NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
April 22 – 26, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 22 – 26, 2024, and Posted on the New York Appellate Digest Website on April 29 & 30, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CIVIL PROCEDURE.

IF THE ORIGINAL PROCESS SERVER'S AFFIDAVIT OF SERVICE FAILS TO INCLUDE A STATEMENT THAT A MAILING IN COMPLIANCE WITH CPLR 308(2) WAS DONE, THE OMISSION CANNOT BE CURED BY AMENDMENT; THE AMENDED AFFIDAVIT SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the amended affidavit of the process server to add the mailing requirement should not have been

accepted by the court. Failing to aver the complaint was mailed in the original affidavit cannot be cured by amendment:

CPLR 308(2) provides that personal service upon a natural person may be acquired "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business" within 20 days. CPLR 308(2) requires strict compliance and the plaintiff has "the burden of proving, by a preponderance of the credible evidence, that service was properly effected" … .* * *

… [C]ertain defects in an affidavit of service, which are related to "a defendant's substantial right to notice of the proceeding against him or her, . . . may not be corrected by an amendment" … . These defects include an erroneous address … and an erroneous mailing date … . The omission from an affidavit of service of a statement that a mailing in compliance with CPLR 308(2) was effectuated also is not amenable to correction pursuant to CPLR 305(c) … . Accordingly, the plaintiff's amended affidavit of service should not have been considered. John Doe v Mesivtha, Inc., 2024 NY Slip Op 02172 Second Dept 4-24-24

Practice Point: A process server's affidavit which does not include a statement that a mailing in compliance with CPLR 308(2) was done, the omission cannot be cured by amendment of the affidavit of service.

APRIL 24, 2024

CONTRACT LAW, LANDLORD-TENANT.

THE COMPLAINT SUFFICIENTLY ALLEGED BOTH BREACH OF CONTRACT AND ANTICIPATORY REPUDIATION OF THE CONTRACT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, in a factually-complex case which cannot be fairly summarized here. determined the complaint

adequately alleged both a breach and an anticipatory repudiation of a contract which encompassed the replacement by plaintiff developer of defendant's single room occupancy building with a mixed-use residential and commercial building for a 40-year lease term:

" 'An anticipatory breach of contract by a promisor is a repudiation of [its] contractual duty before the time fixed in the contract for . . . performance has arrived' " … . Under the doctrine of anticipatory repudiation or anticipatory breach, "if one party to a contract repudiates [its] duties thereunder prior to the time designated for performance and before [it] has received all of the consideration due . . . thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach" … . To constitute repudiation, "there must be some express and absolute refusal to perform" … that is "positive and unequivocal" … .

The first cause of action alleges [defendant] engaged in multiple acts that breached the ground lease agreement: a set of acts in refusing to sign the cure agreement tendered in 2015, and a 2021 statement that it would never sign any agreement. Contrary to the conclusions of the courts below, a claim for breach and a claim for anticipatory repudiation can both be stated on these facts at the pleading stage. * * *

Taking the facts alleged in the complaint as true, which we must do at this stage of the proceeding, [plaintiff] sufficiently demonstrated that [defendant's] 2021 statement was both a new development and a distinct "material breach that escalated, for the first time, to an unequivocal repudiation" … . Audthan LLC v Nick & Duke, LLC, 2024 NY Slip Op 02223, CtApp 4-25-24

Practice Point: Here the complaint adequately alleged both a breach of contract and an anticipatory repudiation of the contract.

APRIL 25, 2024

CRIMINAL LAW, JUDGES, APPEALS, ATTORNEYS.

IT WAS NOT ERROR TO REMOVE THE DISRUPTIVE DEFENDANT FROM THE COURTROOM WITHOUT WARNING JUST PRIOR THE ANNOUNCEMENT OF THE VERDICT AND THE POLLING OF THE JURY; APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE "REMOVAL" ISSUE ON DIRECT APPEAL (CT APP).

The Court of appeals, in a full-fledged opinion by Judge Rivera, over an extensive dissenting opinion, reversing the grant of a writ of coram nobis, determined: (1) defendant was properly removed from court without warning before the verdict and the poll of the jurors; and (2) appellate counsel was not ineffective for failing to raise defendant's removal from the court on direct appeal. Removal was justified by the defendant's acts of violence, verbal abuse and screaming in the courtroom:

We reject the prosecution's claim that any error was de minimis based on the timing of defendant's removal from the courtroom. There is no material stage of the proceeding that is any less consequential to a defendant's right to be present. However, we agree that the trial court's actions were appropriate under the unique circumstances of this case and in no way contrary to law.

A defendant has a constitutional right "to be present at all material stages of their criminal trial," which includes the reading of the verdict and the polling of the jury … . Further, CPL 260.20 provides that a defendant must be present during the trial but may be removed if they are "disorderly and disruptive" such that the "trial cannot be carried on with [the defendant] in the courtroom [] if , after [they] have been warned by the court that [they] will be removed if [they] continue such conduct, [they] continue to engage in such conduct." A court may dispense with the constitutional and statutory warnings when it is impracticable to give them … . … That was the case here. * * *

The Appellate Division erroneously concluded that the trial court violated defendant's right to be present, and therefore incorrectly granted defendant's writ of error coram nobis on the sole ground that appellate counsel was ineffective for failing to raise this meritless claim on direct appeal … . People v Dunton, 2024 NY Slip Op 02130, CtApp 4-23-24

Practice Point: In situations where warning a disruptive defendant is impractical, it is not error to remove the defendant from the courtroom without warning. Here defendant was removed just prior to the announcement of the verdict and the polling of the jurors, a material stage of the trial. Under the unique circumstances of this case defendant's removal was not error.

APRIL 23, 2024

CRIMINAL LAW, EVIDENCE.

A GAP IN THE CHAIN OF CUSTODY OF THE DRUGS SEIZED FROM DEFENDANT AND A DISCREPANCY IN THE DESCRIPTIONS OF THE BAG CONTAINING THE DRUGS DID NOT RENDER THE DRUGS INADMISSIBLE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined a gap in the chain of custody and a discrepancy in the descriptions of the evidence did not render the evidence (white powder in plastic bags) inadmissible. Officer Lin, who seized the evidence, noted a rip in the larger plastic bag. But Osorio, the criminologist who analyzed the white powder, did not notice a rip in the larger bag:

… [T]he record indicates that the gap spanned, at most, only a few hours overnight and "[a]t all times, the drugs apparently remained safely under police control" in an identifiable location at a precinct station … . Officer Lin testified that she placed the evidence inside an envelope used to voucher drugs, and that the only other person in the office at the time was an administrative officer who was tasked with safeguarding such evidence. In leaving the evidence at the station to resume her patrol, Officer Lin followed a procedure intended to reduce opportunities for error and misconduct … . When Officer Lewis arrived to voucher the evidence, "the drugs were found precisely where they were supposed to be" … . * * *

Defendant also focuses on Osorio's testimony that she did not "see" or write in her worksheet that there were rips in the plastic bags recovered from defendant, which he characterizes as irreconcilable with Officer Lin's testimony about the torn condition of the larger bag. Defendant ignores that the bags were admitted into

evidence at trial and the factfinder was expressly encouraged to examine them to confirm Officer Lin's testimony. If the larger bag was torn in some way, Osorio's mere failure to notice that defect would not support an inference of tampering. Because the bag is not part of the record on appeal, it is impossible to discern the existence or extent of any discrepancy, let alone conclude that it rendered the drugs inadmissible…. . People v Baez, 2024 NY Slip Op 02225, CtApp 4-25-24

Practice Point: Here the drugs seized from the defendant were left overnight in a room at the precinct before a voucher was created, and the officer who seized the drugs noticed a rip in the larger plastic bag but the criminologist who analyzed the drugs did not notice such a rip. Despite these issues, the chain of custody was sufficiently proven to render the drugs admissible in evidence.

APRIL 25, 2024

CRIMINAL LAW, EVIDENCE.

ALLOWING EVIDENCE OF UNCHARGED CRIMES AND BAD ACTS UNDER MOLINEUX, AND ALLOWING DEFENDANT HARVEY WEINSTEIN TO BE CROSS-EXAMINED ABOUT THOSE UNCHARGED ALLEGATIONS UNDER SANDOVAL, DEPRIVED HIM OF A FAIR TRIAL; CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS REVERSED AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over two three-judge dissenting opinions, reversing defendant's criminal-sexual-act and rape convictions and ordering a new trial, determined the admission of evidence of uncharged crimes and bad acts under Molineux and the Sandoval ruling allowing the defendant to be cross-examined about the uncharged allegations, deprived defendant of a fair trial:

Before trial, the court granted the prosecution's application to admit certain testimony of uncharged crimes and miscellaneous bad acts as an exception to the Molineux rule, prohibiting such evidence, to establish defendant's intent and his understanding of the complainants' lack of consent. Thus, Complainant B could

testify about defendant's uncharged sexual assaults against her before and after the charged rape and her awareness of defendant's abusive and threatening behavior, and three other women (the "Molineux Witnesses") could testify regarding defendant's sexual misconduct towards them years before and after the charged offenses involving Complainants A and B.

The court also granted … the prosecution's Sandoval application to cross-examine defendant on a broad range of uncharged bad acts should he testify. … [T]he prosecution was permitted to ask about, for example, whether defendant: directed a witness to lie to defendant's wife; filed an application for a passport using a friend's social security number; told a woman he "could harm her professionally" but could also offer her a book publishing opportunity; used his entertainment company's budget for personal costs; withdrew from a business deal and asked others to cease its funding; hid a woman's clothes; insisted that members of his staff falsify a photo for a movie poster by photoshopping a female actor's head on another woman's nude body; told a private intelligence firm to manipulate or lie to people; scheduled a business meeting in 2012 with a woman under false pretenses; induced executives to lie on his behalf; made threats and committed acts of violence against people who worked for him; abandoned a colleague by the side of the road in a foreign country; physically attacked his brother; threatened to cut off a colleague's genitals with gardening shears; screamed and cursed at hotel restaurant staff after they told him the kitchen was closed; and threw a table of food. The court also permitted the prosecution to cross-examine defendant about the details of the sexual assault allegations described by the Molineux Witnesses during the prosecution's case-in-chief. People v Weinstein, 2024 NY Slip Op 02222, CtApp 4-25-24

Practice Point: Molineux and Sandoval are still alive and kicking.

APRIL 25, 2024

CRIMINAL LAW, EVIDENCE.

BEFORE ADMITTING NON-EYEWITNESS TESTIMONY TO IDENTIFY DEFENDANT IN A VIDEO, THE BASIS SHOULD BE DETERMINED OUTSIDE THE PRESENCE OF THE JURY, THE PARTY OFFERING THE WITNESS MUST DEMONSTRATE THE RELIABILITY OF THE WITNESS, AND THE NEED FOR THE TESTIMONY MUST BE DEMONSTRATED; IN ADDITION, A THOROUGH RECORD MUST BE CREATED AND THE JURY SHOULD BE INSTRUCTED THEY ARE FREE TO REJECT THE NON-EYEWITNESS IDENTIFICATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the Appellate Division, over a concurrence, determined the "non-eyewitness" who purported to identify the defendant in a video was not shown to be sufficiently familiar with the defendant and there was no showing that the jury faced an obstacle to making the identification:

This case concerns an increasingly prevalent issue: when may someone who is not an eyewitness to a crime testify to a jury that the defendant is the person depicted in a photo or video. We hold that such testimony may be admitted where the witness is sufficiently familiar with the defendant that their testimony would be reliable, and there is reason to believe the jury might require such assistance in making its independent assessment. Here, there was no showing that the proffered witness was sufficiently familiar with the defendant to render his testimony helpful, or that the jury faced an obstacle to making the identification that the witness's testimony would have overcome. * * *

… [B]efore admitting lay non-eyewitness identification testimony, a court should inquire as to the basis of the witness's familiarity outside the presence of the jury in a separate hearing or voir dire, as the court properly did here. The party offering the witness—in most cases the People—bears the burden of establishing that their testimony would both be helpful and necessary. … [I]t is incumbent on both parties to create a thorough record to aid the court in its determination and to allow for meaningful appellate review. … [I]t would be appropriate for the trial court to provide cautionary jury instructions, both at the time of the testimony and during

the final charge, explaining to the jury that lay non-eyewitness identification testimony is mere opinion testimony that they may choose to accept or reject, and reminding the jurors that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters … . People v Mosley, 2024 NY Slip Op 02125, CtApp 4-23-24

Practice Point: Here the Court of Appeals offers guidance on the use of non-eyewitness testimony to identify the defendant in a video. The reliability of the witness and the need for the testimony must be demonstrated outside the presence of the jury. A full record must be made. And the jury should be instructed they are free to reject the testimony.

APRIL 23, 2024

CRIMINAL LAW, EVIDENCE.

HERE THE COURT OF APPEALS CLARIFIED ITS DEFINITION OF "TESTIMONIAL" EVIDENCE; A FORM DOCUMENT USED TO COLLECT PEDIGREE INFORMATION FROM EVERY NYC ARRESTEE IS NOT "AN OUT-OF-COURT SUBSTITUTE FOR TRIAL TESTIMONY," I.E., THE FORM DOCUMENT IS NOT "TESTIMONIAL" AND CAN BE INTRODUCED AT TRIAL AS A BUSINESS RECORD WITHOUT THE TESTIMONY OF THE CREATOR OF THE DOCUMENT; HERE THE DOCUMENT INDICATED DEFENDANT LIVED IN THE BASEMENT AND WAS USED AT TRIAL TO PROVE HE CONSTRUCTIVELY POSSESSED A WEAPON FOUND IN THE BASEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over an extensive dissenting opinion, determined a document created by the Criminal Justice Agency (CJA), which provides pretrial services in NYC, was not "testimonial" in nature and therefore could be introduced in evidence as a business record without affording the defendant the opportunity to confront the creator of the document. The document was created during an interview of the defendant. The defendant was charged with possession of a weapon found in the basement.

The CJA document indicated defendant lived in the basement and was introduced at trial to prove his constructive possession of the weapon:

… CJA interviews "nearly all individuals arrested" in New York City "to make a pretrial release recommendation to the court" … . In interviewing arrestees to determine their suitability for pretrial release, CJA employees ask them questions regarding community ties and warrant history, including an arrestee's address, how long they have lived there, their employment status, whether they expect anyone at their arraignment, their education, and other relevant queries. The CJA employee records the answers to these questions on a standardized form titled "Interview Report." The employee also verifies the information provided by the arrestee with a third person, whose contact information the CJA employee obtains from the arrestee, and records that verification in a separate section of the form. The CJA employee then gives the completed form, including a recommendation on whether the arrestee is suitable for release, to the arraignment judge, the prosecutor, and defense counsel. * * *

We now clarify that in ascertaining whether out-of-court statements are testimonial, courts should inquire, as the U.S. Supreme Court has instructed, "whether in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony' " … . When that standard is met, the statement should be deemed testimonial for purpose of the Confrontation Clause. * * *

We find it significant that a CJA interview report is routinely prepared for all arrestees in New York City. The information collected is the same in every case, regardless of the particular facts or the elements of the relevant crime: the interviewer collects a predetermined set of pedigree information from the defendant and makes a recommendation to the court as to the defendant's suitability for pretrial release … . People v Franklin, 2024 NY Slip Op 02227 CtApp 4-25-24

Practice Point: The Court of Appeals clarified and brought up-to-date its definition of "testimonial" evidence. A document is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. Here a form document filled out during an intake interview of every NYC arrestee which collects pedigree information was not testimonial, i.e., it was not created as a substitute for trial

testimony. Therefore the document could be admitted at trial as a business record without the need for testimony by the creator of the document.

APRIL 25, 2024

CRIMINAL LAW, EVIDENCE.

THE TRIAL JUDGE SHOULD HAVE HELD AN INDEPENDENT-SOURCE HEARING BEFORE ALLOWING THE UNDERCOVER OFFICER TO IDENTIFY THE DEFENDANT AT TRIAL; HEARING AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the conviction and ordering an independent-source hearing and a new trial, found the record insufficient to determine whether the undercover officer had an independent source for his in-court identification of the defendant. Supreme Court, rather than holding an independent-source hearing, relied on the undercover officer's prior testimony at the probable cause hearing. But the Court of Appeals found that testimony insufficient:

… [W]e address whether Supreme Court erred when it denied defendant's motion for an independent source hearing and, instead, used an undercover police officer's prior testimony at a probable cause hearing to render a determination on whether the officer had an independent source for his prospective in-court identification of defendant. … [T]he trial court erred in admitting the undercover officer's in-court identification without a hearing record sufficient to support an independent source determination for the identification. * * *

… [At the probable cause hearing] the undercover testified that he had never interacted with the seller before the date in question and did not interact with the seller directly during the buy and bust. Although the undercover described the seller's clothes, he did not provide a physical description of the seller. He did, however, testify about his close proximity to the seller—close enough to hear that the intermediary and the seller were having a conversation, but not their words. … [H]is testimony did not address how long the seller was within his sight or the

nature of his confirmatory identification of defendant. People v Williams, 2024 NY Slip Op 02128, CtApp 4-23-24

Practice Point: Here the trial judge relied on the officer's testimony at the probable cause hearing to demonstrate the officer had an independent source for his in-court identification of the defendant. The testimony was deemed too weak to demonstrate an independent source. New trial and independent-source hearing ordered.

APRIL 23, 2024

CRIMINAL LAW, JUDGES.

A JUROR WAS CONVINCED DEFENDANT HAD FOLLOWED HER HOME AND SO INFORMED THE JURY DURING DELIBERATIONS; THE JUROR WAS "GROSSLY UNQUALIFIED" AND DEFENDANT'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing defendant's conviction and ordering a new trial, in a full-fledged opinion by Judge Wilson, determined a juror should have been dismissed as "grossly unqualified," and a mistrial should have been granted:

Upon a jury verdict, the trial court convicted Kenneth Fisher of three counts of third-degree criminal possession of a controlled substance (PL 220.16) arising from two controlled buy operations. He was sentenced to nine years in prison. One of the jurors in Mr. Fisher's case was certain that Mr. Fisher had followed her home after the first day of jury selection, a belief the trial court deemed likely unfounded. Instead of promptly informing the court of her concern, she instead waited three days, until the case was submitted to the jury, and then expressed her safety concern to the other jurors as they deliberated. Those facts established that the juror was "grossly unqualified" pursuant to CPL 270.35, because it was clear she "possesse[d] a state of mind which would prevent the rendering of an impartial verdict" … . Although the trial judge then elicited some assurances that the juror could put aside her concerns, those assurances were insufficient to support a conclusion that the juror should be retained. Therefore, the juror should have been dismissed and a mistrial granted. * * *

Strongly held, prejudicial beliefs about the defendant which are not based on the trial evidence strike at the heart of the right to an impartial jury, and therefore render a juror "grossly unqualified" unless the bias can be cured or set aside. Given the extent of Juror Six's prejudicial beliefs and her introduction of those beliefs into deliberations, it was error to conclude that the issue was cured merely by "yes" answers to formulaic questions. People v Fisher, 2024 NY Slip Op 02129, CtApp 4-23-24

Practice Point: A juror who believed defendant had followed her home and who so informed the jury during deliberations was "grossly unqualified" requiring a mistrial declaration.

APRIL 23, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DOCCS MUST MAKE SOME EFFORT TO FIND COMMUNITY-BASED EMPLOYMENT, EDUCATIONAL OR TRAINING OPPORTUNITIES FOR SEX OFFENDERS HELD IN THE RESIDENTIAL TREATMENT FACILITY AT FISHKILL CORRECTIONAL FACILITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two partial dissents by three judges, reversing (modifying) the appellate division, determined the Department of Corrections and Community Supervision (DOCCS) must make some effort to find community-based employment, educational or training opportunities for sex offenders held in the residential treatment facility (RTF) at Fishkill Correctional Facility:

Plaintiffs are convicted sex offenders who were confined in the Fishkill RTF while on postrelease supervision (PRS). Since 2014, DOCCS has used the Fishkill RTF to confine convicted sex offenders past the maximum expiration dates of their carceral sentences in circumstances where the offenders are unable to find housing in compliance with the requirements of the Sexual Assault Reform Act (SARA), which bars them from living within 1,000 feet of a school … . * * *

We agree with plaintiffs that DOCCS cannot categorically refuse to attempt to secure community-based opportunities for RTF residents. Crucially, while DOCCS surely has discretion in operating its RTF programs, the record here demonstrates that DOCCS is exercising no discretion with respect to community-based opportunities. DOCCS instead offers only speculation that the opportunities would be difficult to secure for the types of offenders housed in that RTF. To be sure, the statute [Correction Law § 73 [1]] establishes no percentage or threshold number of RTF residents who must be allowed outside the facility to engage in community-based activities. But defendants incorrectly construe the permissive phrase, "may be allowed to go outside," to empower DOCCS to bar all RTF residents categorically from accessing community-based opportunities without considering whether such opportunities are available or appropriate. A comprehensive reading of the statutory provisions cannot support such a construction. By reading the permissive phrase in isolation, defendants read the definitional provision out of the statute, eviscerate the character and purpose of the RTF, and undermine the legislative intent. Alcantara v Annucci, 2024 NY Slip Op 02224, CtApp 4-25-24

Practice Point: The Department of Corrections and Community Supervision cannot interpret the Correction Law such that the purpose of the statute (here finding community-based employment, educational or training opportunities for sex offenders) is thwarted.

APRIL 25, 2024

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE.

PLAINTIFF BROUGHT AN EMPLOYMENT DISCRIMINATION AND RETALIATION ACTION IN FEDERAL COURT; DEFENDANTS WERE AWARDED SUMMARY JUDGMENT IN THE FEDERAL ACTION; BECAUSE THE FEDERAL COURT DID NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S NYS AND NYC HUMAN RIGHTS LAW CAUSES OF ACTION, PLAINTIFF PURSUED THEM IN STATE COURT; HOWEVER ALL THE STATE ISSUES HAD BEEN ADDRESSED IN THE FEDERAL ACTION; COLLATERAL ESTOPPEL PRECLUDED THE STATE ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissenting opinion, determined that the employment discrimination and retaliation claims brought by plaintiff adjunct professor against New York University under the NYS and NYC Human Rights Law were precluded by the doctrine of collateral estoppel. Plaintiff had brought a federal action based upon the same facts which was dismissed, but the District Court declined to exercise supplemental jurisdiction over the state and city Human Rights Law causes of action. Plaintiff therefore could pursue those causes of action in state court. But because all the issues had been sufficiently dealt with by the federal court, the collateral estoppel doctrine was triggered:

The courts below properly applied our established principles of collateral estoppel in the context of the unique requirements of the City Human Rights Law. Collateral estoppel "bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" and so "the determination of an essential issue is binding in a subsequent action, even if it recurs in the context of a different claim" … . If there is identity of issues between the prior determination and the instant litigation, and the precluded party had a full and fair opportunity to contest the prior determination, collateral estoppel applies and the prior determination is binding in the subsequent action … . Russell v New York Univ., 2024 NY Slip Op 02226, CtApp 4-25-24

Practice Point: In an employment discrimination and retaliation case brought in federal court, a plaintiff can ask the federal court to exercise supplemental jurisdiction over New York State and New York City Human Rights Law causes of action. Where, as here, the federal court declines to exercise supplemental jurisdiction, the plaintiff may pursue those actions in state court. Here, because plaintiff lost the federal case, and all the issues raised in the state case were addressed in the federal case, the doctrine of collateral estoppel precluded the state action.

APRIL 25, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS INJURED WHEN A PIECE OF WIRE STRUCK HIS EYE WHEN HE WAS USING A NAIL GUN; PLAINTIFF DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER THE WORK HE WAS DOING REQUIRED EYE PROTECTION WITHIN THE MEANING OF THE RELEVANT INDUSTRIAL CODE PROVISION; THEREFORE PLAINTIFF SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant was required to provided eye protection for the work plaintiff was engaged in at the time his eye was injured:

The plaintiff allegedly was injured while operating a nail gun to attach wood plates to a building roof when debris from a metal wire to which nails were secured, such that they could be loaded into the nail gun, flew off and hit his right eye. * * *

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control … . "In order to establish liability under Labor Law § 241(6), a plaintiff must 'establish the violation of an Industrial Code provision which sets forth specific safety standards,' and which 'is applicable [to the facts] of the case'" … . Industrial Code (12 NYCRR) § 23-1.8(a) requires the furnishing of

eye protection equipment to employees who, inter alia, are "engaged in any . . . operation which may endanger the eyes."

Here, the plaintiff's submissions failed to eliminate a triable issue of fact as to whether, at the time of his accident, the plaintiff was engaged in work that "may endanger the eyes" so as to require the use of eye protection pursuant to Industrial Code (12 NYCRR) § 23-1.8(a) … . Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc., 2024 NY Slip Op 02166, Second Dept 4-24-24

Practice Point: Although plaintiff was struck in the eye by a piece of wire when using a nail gun, he did not eliminate questions of fact about whether the work he was doing triggered the eye-protection requirement in the Industrial Code. Therefore plaintiff was not entitled to summary judgment on his Labor Law 241(6) cause of action.

APRIL 24, 2024

MEDICAID, PUBLIC HEALTH LAW, ADMINISTRATIVE LAW.

FOR-PROFIT NURSING HOMES' CHALLENGE TO ADJUSTED MEDICAID REIMBURSEMENT RATES REJECTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing (modifying) the Appellate Division, rejected petitioner for-profit nursing homes' challenges to the adjusted Medicaid reimbursement rates which were to be implemented as of April 1, 2020:

… [W]e reject petitioners' challenges to adjusted Medicaid reimbursement rates issued to comply with amended Public Health Law ("PHL") § 2808 (20) (d), which mandates the elimination of one component from the computation formula used to set rates of for-profit residential health care facilities, on or after April 1, 2020. The amendment and the adjusted rates do not result in a retroactive effect and petitioners failed to establish that the rates are not "reasonable and adequate to meet costs" under PHL § 2807 (3) or that the rates violate their equal protection rights. We hold that respondents may implement the recalculated rates for services provided as of April 2, 2020 … . * * *

Petitioners, 116 for-profit nursing homes, filed this hybrid declaratory judgment and article 78 proceeding against State respondents—the Department [of Health] and its Commissioner and the Director of the Budget—challenging the Department's implementation of the recalculated rates without the residual equity reimbursement factor. Simultaneously, petitioners moved for a preliminary injunction to prevent respondents from enforcing the equity elimination clause. Supreme Court granted petitioners' motion for a preliminary injunction against enforcement of the clause pending a final determination of the proceeding. Matter of Aaron Manor Rehabilitation & Nursing Ctr., LLC v Zucker, 2024 NY Slip Op 02126, CtApp 4-23-24

Practice Point: The procedures and criteria for challenges to Medicaid reimbursement rates for for-profit nursing homes explained in depth.

APRIL 23, 2024

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

IN THIS MENTAL HYGIENE LAW ARTICLE 10 PROCEEDING TO DETERMINE WHETHER RESPONDENT SEX OFFENDER SUFFERED FROM A MENTAL ABNORMALITY WARRANTING CIVIL MANAGEMENT, THE JUDGE CONFLATED TWO DIFFERENT LEGAL STANDARDS, ERRONEOUSLY FOUND THAT A MENTAL ABNORMALITY CANNOT BE PROVEN BY A CONSTELLATION OF CONDITIONS, DISEASES AND DISORDERS, AND IMPROPERLY RELIED ON OUTSIDE RESEARCH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, reversing Supreme Court and ordering a new trial, determined several errors by the judge in this Mental Hygiene Law article 10 proceeding tainted the judge's finding that the state had not proven respondent sex offender suffered from a mental abnormality and required civil management:

This article 10 proceeding arose out of respondent Richard V.'s 2002 conviction of rape in the first degree. In October 2001, respondent and an accomplice posed as plumbers to gain entry to the apartment of a female acquaintance. After the woman brought them inside, respondent subdued her with pepper spray, restrained her, repeatedly attacked her, threatened to kill her, and twice violently raped her.* * *

The sole issue at the bench trial was whether respondent suffers from a mental abnormality that "predisposes [him] to the commission of conduct constituting a sex offense" resulting in "having serious difficulty [] controlling such conduct" … . At the second stage of an article 10 proceeding — the dispositional phase — the standard is whether a respondent has "such an inability to control his behavior that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" …

There can be little dispute that Supreme Court conflated the applicable legal standards. * * *

… Supreme Court committed reversible error in finding that the State could not use a "constellation" of conditions, diseases, and disorders to establish that respondent has a mental abnormality. * * *

Supreme Court's extensive usage of outside research blurred the lines between the roles of judge and counsel, depriving the parties of the opportunity to respond … . Matter of State of New York v Richard V., 2024 NY Slip Op 02158, First Dept 4-23-24

Practice Point: When a judge does outside research to inform the decision, the parties are deprived of the opportunity to respond.

APRIL 23, 2024

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT CARPET AND FLOORING SUBCONTRACTOR'S REQUEST TO INSPECT THE AREA OF THE FLOOR WHERE PLAINTIFF ALLEGEDLY STEPPED INTO AN UNGUARDED VENT HOLE SHOULD HAVE BEEN GRANTED; ALTHOUGH THE VENT COVER HAD BEEN REPLACED, IT CAN NOT BE SAID THE INSPECTION WOULD BE FRUITLESS, OR THAT THE INSPECTION WOULD CAUSE UNREASONABLE ANNOYANCE, EXPENSE, EMBARRASSMENT OR OTHER PREJUDICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant carpet and flooring subcontractor's (S&'s) request to inspect the area of the building where plaintiff stepped into a vent hole from which a cover had been dislodged should not have been denied. Although the vent cover had been replaced, it could not be said for certain that an inspection would be fruitless:

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has directed that the phrase "material and necessary" in this statute should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" … . Under this standard, S&F is entitled to inspect the site of the incident giving rise to plaintiff's allegedly serious injuries.

While the replacement of the … cover might reduce the likelihood that a site inspection will produce evidence useful to S&S's defense, it does not make it certain that an inspection will be useless. … It is for S&F, not its adversary, to determine whether the inspection of the site of the accident is sufficiently likely to produce relevant information to be worth S&F's time and effort. … . …

… [A] court's power to limit otherwise proper use of a disclosure device should be exercised only for the purpose of avoiding "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice."

We fail to see how an inspection of the site of the accident giving rise to this lawsuit would impose on plaintiff, or on anyone else, any of the burdens

enumerated by CPLR 3103(a) to an "unreasonable" extent. Balsamello v Structure Tone, Inc., 2024 NY Slip Op 02251, First Dept 4-25-24

Practice Point: An inspection by defendant of the area where plaintiff was injured should be allowed absent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

APRIL 25, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

CHARTER SCHOOLS ARE NOT SUBJECT TO THE NOTICE OF CLAIM REQUIREMENTS IN THE EDUCATION LAW AND GENERAL MUNICIPAL LAW; PLAINTIFF-STUDENT, WHO HAD BEEN BULLIED AND WAS PUSHED TO THE FLOOR BY ANOTHER STUDENT, RAISED QUESTIONS OF FACT SUPPORTING THE NEGLIGENT SUPERVISION CAUSE OF ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, determined (1) charter schools are not subject to the notice of claim requirements of the Education Law and the General Municipal Law, and (2) plaintiff student, who allegedly had been bullied and was pushed to the floor by another student when the hallway was unsupervised, raised questions of fact supporting the negligent supervision cause of action:

Since charter schools are independent from school districts with respect to civil liability, financial obligations, and liability insurance coverage, it stands to reason that the extraordinary safeguards of prelitigation notification of claims applicable to school districts, municipalities and other wholly public entities would not apply to charter schools. * * *

The evidence presented triable issues of fact as to whether there were monitors present in the hallway at the time of the incident as required by the School's policies and procedures and whether the presence of such monitors could have

prevented the alleged pushing incident … . A. P. v John W. Lavelle Preparatory Charter Sch., 2024 NY Slip Op 02205, Second Dept 4-24-24

Practice Point: Charter schools are not subject to the notice-of-claim requirement in the Education Law and General Municipal Law; i.e., a plaintiff suing a charter school for negligence need not file or serve a notice of claim as a condition precedent.

APRIL 24, 2024

NEGLIGENCE, EMPLOYMENT LAW, CONTRACT LAW.

PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE ALLEGED DEFENDANT DRIVER WAS DEFENDANT COMPANY'S EMPLOYEE AND WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT AT THE TIME OF THE ACCIDENT; DEFENDANT COMPANY FAILED TO DEMONSTRATE THE DRIVER WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE; THE FACT THAT THE EMPLOYMENT CONTRACT USES THE TERM "INDEPENDENT CONTRACTOR" IS NOT DISPOSITIVE OF THE ISSUE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant employer in this traffic accident case did not demonstrate the defendant driver was an independent contractor as opposed to an employee acting within the scope of employment:

… [Plaintiff] allegedly was injured when a vehicle he was operating collided with a vehicle owned and operated by the defendant Luis F. Leal. * * * The plaintiffs alleged … that Leal was [defendant] Publishers' employee, and that Leal was acting within the scope of his employment at the time of the accident. …

"The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his [or her] servant within the scope of employment. Conversely, the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" … . "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of

control exercised by the purported employer over the results produced or the means used to achieve the results" … . "Factors relevant to assessing control include whether the worker (1) worked at his [or her] own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" … . "The fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive" … . Whether an actor is an independent contractor or an employee is usually a factual issue for a jury … . Brielmeier v Leal, 2024 NY Slip Op 02163, Second Dept 4-24-24

Practice Point: An employer may be responsible for the negligence of an employee, but is not responsible for the negligence of an independent contractor. The fact that the employment contract uses the term "independent contractor" is not dispositive. The relevant criteria are explained.

APRIL 24, 2024

NEGLIGENCE, MUNICIPAL LAW.

A NOTICE OF VIOLATION FROM THE CITY TO THE ABUTTING PROPERTY OWNER REGARDING THE DETERIORATED CONDITION OF THE SIDEWALK RAISED A QUESTION OF FACT WHETHER THE CITY HAD WRITTEN NOTICE OF THE SIDEWALK DEFECT (A PROTRUDING METAL BAR) WHICH CAUSED PLAINTIFF'S SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the city had notice of the condition of the sidewalk which allegedly caused her slip and fall; Plaintiff demonstrated a notice of violation had been issued to the abutting property owner concerning the deterioration of the sidewalk. Plaintiff had alleged she tripped over a metal bar protruding from the sidewalk. The notice of violation raised a question of fact whether that specific defect was encompassed by the notice:

The plaintiff submitted … a Notice of Violation from the Department of Public Works, Office of the Commissioner, to the purported owner of the property abutting the sidewalk on which the plaintiff fell. The Notice of Violation was issued by the Commissioner of the Department of Public Works, the very individual who was statutorily designated to receive written notice of sidewalk defects. The Notice of Violation stated that an inspection, which … found … that "deteriorated and hazardous conditions" existed on the abutting sidewalk. Under the circumstances, the plaintiff raised a triable issue of fact as to whether the City did, in fact, have prior written notice of the alleged defect … . Whether the Notice of Violation "encompassed the particular condition which allegedly caused the subject accident is an issue of fact which should await resolution at trial" … . Douglas v City of Mount Vernon, N.Y., 2024 NY Slip Op 02173, Second Dept 4-24-24

Practice Point: Here a notice of violation issued by the city to the abutting property owner concerning the deteriorated condition of the sidewalk raised a question of fact whether the city had prior written notice of the specific defect, a protruding metal bar, which caused plaintiff's fall.

APRIL 24, 2024

TAX LAW. CORPORATION LAW.

APPELLANTS IMPROPERLY DEDUCTED ROYALTY PAYMENTS RECEIVED FROM FOREIGN AFFILIATE CORPORATIONS WHICH WERE NOT SUBJECT TO NEW YORK FRANCHISE TAXES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge concurrence, determined the appellant corporations improperly deducted royalty payments received from foreign affiliates not subject to New York's franchise taxes:

Under a taxation scheme in effect from 2003 through 2013, New York allowed corporations that paid franchise taxes in New York to deduct income received as royalty payments from members of the same corporate group, or family, in calculating their taxable income. The deduction was allowed only if the royalty

payment came from a related entity that had already paid a New York tax on the same income through operation of another provision in the Tax Law that required companies to add back royalty payments made to related entities for the purposes of calculating their own taxable income.

In these cases, the state Department of Taxation and Finance determined that appellants improperly deducted royalty payments they received from affiliates in foreign countries that were not subject to New York franchise taxes and, so, were not required to add those payments back on a New York tax return. Appellants challenge the Tribunal's denial of the deduction as being contrary to the clear language of the statute and as violating the Commerce Clause's prohibition on discrimination against foreign commerce. Because the Appellate Division correctly interpreted the statutes as permitting a tax deduction only where a related subsidiary was subject to the add back requirement, and because any burden on interstate or foreign commerce created by this tax scheme was incidental and did not violate the dormant Commerce Clause, we affirm. Matter of Matter of Walt Disney Co. & Consol. Subsidiaries v Tax Appeals Trib. of the State of New York, 2024 NY Slip Op 02127, CtApp 4-23-24

Practice Point: Corporations may not deduct royalties received from foreign affiliate corporations which are not subject to New York's franchise taxes.

APRIL 23, 2024

WORKERS' COMPENSATION.

CLAIMANT PARTICIPATED IN THE CLEAN UP AFTER THE WORLD TRADE CENTER ATTACK ON 9-11 AND WAS THEREFORE ENTITLED TO WORKERS' COMPENSATION BENEFITS UNDER ARTICEL 8-A (THIRD DEPT).

The Third Department, reversing (modifying) the Workers' Compensation Board, determined that some of the World Trade Center clean-up activities of the claimant qualified for benefits pursuant to Workers' Compensation Law article 8-A:

"Workers' Compensation Law article 8-A was enacted to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the [WTC] September 11th, 2001 attack" … . * * *

… [W]e find, in light of the liberal construction afforded to Workers' Compensation Law article 8-A, that claimant's activities of assisting with clearing the area — which notably was located within the statutorily-defined WTC site — in order for the emergency vehicles to access Ground Zero had a tangible connection to the rescue efforts. As such, the Board's determination that claimant did not participate in the rescue [*3]effort operations to qualify under Workers' Compensation Law article 8-A is not supported by substantial evidence … . Matter of Liotta v New York State Unified Ct. Sys., 2024 NY Slip Op 02237, Third Dept 4-25-24

Practice Point: Article 8-A of the Worders' Compensation Law was enacted to cover rescue and other worker's who responded to the World Trade Center attack on 9-11. Here claimant participated in clean-up activities to keep the area clear for emergency vehicles and was therefore entitled to benefits pursuant to article 8-A.

APRIL 25, 2024