in support of the petition. During this call, the mother told the 911 operator that the father was harassing her and threatening her, that there were weapons in the house, including knives and guns, and that she was in fear for her life. However, no evidence was admitted in support of ACS's [Administration of Children's Services'] position that the children observed, were aware of, or were in close proximity to the domestic violence, and that their physical, mental, or emotional condition was impaired or was in danger of becoming impaired … . While ACS contends that the redacted ACS progress notes were admitted into evidence, and contain the children's out-of court-statements demonstrating the children were aware of and heard the domestic violence, the progress notes, although marked for identification at the virtual hybrid hearing, were never entered into evidence, and therefore, cannot be considered. Thus, ACS failed to establish that the children's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the father's acts of violence toward the mother … . Matter of Easton J. (Courtney J.), 2024 NY Slip Op 01810, Second Dept 4-3-24

Practice Point: To find neglect based on an act of domestic violence by father against mother there must be admissible evidence the child was present.

APRIL 3, 2024

FAMILY LAW, JUDGES, APPEALS, EVIDENCE.

SERVICE OF THE ORDER APPEALED FROM BY EMAIL DOES NOT START THE TIME TO TAKE AN APPEAL; FATHER'S REQUEST FOR TELEPHONIC AND WRITTEN CONTACT WITH HIS DAUGHTER PROPERLY DENIED; FATHER WAS INCARCERATED FOR PREDATORY SEXUAL BEHAVIOR INVOLVING A CHILD ABOUT THE SAME AGE AS HIS DAUGHTER (THIRD DEPT).

The Third Department, affirming Family Court's denial of father's request for telephonic and written contact with his daughter, in a full-fledged opinion by Justice Egan, determined Family Court did not abuse its discretion. Father is incarcerated after pleading guilty to predatory sexual assault against a child, possessing a sexual performance by a child, promoting a sexual performance by a child and use of a child in a sexual performance. The victim of father's crimes was about the same age as father's daughter and was acquainted with father's daughter. The Third Department noted that the time for perfecting father's appeal never started to run because the notice of the entry of the order appealed from was sent to father by email, which is not an accepted method of service:

… "[A]s the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely" … . * * *

Family Court observed that the father pleaded guilty to sex offenses relating to a victim who was about the same age as the child at the time of the hearing — and who was, we note, acquainted with the child — and the father's testimony gave no reason to believe that he appreciated how his actions might have impacted the child. Family Court further credited the mother's testimony that she had given the child all of the father's letters after screening them for inappropriate content, and that the child had simply decided, without any interference from the mother, not to respond to them. The child was almost 13 years old at the time of the hearing and, as such, her apparent desire not to communicate with the father was entitled to

some weight in assessing her best interests … . We are satisfied that, according deference to Family Court's assessment of witness credibility, the foregoing constitutes a sound and substantial basis in the record for the determination that the presumption favoring visitation with a noncustodial parent had been rebutted and that the best interests of the child would be served by limiting contact with the father to written correspondence to which the child was not required to respond … . Matter of Robert M. v Barbara L., 2024 NY Slip Op 01847, Third Dept 4-4-24

Practice Point: Service of an order by email does not start the 30-day period for taking an appeal of the order.

Practice Point: Family Court did not abuse its discretion by denying the incarcerated father's request for telephonic and written contact with his daughter. Father had pled guilty to predatory sexual behavior involving a victim about the same age as his daughter and with whom his daughter was acquainted.

APRIL 4, 2024

FORECLOSURE, UNIFORM COMMERCIAL CODE, CIVIL PROCEDURE, EVIDENCE.

THE BANK IN THIS FORECLOSURE ACTION FAILED TO PROVIDE THE ORIGINAL LOAN DOCUMENT AND THE LOST NOTE AFFIDAVIT WAS INSUFFICIENT; THE MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN DENIED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for a default judgment in this foreclosure action should not have been granted because the original loan document was not provided and the lost note affidavit was insufficient:

A plaintiff moving for leave to enter a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's failure to answer or appear … . Pursuant to UCC 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name

and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms." Here, the plaintiff failed to set forth the facts that prevented the production of the original home equity line of credit agreement … . The lost note affidavit submitted by the plaintiff in support of its motion, inter alia, for leave to enter a default judgment against the defendants failed to state when the search for the credit agreement occurred, did not identify who conducted the search for the credit agreement, or explain when or how the credit agreement was lost … . JPMorgan Chase Bank, N.A. v Morton, 2024 NY Slip Op 01802, Second Dept 4-3-24

Practice Point: Here in this foreclosure action, in moving for a default judgment the bank did not provide the original loan document and did not provide a sufficient lost note affidavit. The motion should have been denied, criteria explained.

APRIL 3, 2024

NEGLIGENCE, EVIDENCE, JUDGES, CIVIL PROCEDURE.

ALTHOUGH DEFENDANT RAISED A QUESTION OF FACT ABOUT PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT RAISE A QUESTION OF FACT ABOUT HIS OWN LIABILTY; THE JUDGE SHOULD NOT HAVE DEEMED PLAINTIFF'S SUMMARY JUDGMENT MOTION PREMATURE (SECOND DEPT).

The Second Department, reversing Supreme Court in this rear-end collision case, determined that although defendant raised a question of fact about whether plaintiff was contributorily negligent, defendant did not raise a question of fact about the defendant-driver's liability. In addition, plaintiff's motion for summary judgment should not have been deemed premature:

… [T]he defendants submitted an affidavit from the defendant driver, in which he stated that he was "not fully responsible" for the accident. The defendant driver also averred that the traffic light had turned green and that the plaintiff had moved

forward and then suddenly stopped, causing the defendant driver to strike the rear of the plaintiff's vehicle despite his efforts to stop his vehicle. This evidence raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident, thereby supporting the denial of that branch of her motion which was for summary judgment dismissing the affirmative defenses alleging comparative negligence … . However, since the defendants' evidence related only to the plaintiff's comparative fault, the defendants failed to raise a triable issue of fact in opposition to that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging negligent operation of a motor vehicle … .

Furthermore, the Supreme Court erred in determining that the plaintiff's motion was premature. "[W]hile a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, [a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" … . Here, the defendants had personal knowledge of the relevant facts, and their mere hope or speculation that evidence might be uncovered during discovery was an insufficient basis for denying the plaintiff's motion …. Martin v Copado-Esquivel, 2024 NY Slip Op 01804, Second Dept 4-3-24

Practice Point: In a rear-end collision case, the fact that defendant raises a question of fact about plaintiff's contributory negligence does not preclude granting plaintiff summary judgment on the issue of defendant's liability.

Practice Point: Here, where the facts of the rear-end collision were within defendant's personal knowledge, plaintiff's motion for summary judgment should not have been dismissed as premature.

APRIL 3, 2024

NEGLIGENCE, REAL ESTATE, AGENCY, CONTRACT LAW.

A MANAGING AGENT IS NOT LIABLE FOR INJURY CAUSED BY A DANGEROUS CONDITION ON THE MANAGED PROPERTY UNLESS THE MANAGING AGENT EXERCISES COMPLETE AND EXCLUSIVE CONTROL OVER THE OPERATION OF THE PROPERTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the property managing agent did not exercise complete and exclusive control of the operation of the property and therefore could not be held liable for plaintiff's trip and fall over a stub-up pipe protruding from a step:

Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against CBRE [the managing agent] on the ground that CBRE does not own, operate, or control the premises. "Where, as here, a managing agent is accused of nonfeasance which causes injury to a third party, it is subject to liability only where it has complete and exclusive control of the management and operation of the property in question" … . "A managing agent is not in complete and exclusive control of the premises where the owner has reserved to itself a certain amount of control in the written agreement" … .

Here, CBRE established, prima facie, that it was a managing agent of the premises and that the management agreement was not so comprehensive and exclusive as to displace the duty of the owner of the premises to maintain the premises safely … . Quezada v CBRE, Inc., 2024 NY Slip Op 01829, Second Dept 4-3-24

Practice Point: A managing agent is not liable for injury caused by a dangerous condition on the managed property unless the agent exercises complete and exclusive control over the operation of the property.

APRIL 3, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW.

THE POLICE OFFICER WHO STRUCK PLAINTIFF'S CAR WAS ENGAGED IN AN "EMERGENCY OPERATION" AND DID NOT ACT IN "RECKLESS DISREGARD" OF THE SAFETY OF OTHERS; COMPLAINT DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the city demonstrated the police officer who struck plaintiff's car was engaged in an "emergency operation" at the time of the accident and did not act in "reckless disregard" for the safety of others:

Defendants demonstrated that defendant police officer was engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law § 1104 by submitting evidence that the officer was responding to a radio call about a man with a gun when his police vehicle struck plaintiff's car … . Accordingly, defendants demonstrated that the officer's conduct is to be assessed under the statute's "reckless disregard" standard (Vehicle and Traffic Law § 1104 [e] …).

Defendants further demonstrated that the officer did not operate the police vehicle in reckless disregard for the safety of others (see Vehicle and Traffic Law § 1104 [e] …). The officer testified that he approached a red light with a vehicle stopped at the intersection, so he had to cross the double yellow lines to avoid it. He also testified that he reduced his speed and looked both ways when approaching the red light at the intersection. The officer attempted to avoid colliding with plaintiff by braking hard and swerving upon realizing that plaintiff's car had entered the intersection. Seo v City of New York, 2024 NY Slip Op 01785, First Dept 4-2-24

Practice Point: When a police officer engaged in an emergency operation takes steps to avoid colliding with other vehicles the "reckless disregard for the safety of others" standard has not been met.

Similar issues and result in a suit against a private ambulance company in Alonso v Crest Transp. Serv., Inc., 2024 NY Slip Op 01788, Second Dept 4-3-24

APRIL 2, 2024