NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
April 29 – May 3, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released April 29 – May 3, 2024, by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website on Monday, May 6, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ARBITRATION.

THE FOURTH DEPARTMENT REJECTED SUPREME COURT'S RULING THAT THE ARBITRATOR "MANIFESTLY DISREGARDED SUBSTANTIVE LAW" AND THAT THE ARBITRATION AWARD WAS "IRRATIONAL," EXPLAINING THE CRITERIA FOR BOTH (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that none of Supreme Court's grounds for vacating the arbitration award were valid. The arbitrator did not "manifestly disregard the substantive law." The award was not "irrational." The Fourth Department explained the criteria for both:

… [T]he court determined that the arbitrator manifestly disregarded "substantive law" applicable to the parties' dispute when the arbitrator distinguished, rather than applied, two prior arbitration awards that petitioner and the court read as favorable to petitioner's position on the timeliness issue. That was error. "The effect, if any, to be given to an earlier arbitration award in subsequent arbitration proceedings is a matter for determination in that forum" … . Neither petitioner nor the court identified any "substantive law applicable to the parties' dispute" to support application of the doctrine of manifest disregard of law … . In any event, even if the two prior arbitration awards constituted substantive law, inasmuch as the record establishes that the arbitrator considered, but distinguished, those arbitration awards, we conclude that petitioner failed to establish that the arbitrator "knew of a governing legal principle" that was "well defined, explicit, and clearly applicable to the case" and "yet refused to apply it or ignored it altogether … .* * *

"An award is irrational if there is no proof whatever to justify the award" … . Where, however, "an arbitrator offer[s] even a barely colorable justification for the outcome reached, the arbitration award must be upheld" … .

Here, the arbitrator issued a thoughtful, well-reasoned opinion and award in which he considered the terms of the CBA [collective bargaining agreement], the evidence adduced at the hearing, and prior arbitration awards, and we thus conclude that "[i]t cannot be said that the arbitrator's procedural resolution of the issue concerning compliance with the contractual requirement that the demand for

arbitration be made within a specified time . . . was irrational" … . Matter of Buffalo Teachers' Fedn. (Board of Educ. of Buffalo City Sch. Dist.), 2024 NY Slip Op 02429, Fourth Dept 5-3-24

Practice Point: Read this decision to understand how limited the court's role is when reviewing an arbitration award.

MAY 3, 2024

CIVIL PROCEDURE, CONSTITUTIONAL LAW, EDUCATION-SCHOOL LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

COMPLAINT ALLEGING THE NEW YORK CITY PUBLIC SCHOOL SYSTEM DISCRIMINATES AGAINST STUDENTS OF COLOR AND SEEKING INJUNCTIVE RELIEF SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court, determined the complaint alleging the New York City public school system discriminates against Black and Latinx students and seeking injunctive relief was justiciable and stated valid causes of action. Therefore the complaint, which had been dismissed, is now reinstated. The opinion is comprehensive and far too detailed to fairly summarize here:

Plaintiffs allege that State and City policies create a "racialized" admission pipeline. According to plaintiffs, the pipeline begins with a single standardized test for the City's Gifted & Talented (G&T) programs taken by children as young as four-years-old. The G&T test, plaintiffs assert, disproportionately benefits "privileged" white students and their "in-the-know" parents, who have the "navigational capital" to understand the admissions process and the economic capital to pay for expensive test preparation. The G&T programs, plaintiffs allege, provide superior academic preparation, which allows primarily white and Asian students to continue through the pipeline to academically screened middle and high schools, relegating Black and Latinx students to unscreened schools, often in poorly maintained buildings with limited extracurricular programs. The end of the

pipeline, or “zenith” as plaintiffs describe it, is admission to one of eight New York City specialized high schools based on the results of the Special High School Admissions Test (the SHSAT).* * *

The pipeline, plaintiffs claim, is designed to exclude Black and Latinx students from the City’s prime educational opportunities. According to plaintiffs, the State and the City “intentionally adopted” and “for decades have intentionally retained—with no pedagogical basis—testing-based sorting that they know excludes students of color from equal educational opportunities.” This knowledge was acquired, plaintiffs allege, “through decades of experience and reflected in [defendants] own admissions” including the knowledge of the public school system’s “racist character and outcomes.” Despite this knowledge, plaintiffs allege that the State and the City “intentionally refuse to dismantle . . . its racialized channeling system.” IntegrateNYC, Inc. v State of New York, 2024 NY Slip Op 02369, First Dept 5-2-24

Practice Point: Here Supreme Court’s conclusion that the suit seeking injunctive relief from discriminatory education policies and procedures in the New York City public school system was not “justiciable” was rejected.

MAY 2, 2024

CIVIL PROCEDURE, CORPORATION LAW, EVIDENCE, CONVERSION, FRAUD.

AN ACTION AGAINST A CORPORATION AND AN ACTION AGAINST INDIVIDUAL PRINCIPALS OF THE CORPORATION DO NOT HAVE AN "IDENTITY OF PARTIES" WHICH WOULD ALLOW DISMISSAL OF ONE OF THE COMPLAINTS; TEXT MESSAGES DO NOT SUPPORT DISMISSAL OF A COMPLAINT BASED ON "DOCUMENTARY EVIDENCE;" THE COMPLAINT STATED A CAUSE OF ACTION FOR CONVERSION; THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUD (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined certain causes of action should not have been dismissed. Dismissal of two causes action on the ground there existed identical causes of action in another lawsuit was error because the parties in the two lawsuits were not the same. It was error to dismiss a cause of action based on documentary evidence because text messages do not fit the definition of "documentary evidence." It was also error to dismiss the action for conversion for failure to state a cause of action:

It is well settled that " '[i]ndividual principals of a corporation are legally distinguishable from the corporation itself' and a court may not 'find an identity of parties by, in effect, piercing the corporate veil without a request that this be done and, even more importantly, any demonstration . . . that such a result is warranted' " … . * * *

… [T]he court erred in using text message excerpts to justify dismissal of the fourth cause of action or, indeed, any cause of action. Documents such as text messages "do not meet the requirements for documentary evidence" to support a CPLR 3211 (a) (4) motion … . To be considered documentary, evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable" … . Here, the text messages do not even identify the person who is communicating with plaintiff. The names and numbers are redacted. Moreover, the text messages do not "conclusively establish[ ] a defense as a matter of law" with respect to the fourth cause of action … . * * *

The second cause of action alleges that defendants converted plaintiff's personal property, including dental equipment, to their own use. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property . . . and (2) [a] defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" … . … [W]e conclude that the pleading includes sufficient allegations to support a cause of action for conversion. Plaintiff alleged that each defendant exerted dominion and control over property to which she had a possessory right or interest … . Nosegbe v Charles, 2024 NY Slip Op 02406, Fourth Dept 5-3-24

Practice Point: An action against a corporation and an action against individual principals of that corporation do not have "an identity of parties" which would subject one of the actions to dismissal.

Practice Point: Text messages are not "documentary evidence" which can be the basis for dismissal of a complaint.

MAY 3, 2024

CIVIL PROCEDURE, EVIDENCE.

AFTER PLAINTIFF'S POST-NOTE DEPOSITION SUBPOENA FOR THE NONPARTY WITNESS WAS QUASHED, PLAINTIFF OBTAINED A VOLUNTARY STATEMENT FROM THE NONPARTY WITNESS; OBTAINING THE STATEMENT WAS A PROPER METHOD OF "INFORMAL DISCOVERY" (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff properly conducted "informal discovery" by obtaining a voluntary statement from a nonparty witness after plaintiff's post-note deposition subpoena for the witness was quashed:

Supreme Court granted defendant's motion to quash the untimely, post-note deposition subpoena plaintiff served on nonparty witness Harris-Aikens, and to preclude plaintiff from "examining or otherwise taking any sworn testimony from"

Harris-Aikens (the December Order), and suspended disclosure pursuant to CPLR 3103(b). …

… [T]he Harris-Aikens witness statement did not constitute "disclosure of the particular matter in dispute" prohibited by CPLR 3103(b). The statement was not an examination or other sworn testimony explicitly prohibited by the December Order, and was not otherwise an enumerated "disclosure device" under CPLR 3102(a) … . Rather, obtaining the witness statement was plaintiff's proper exercise of ex parte, informal discovery, which the Court of Appeals has long recognized as a permissible and invaluable avenue by which litigants prepare for trial … . Everett v Equinox Holdings, Inc., 2024 NY Slip Op 02276, First Dept 4-30-24

Practice Point: Obtaining a voluntary statement from a nonparty witness here did not violate the court order quashing a deposition subpoena for the same witness. The voluntary statement was a proper form of "informal discovery."

APRIL 30, 2024

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

THE MAJORITY CONCLUDED SUPREME COURT, SUA SPONTE, PROPERLY DISMISSED THE FORECLOSURE ACTION PURSUANT TO 22 NYCRR 202.27 BECAUSE PLAINTIFF FAILED TO COMPLY WITH THE COURT'S DIRECTIVES; THE DISSENT ARGUED DISMISSAL PURSUANT TO SECTION 202.27 WAS IMPROPER AND PLAINTIFF'S MOTION TO VACATE THE DISMISSAL SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, over a substantive dissent, determined Supreme Court, sua sponte, properly dismissed the foreclosure action as abandoned pursuant to 22 NYCRR 202.27 based upon plaintiff's failure to comply with the court's directive. The dissent argued the criteria for a section 202.27 dismissal were not met and the motion to vacate the dismissal should have been granted:

… [W]e reject plaintiff's contention that the action was improperly dismissed. Although the April 2020 order does not specify which statutory or regulatory basis was being relied upon to dismiss the action, this Court has "consistently held" that 22 NYCRR 202.27 authorizes a trial court to dismiss an action as abandoned where a "party fails to timely comply with a court's directive to progress the case" … . Supreme Court described in its April 2020 order how plaintiff had made no effort to move this action forward since 2016 and how plaintiff was summoned to a status conference in November 2019, where the court directed plaintiff to move for a judgment of foreclosure no later than December 31, 2019. Plaintiff failed, without explanation, to comply with that directive, and Supreme Court was therefore within its discretion to dismiss the action pursuant to 22 NYCRR 202.2 … . U.S. Bank N.A. v Hartquist, 2024 NY Slip Op 02352, Third Dept 5-2-24

Practice Point: The court has the power to, sua sponte, dismiss an action pursuant to 22 NYCRR 202.27 where plaintiff has failed to comply with court directives.

MAY 2, 2024

CIVIL PROCEDURE, JUDGES, REAL PROPERTY LAW.

IN THIS PARTITION ACTION, THERE WAS NO PENDING MOTION FOR SUMMARY JUDGMENT AND THERE WAS NO INDICATION THE PARTIES HAD LAID THEIR PROOF BARE SUCH THAT THE COURT COULD CONSIDER GRANTING SUMMARY JUDGMENT; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have granted summary judgment in the absence of a motion and a hearing. The underlying issue is whether the subject real property should be partitioned or sold at auction:

… [D]efendant and decedent made an oral motion for … a hearing on whether the property could be partitioned. Rather than decide that motion, the court directed the parties to exchange expert reports and set the matter down for a conference, at which time a hearing would be scheduled if the parties could not come to an

agreement regarding partition. However, when the parties appeared for the scheduled conference, the court did not set a date for the hearing, but, instead, held the conference, and subsequently, in effect, granted summary judgment to plaintiffs. Because "there was no motion for summary judgment pending before the court at that time, . . . it was error for the court to grant such relief" … . Although a court "has the power to award summary judgment to a nonmoving party, predicated upon a motion for the relief by another party, it may not sua sponte award summary judgment if no party has moved for summary judgment . . . , unless it appears from a reading of the parties' papers that they were deliberately charting a course for summary judgment by laying bare their proof" … . Here, contrary to plaintiffs' contention, it does not appear that the parties were deliberately charting a course for summary judgment. Indeed, the only motion pending before the court was the oral motion of defendant and decedent for … a hearing. Therefore, we reverse … and remit the matter for a hearing on whether the property may be partitioned without undue prejudice and for an accounting. The accounting shall be held "before interlocutory judgment is rendered" (RPAPL 911 …). Smith v Smith, 2024 NY Slip Op 02478, Fourth Dept 5-3-24

Practice Point: Generally a judge cannot grant summary judgment absent a motion.

Practice Point: If the parties lay bare all their proof indicating they have charted a course for summary judgment (not the case here), the court may award summary judgment absent a motion.

MAY 3, 2024

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE DEFENDANT SHARED A COMMUNITY OF PURPOSE WITH THE SHOOTER WAS LEGALLY INSUFFICIENT; ASSAULT AND FIREARMS CONVICTIONS REVERSED AND INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, reversing defendant's assault and related use and possession of a firearm convictions, determined there was insufficient evidence that defendant shared the intent to shoot the victim. The victim was shot.

Defendant drove a car which followed the wounded victim who was then robbed by an occupant of the car:

The trial evidence is insufficient to demonstrate that defendant shared a community of purpose with the unidentified shooter to cause serious physical injury to the victim or that he aided the shooter in doing so … . To begin with, there was no evidence that defendant formed a plan with anyone to assault the victim or had any advance knowledge that the victim was going to be attacked … . Further, although there is proof that defendant was present, he cannot be observed on the surveillance video striking the victim or participating in any way in the altercation that preceded the shooting. In fact, the victim testified that, during the brief struggle, he did not know if defendant was there to help him or harm him and that it was defendant's friends with whom he was actually fighting. Additionally, as noted above, there was no indication during this brief and seemingly chaotic interaction that defendant was aware that [anyone] had a gun …. This situation is also not akin to cases where an accomplice's community of purpose with a fellow assailant can be inferred from his or her continued participation in an attack after the other produces a weapon … . … [T]here is evidence that, following the shooting, defendant drove a vehicle in the direction of the victim and stopped it [an assailant's] command, at which time [the assailant] got out and robbed the victim. However, that alone is insufficient to establish that defendant shared a community of purpose to commit the earlier assault or provided assistance thereto. People v Walker, 2024 NY Slip Op 02346, Third Dept 5-2-24

Practice Point: Defendant's presence with the assailants when the victim was shot, and defendant's driving a car following the wounded victim victim and stopping the car to allow an assailant to get out and rob the victim, did not demonstrate defendant shared a community of purpose with the shooter at the time of the shooting.

MAY 2, 2024

CRIMINAL LAW, EVIDENCE.

TRIAL TESTIMONY RENDERED SEVERAL COUNTS IN THIS SEXUAL ABUSE CASE DUPLICITOUS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on several counts in this sexual abuse case, determined the trial testimony rendered the counts duplicitous:

… [T]he trial testimony rendered counts 4, 5, 7, and 8 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' " … . A duplicitous count "may undermine the requirement of jury unanimity," inasmuch as some jurors may find that defendant committed one criminal act under the count, while other jurors may find that defendant committed some other criminal act under the same count … .

At trial, the victim was unable to identify the number of times defendant touched her during the relevant time period. She testified that he touched her breasts "[a]t least two" times. The victim also testified that defendant put his fingers inside her vagina "[p]robably at least three" times and licked her vagina "[a]t least three times." She further testified that when he touched her vagina, he would also touch her breasts, but she could not "remember the specifics" of each occurrence. Under the circumstances presented here, we conclude, with respect to counts 4, 5, 7, and 8, that "it is impossible to determine whether the jury reached a unanimous verdict on those counts . . . [and] impossible to determine whether defendant was convicted of an act for which he was not indicted" … . People v Hunt, 2024 NY Slip Op 02471, Fourth Dept 5-3-24

Practice Point: If the trial testimony makes it possible for the jury to convict based upon an allegation that was not part of the indictment, the conviction will be reversed.

MAY 3, 2024

CRIMINAL LAW, JUDGES, CONSTITUTIONAL LAW, VEHICLE AND TRAFFIC LAW.

FAILURE TO INFORM DEFENDANT A FINE IS PART OF THE SENTENCE RENDERED THE GUILTY PLEA INVOLUNTARY (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined the failure to inform defendant that a fine was part of the sentence rendered the plea involuntary:

"[I]n order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" … . "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" … , and the failure to advise a defendant at the time of the guilty plea of a direct consequence of that plea "requires that [the] plea be vacated" … . Here, the court failed to advise defendant that the sentence imposed on a person convicted of aggravated unlicensed operation of a motor vehicle in the first degree must include a fine in an amount between $500 and $5,000 (see Vehicle and Traffic Law § 511 [3] [b] [i]). People v Carmichael, 2024 NY Slip Op 02427, Fourth Dept 5-3-24

Practice Point: A judge's failure to inform the defendant that a fine is part of the sentence renders the guilty plea involuntary.

MAY 3, 2024

CRIMINAL LAW, JUDGES.

THERE WAS NO RECORD DEFENSE COUNSEL WAS INFORMED OF THE JURY NOTE AND NO RECORD THE JUDGE RESPONDED TO THE NOTE, A MODE OF PROCEEDINGS ERROR; ALTHOUGH THE NOTE REFERRED ONLY TO ONE COUNT, THE THREE COUNTS WERE FACTUALLY CONNECTED REQUIRING A NEW TRIAL (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the absence of a record indicating defense counsel was notified of a

note from the jury, or even that the judge responded to the note, was a mode of proceedings error. The People's argument that the note addressed only one count of the indictment and the convictions on the other counts should survive was rejected. The nature of the jury's question was relevant to all counts:

The fourth note stated: "We the jury request to hear the judge's reading of count 1, including definitions and detail. Further, can you please confirm if it is up to our determination to decide if something is considered as "course of conduct" and "act"? As written on the verdict sheet, count 1 states "engaging in a course off conduct," we want to confirm if this is a typo or not." * * *

When an O'Rama error occurs, the question of whether the error in the proceedings related to some charges requires reversal on the other charges is determined on a case-by-case basis, with 'due regard' for the facts of the case, the nature of the error, and the 'potential for prejudicial impact on the over-all outcome' … .

Here, the three counts of the indictment were alleged to arise from a course or repetition of conduct in violation of the order of protection reasonably perceived as threatening to the victim's safety (count 1), through means both electronic/written (count 2) and telephonic (count 3). Thus, given the underlying factual relationship between the crimes, defendant is entitled to a new trial … . People v Jamison, 2024 NY Slip Op 02286, First Dept 4-30-24

Practice Point: If the record is silent about whether counsel was notified of a jury note and whether the judge even responded to the note, that is a mode of proceedings error.

Practice Point: Although the jury note related to only one of the three counts, the convictions on the other two counts could not survive because all the counts were factually connected.

APRIL 30, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

7-YEAR-OLD'S ARE STATUTORILY EXCLUDED FROM THE CLASS OF VICTIMS UNDER PENAL LAW 263.11, TO WHICH DEFENDANT PLED GUILTY; RISK-LEVEL REDUCED FROM TWO TO ONE (FOURTH DEPT).

The Fourth Department, reducing defendant's SORA risk-level from two to one, determined the 17-year-old involved in the offense was statutorily excluded from the class of victims:

… [T]he court erred in assessing 20 points for the number of victims under risk factor 3 … . The court based its assessment on a determination that a 17-year-old was a victim of defendant's conduct. However, 17-year-olds are statutorily excluded from the class of victims under Penal Law § 263.11, to which defendant pleaded guilty. When those points are removed, defendant has a total of 60 points, making him a presumptive level one risk. People v Cockrell, 2024 NY Slip Op 02439, Fourth Dept 5-3-24

Practice Point: 17-year-old's are statutorily excluded from the class of victims under Penal Law 263.11.

MAY 3, 2024

CRIMINAL LAW.

HERE THE PEOPLE REQUESTED AN ADJOURNMENT OF THE HUNTLEY HEARING BUT THE RECORD IS SILENT ABOUT THE LENGTH OF THE REQUESTED ADJOURNMENT; THEREFORE THE ENTIRE TIME BETWEEN THE REQUEST AND THE HEARING WAS COUNTED AGAINST THE PEOPLE FOR "SPEEDY TRIAL" PURPOSES (FOURTH DEPT).

The Fourth Department, granting the speedy trial motion and dismissing the indictment, determined that the record did not indicate the length of an adjournment of the Huntley hearing requested by the People and, therefore, the entire time between the request and the hearing was chargeable to the People:

"Normally, the People will be charged only with the actual period of adjournment requested, following their initial statement of readiness; any additional period of delay, for the convenience of the court's calendar, will be excludable" … . The People, however, "bear the burden of ensuring that the record explains the cause of adjournments sufficiently for the court to determine which party should properly be charged with any delay" … . Here, there is no explanation as to the reason for the requested adjournment in the record, and there is no indication on the record of the length of the adjournment the People were requesting. Thus, the entire period is chargeable to the People … . Furthermore, the adjournment is not excludable inasmuch as defendant did not expressly consent to the adjournment … . People v Bish, 2024 NY Slip Op 02409, Fourth Dept 5-3-24

Practice Point: If the People request an adjournment of a hearing but the record is silent about the length of the requested adjournment, the entire time between the request and the hearing may be chargeable to the People.

MAY 3, 2024

CRIMINAL LAW.

THE DOCTRINE OF MERGER CAN BE APPLIED TO DISMISS A KIDNAPPING CHARGE EVEN IF THE LESSER OFFENSE IS NOT CHARGED (FOURTH DEPT).

The Fourth Department remitted the matter for consideration of the People's remaining objection to applying the merger doctrine to the kidnapping charge. County Court had erroneously ruled the merger doctrine could not be applied to dismiss the kidnapping charge unless the lesser offense is also charged:

… [D]efendant contends that the court erred in denying that part of his omnibus motion seeking to dismiss the charge of kidnapping in the second degree pursuant to the merger doctrine. The kidnapping merger doctrine is a judicially-created doctrine intended to prevent overcharging and "to prohibit a conviction for kidnapping based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and independent criminal responsibility for kidnapping may not fairly be attributed to

the accused" … . A kidnapping charge "is generally deemed to merge with another offense only where there is minimal asportation immediately preceding the other crime or where the restraint and underlying crime are essentially simultaneous" … . Even if that is so, however, there is no merger where "the manner of detention is egregious" … . We agree with defendant that the court erred in concluding that the merger doctrine did not apply because defendant was charged only with kidnapping and, therefore, there was no other crime with which the count could merge.

… [D]efendant correctly contends that he had committed acts that would have supported a conviction for menacing and, therefore, the merger doctrine was applicable whether he was charged with the lesser offense or not … . * * *

Inasmuch as the court did not rule on the People's alternative argument—i.e., that the merger doctrine did not apply because any alleged menacing of the victim was incidental to the kidnapping—we may not affirm the decision on that ground … . We therefore … reserve decision, and remit the matter to County Court for a ruling on the motion in accordance with this memorandum … . People v Almonte, 2024 NY Slip Op 02426, Fourth Dept 5-3-24

Practice Point: The doctrine of merger can be applied to dismiss a kidnapping charge even if the lesser offense is not charged.

MAY 3, 2024

CRIMINAL LAW.

THE MARIJUANA FELONY CONVICTION WHICH WAS THE BASIS FOR DEFENDANT'S SECOND FELONY OFFENDER STATUS WAS BASED ON A STATUTE WHICH HAS SINCE BEEN REPEALED AND REPLACED WITH A MISDEMEANOR; DEFENDANT WAS ENTITLED TO RESENTENCING AS A FIRST-TIME FELONY OFFENDER (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined defendant, who had been sentenced as a second felony offender, was entitled to resentencing as a first-time felony offender because his 2013 marijuana-felony

conviction was based upon a statute which had been repealed and replaced by a misdemeanor:

MRTA [Marihuana Regulation and Taxation Act] provides a procedural mechanism for a person, such as defendant, who has completed serving a sentence for a conviction under Penal Law former article 221 to petition the court of conviction for vacatur of that conviction where … the person would have been guilty of a lesser or potentially less onerous offense under [the new] article 222 than under former article 221 … . … Defendant successfully moved to vacate his January 2013 felony conviction, and Supreme Court … replaced that conviction with a conviction under Penal Law § 222.30.

… [D]efendant moved pursuant to CPL 440.20 to vacate the sentence imposed for his 2019 conviction. He contended that the vacatur of his prior felony marihuana conviction invalidated the enhanced sentence imposed for his 2019 conviction, which was based on the prior felony conviction. … Supreme Court … granted defendant's motion to set aside the sentence for his 2019 conviction and resentenced him as a first felony offender to 3½ years in prison and 3½ years of postrelease supervision. * * *

… [W]e conclude that one of the "purposes" … served in substituting the misdemeanor for the felony conviction is to allow for the retroactive amelioration of a predicate felony sentence. People v Parker, 2024 NY Slip Op 02414, Fourth Deptp 5-3-24

Practice Point: Here defendant's second felony offender status was based on a marijuana statute which has since been repealed and replaced with a misdemeanor. Defendant was entitled to resentencing as a first-time felony offender.

MAY 3, 2024

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

THE ADIRONDACK PARK AGENCY PROPERLY ISSUED PERMITS FOR THE APPLICATION OF AN HERBICIDE IN LAKE GEORGE TO CONTROL AN INVASIVE AQUATIC PLANT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Fisher, reversing Supreme Court, determined the Adirondack Park Agency (APA) properly issued permits for the application of an herbicide (ProcellaCOR EC) in Lake George to control an invasive aquatic plant called Eurasian watermilfoil (EWM). Supreme Court had granted the Article 78 petition and vacated the permits. Applying black letter administrative law, the Third Department found no basis to overturn the APA's ruling. The opinion is too fact-specific and detailed to fairly summarize here:

… [W]here an agency's determination was rendered without a fact-finding hearing, a court's review is limited to "whether [the] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3] …). In performing such review, "[i]t is well settled that a court cannot substitute its view of the factual merits of a controversy for that of the administrative agency" … . And, when "the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" … . Indeed, "[i]f a determination is rational it must be sustained even if the court concludes that another result would also have been rational" … .

Although an agency acts arbitrarily and capriciously when it fails to conform to its own regulations, an agency's interpretation of its own regulations is entitled to deference if that interpretation does not contradict the plain language of the regulations and is not irrational or unreasonable … . Matter of Lake George Assn. v NYS Adirondack Park Agency, 2024 NY Slip Op 02356, Third Dept 5-2-24

Practice Point: Black letter administrative law for the review of an agency's determination when there was no fact-finding hearing was applied here. The Adirondack Park Agency's issuance of permits for the application of an herbicide in Lake George was upheld.

MAY 2, 2024

FAMILY LAW, ADMINISTRATIVE LAW, EMPLOYMENT LAW.

PETITIONER DEMONSTRATED THE CHILD WAS NEVER HARMED AND SHE HAD MADE SERIOUS AND SUCCESSFUL EFFORTS AT REHABILITATION; RE: PETITIONER'S EMPLOYMENT IN THE CHILDCARE FIELD, RESPONDENT NYS OFFICE OF CHILDEN AND FAMILY SERVICES IS PRECLUDED FROM INFORMING ANY PROVIDER OR LICENSING AGENCY THAT PETITIONER IS THE SUBJECT OF A CHILD MALTREATMENT REPORT (FOURTH DEPT).

The Fourth Department, in an Article 78 proceeding transferred by Supreme Court, determined the respondent NYS Office of Children and Family Services should not have ruled that "petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field." The Fourth Department therefore directed that respondent "shall be precluded from informing a provider or licensing agency which makes an inquiry that petitioner is the subject of an indicated child maltreatment report." No child had ever been harmed by petitioner and petitioner demonstrated serious and successful rehabilitative efforts.

… [T]he record establishes that petitioner had taken actions to show that she "[is] able to deal positively with [the] situation or problem that gave rise to the previous incident(s) of child . . . maltreatment" … . As petitioner contends, the ALJ [Administrative Law Judge] failed to consider the evidence of psychological rehabilitation showing that she could deal positively with the trauma she suffered as a result of the domestic violence inflicted upon her by the father, which precipitated the indicated report. Petitioner's marriage and family therapist submitted a letter explaining that petitioner had suffered from post-traumatic stress disorder "as a result of the relationship" with the father, but that petitioner "ha[d] made an enormous amount of progress and ha[d] reached her treatment goals," and "in no way presented as an unfit parent" during the course of her treatment. The psychologist who performed a comprehensive evaluation and testing of petitioner opined that, despite having been "aggressively abused" by the father, there was no

indication that petitioner harbored "resentments toward others," petitioner showed "no defensiveness or tendency to distort the facts of the situation," and petitioner scored "unusually low" on the potential for abuse scale, which demonstrated that petitioner had "none of the characteristics, personal status or problems with the child or family members that would raise the question of abusive potential on her part." Petitioner also had a "significantly elevated score on the scale indicating . . . the tendency to maintain emotional stability and to adequately deal with interpersonal exchanges." Moreover, the ALJ ignored petitioner's testimony about her improved ability to deal positively with emotionally challenging situations and the letters from other individuals attesting to petitioner's ability to properly parent the child. The record therefore indisputably establishes that petitioner is able to deal positively with the situation or problem that gave rise to the indicated report. Matter of Hastings v New York State Off. of Children & Family Servs., 2024 NY Slip Op 02436, Fourth Dept 5-3-24

Practice Point: A person who has been found to have committed acts of child maltreatment can petition the NYS Office of Children and Family Services for a ruling precluding the agency from informing any childcare provider of licensing agency of the maltreatment, thereby clearing the way for that person's employment in the childcare field.

MAY 3, 2024

FAMILY LAW, EVIDENCE.

TERMINATION OF FATHER'S PARENTAL RIGHTS AFFIRMED; TWO DISSENTERS ARGUED THERE WAS NO ADMISSIBLE PROOF FATHER FAILED TO PLAN FOR THE CHILDREN'S FUTURE FOR ONE FULL YEAR (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, affirmed the termination of father's parental rights. The dissenters argued there was no admissible proof that father failed to plan for the children's future for one full year:

From the dissent:

We agree with the majority that petitioner met its burden of establishing that respondent father failed to plan for the children's future from April 2021—when the father began hearing voices but failed to disclose it—through December 2021. However, inasmuch as petitioner failed to meet its burden of establishing by clear and convincing evidence that the father failed to plan for the children's future for one full year …, we respectfully dissent.

To that end, the only evidence of a failure to plan for the children's future from December 2020 to April 2021 was petitioner's exhibit 5, a medical record that referenced the father's admission to continued use of synthetic marihuana. However, that exhibit was withdrawn by petitioner as not properly authenticated and was thereafter never entered into evidence or placed into the record. Inasmuch as the record lacks other admissible evidence that the father failed to plan for the children's future from December 2020 to April 2021, Family Court's improper reliance upon facts outside the record is not harmless … , and petitioner failed to meet its burden by clear and convincing evidence … . Therefore, we would reverse the order and dismiss the petition against the father. Matter of Tori-Lynn L. (Troy L.), 2024 NY Slip Op 02440, Fourth Dept 5-3-24

Practice Point: One element of the proof necessary to terminate parental rights is the parent's failure to plan for the children's future for one full year.

MAY 3, 2024

FAMILY LAW.

MOTHER'S LEAVING THE CHILD WITH THE PETITIONERS, THE CHILD'S BROTHER AND SISTER-IN-LAW, FOR A LITTLE MORE THAN A MONTH DID NOT MEET THE "EXTRAORDINARY CIRCUMSTANCES" STANDARD FOR THE AWARD OF JOINT CUSTODY TO MOTHER AND PETITIONERS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the evidence did not support the award of joint custody of the child shared by mother and the child's

brother and sister-in-law (petitioners). The extraordinary circumstances required to award custody to nonparents were not demonstrated. Mother had left the child with the petitioners for a little more than a month before seeking the child's return:

… [T]he court's determination to award petitioners joint custody of the child along with herself and the father lacks a sound and substantial basis in the record inasmuch as petitioners failed to establish the existence of extraordinary circumstances. " '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " … . "A finding of extraordinary circumstances is rare, and the circumstances must be such that they 'drastically affect the welfare of the child' " … . Such circumstances are not established by a mere showing that the nonparent "could do a better job of raising the child" … . Where a nonparent fails to establish extraordinary circumstances, "the inquiry ends" … .

… We conclude that petitioners failed to meet their burden of establishing that the mother "relinquished her superior right to custody" … . … [T]he mother's decision to leave the child with petitioners for a little over a month before seeking his return did not amount to the type of prolonged separation that would evidence the mother's abandonment of the child or her intent to do so … . Matter of Adams v John, 2024 NY Slip Op 02404, Fourth Dept 5-3-24

Practice Point: Here the child's brother and sister-in-law were awarded joint custody of the child with mother after mother left the child with the petitioners for a little more than a month. The "extraordinary circumstances" standard for the award of custody to nonparents was not met.

MAY 3, 2024

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

COUNTY-SHERIFF DISCIPLINARY RECORDS CREATED BEFORE THE 2020 REPEAL OF THE STATUTE WHICH EXEMPTED THEM FROM DISCLOSURE PURSUANT A FOIL REQUEST ARE NOW SUBJECT TO DISCLOSURE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the FOIL request for county-sheriff disciplinary records which were created before Civil Rights Law 50-a was repealed in 2020 must be disclosed. Civil Rights Law 50-a had exempted disciplinary records from disclosure:

Former section 50-a operated as an exception to the general rule that permitted public access through FOIL to certain government records, i.e., it exempted from disclosure "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency" … . When section 50-a was repealed on June 12, 2020, that exception was removed. " 'A statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events' " … . Likewise, it is not a retroactive application of the repeal of section 50-a to conclude that past police disciplinary records are no longer subject to that exception and are now subject to FOIL; it is merely a recognition that police departments faced with FOIL requests cannot rely on an exception that no longer exists to evade their prospective duty of disclosure … . Matter of Abbatoy v Baxter, 2024 NY Slip Op 02393, Fourth Dept 5-3-24

Practice Point: Here the statute protecting county-sheriff disciplinary records from disclosure pursuant to a FOIL request was repealed in 2020. Disciplinary records created prior to the repeal are now subject to disclosure.

MAY 3, 2024

INSURANCE LAW, MEDICAL MALPRACTICE.

THE DEFENDANT INSURANCE COMPANY IS OBLIGATED TO DEFEND PLAINTIFF PEDIATRICIAN IN THE UNDERLYING ACTION BY A FORMER PATIENT ALLEGING SEXUAL ABUSE DURING A PHYSICAL EXAM (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant insurance company was obligated to defend plaintiff pediatrician who stands accused of the sexual abuse of a former patient:

Supreme Court denied plaintiff's [summary judgment] motion and granted defendant's cross-motion [for summary judgment] on the grounds that the complaint in the underlying action did not assert claims arising from a "medical incident" or "professional services," as those terms are defined in the subject insurance policy, and in any event that the policy's exclusion for sexual assault precluded coverage. * * *

… [A]lthough the complaint in the underlying action primarily alleges that plaintiff sexually abused his former patient during a medical examination, it also contains "facts or allegations" that bring the claim "potentially within the protection purchased" for claims arising from professional services rendered by plaintiff, thus triggering the duty to defend … . For instance, the underlying complaint alleges that plaintiff improperly diagnosed, cared for and treated the former patient in question, and failed to provide her with "proper and appropriate pediatric care." The underlying complaint further alleges that plaintiff inserted his finger into the former patient's vagina "without gloves," suggesting that perhaps such action would have been medically proper had plaintiff been wearing gloves. Without any context or details regarding the nature of the medical treatment being provided by plaintiff at the time of the alleged improper touching of the former patient, we cannot categorically conclude that the underlying complaint is devoid of facts or allegations that potentially bring the former patient's claims within the protection purchased by plaintiff in the subject liability policy. Mscichowski v MLMIC Ins. Co., 2024 NY Slip Op 02391, Fourth Dept 5-3-24

Practice Point: As long as some of the allegations in a complaint arguably fall within the protection of the insurance policy, the insurer is obligated to defend the insured.

MAY 3, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THE NEARLY $10 MILLION VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS SUPPORTED BY SUFFICIENT EVIDENCE OF PROXIMATE CAUSE; IT WAS ALLEGED DEFENDANT DOCTOR SHOULD HAVE SENT PLAINTIFF'S DECEDENT TO THE EMERGENCY ROOM AND THE FAILURE TO DO SO PLAYED A ROLE IN PLAINTIFF'S DECEDENT'S SUICIDE THE NEXT DAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nearly $10 million verdict should not have been set aside on the ground the evidence of proximate cause was insufficient. Plaintiff alleged defendant doctor (Strange) should have sent plaintiff's decedent to the emergency room the day before plaintiff's decedent committed suicide. The matter was remitted for consideration of other grounds for setting aside verdict:

… Supreme Court erred in granting that branch of Strange's motion which was to set aside the verdict on the issue of proximate cause and for judgment as a matter of law dismissing the complaint insofar as asserted against him, since the jury reasonably concluded, based on the evidence presented at trial, that Strange's alleged departures were a proximate cause of the decedent's death. The plaintiff's expert witness testified that the decedent's suicide was preventable and that a referral to the emergency room would have allowed the decedent to be admitted to the hospital. Such testimony was sufficient to allow a reasonable person to conclude that it was more probable than not that Strange's conduct, under these circumstances, diminished the decedent's chance of a better outcome … . Shouldis v Strange, 2024 NY Slip Op 02340, Second Dept 5-2-24

Practice Point: Proximate cause in a medical malpractice case is demonstrated if the doctor's conduct "diminished the … chance of a better outcome."

MAY 1, 2024

NEGLIGENCE, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

DEFENDANT NYC DEPARTMENT OF EDUCATION DID NOT OWE A DUTY TO A SCHOOL ADMINISTRATOR WHO WAS ATTACKED BY A STUDENT IN A SCHOOL HALLWAY; THERE WAS NO "SPECIAL RELATIONSHIP" BETWEEN DEFENDANTS AND PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the absence of a special relationship between plaintiff high school administrator and defendant NYC Department of Education precluded recovery for an attack on the administrator by a student in the school's hallway:

"Absent the existence of a special relationship between the defendants and the . . . plaintiff, liability may not be imposed on the defendants for a breach of a duty owed generally to persons in the school system and members of the public" … . To succeed on a cause of action sounding in negligence, the plaintiff must establish that the defendants owed her a special duty of care … .

A plaintiff may demonstrate that a special relationship exists by showing, among other things, that the municipality "voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefits from the duty," or that "the municipality assume[d] positive direction and control in the face of a known, blatant and dangerous safety violation" … . A special relationship based upon a duty voluntarily assumed by the municipality requires proof of the following: "'(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking'" … .

… The defendants' submissions demonstrated that they did not voluntarily assume a duty toward the plaintiff. The defendants did not make any promises to the plaintiff or take any actions regarding security protocols in the school that amounted to an affirmative undertaking of protection by them on her behalf, nor could the plaintiff have justifiably relied on any such actions … . Notably, the plaintiff testified at her deposition that she had no reason to fear the student who allegedly assaulted her. The plaintiff also testified that, prior to the incident, the student had never made any threats toward her and she never asked the school to provide her with protection from the student. Moreover, the defendants did not take positive direction and control in the face of a known, blatant, and dangerous safety violation … . Villa-Lefler v Department of Educ. of the City of N.Y., 2024 NY Slip Op 02343, Second Dept 5-1-24

Practice Point: Absent a "special relationship' between plaintiff school administrator and defendant NYC Department of Education, defendant is not liable for an attack on the administrator by a student in a school hallway.

MAY 1, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT'S ALLEGATION PLAINTIFF CAME TO A SUDDEN STOP IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT DEFENDANT'S LIABILITY; HOWEVER A QUESTION OF FACT REMAINED CONCERNING DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this rear-end collision case should have been awarded summary judgment on liability, but defendant's comparative negligence affirmative defense properly survived dismissal. Defendant alleged that plaintiff made a sudden stop, which was not enough to raise a question of fact on defendant's liability:

… [P]laintiff established her entitlement to judgment as a matter of law on the issue of liability through her own affidavit, which demonstrated, prima facie, that

the defendant's vehicle struck the plaintiff's vehicle in the rear while the plaintiff's vehicle was stopped on the LIE due to traffic conditions … . In opposition, the defendant failed to raise a triable issue of fact. The defendant's averments in his affidavit that the plaintiff's vehicle made a sudden stop and that the plaintiff had told the defendant after the accident that she had stopped her vehicle to allow another car merge into the lane ahead of her, do not provide a nonnegligent explanation for striking the plaintiff's vehicle …

However, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law dismissing the defendant's affirmative defense alleging comparative negligence on the ground that the defendant's negligence was the sole proximate cause of the accident. The plaintiff's affidavit failed to provide sufficient details to demonstrate, prima facie, that she was not comparatively at fault in causing the accident … . Fischetti v Simonovsky, 2024 NY Slip Op 02302, Second Dept 5-1-24

Practice Point: A defendant in a rear-end collision case will not escape summary judgment on liability by alleging plaintiff came to a sudden stop.

MAY 1, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

EVEN THOUGH PLAINTIFF BICYCLIST ADMITTED ROLLING THROUGH A BIKE-PATH STOP SIGN BEFORE ENTERING THE INTERSECTION, THERE REMAINED QUESTIONS OF FACT ABOUT WHETHER DEFENDANT DRIVER FAILED TO SEE WHAT WAS TO BE SEEN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant-driver's motion for summary judgment in this intersection bicycle-car collision case should not have been granted. Although plaintiff-bicyclist acknowledged he did not completely stop at the bike-path stop sign before entering the intersection, there were questions of fact whether defendant driver (Butler) failed to see what was to be seen:

… [P]laintiff's admission that he came to a "rolling stop" at the stop sign, which amounts to a violation of Vehicle and Traffic Law § 1172 (a) and establishes some degree of fault on his part. Nevertheless, that fact is not dispositive as to whether he was the sole proximate cause of the accident … . To this point, Butler's testimony suggests that no other vehicles were at the intersection prior to her turning left and that her visibility down the bike path was limited to approximately 20 feet, due in part to a building, trees and bushes obstructing her view. However, our review of the photographs of the intersection contained in the record casts doubt on that account, as a lengthy portion of the bike trail both preceding and after the stop sign located on said trail appears visible from Butler's vantage point both at the light and after she commenced the left turn. Whether plaintiff should have been visible to Butler is further unresolved by the time frames relative to Butler commencing the turn and the time to impact as well as the varying accounts from plaintiff, Butler and the police report specific as to how far Butler had traveled into the intersection before the collision took place … . Ruberti v Butler, 2024 NY Slip Op 02358, Third Dept 5-2-24

Practice Point: In this intersection bicycle-car collision case, plaintiff-bicyclist's failure to come to a complete stop at the bike-path stop sign did not establish he was the sole proximate cause of the accident.. There were questions of fact about whether defendant driver failed to see what was there to be seen.

MAY 2, 2024

PRODUCTS LIABILITY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF WAS INJURED USING DEFENDANT'S BOW; DEFENDANT MOVED FOR PERMISSION TO PERFORM TESTS ON THE BOW WHICH INVOLVED REMOVING AND THEN REPLACING THE DAMAGED COMPONENT OF THE BOW; THE JUSTIFICATION FOR SUCH TESTING WAS NOT DEMONSTRATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant bow manufacturer (PSE) was not entitled to testing of the bow beyond the visual inspection already done. Plaintiff was struck in the eye when using the bow.

Defendant moved for permission to replace the damaged component of the bow, test the bow, and then replace the damaged component. Supreme Court had granted the motion:

A party "seeking to conduct destructive testing should provide a reasonably specific justification for such testing including, inter alia, the basis for its belief that nondestructive testing is inadequate and that destructive testing is necessary; further, there should be an enumeration and description of the precise tests to be performed, including the extent to which each such test will alter or destroy the item being tested" … . Even assuming, arguendo, that the additional testing proposed by PSE is non-destructive, we conclude that PSE failed to establish in the first instance that the additional testing is "material and necessary" to its defense of the action (CPLR 3101 [a] …). PSE's expert made only a conclusory statement that re-stringing the bow with an undamaged component "should better represent the condition it was in prior to the" accident … . Therefore, even in the absence of an abuse of the court's discretion, we substitute our own discretion for that of the motion court and deny the motion … . Roche v Precision Shooting Equip., Inc., 2024 NY Slip Op 02419, Fourth Dept 5-3-24

Practice Point: There are standards which must be met in a products liability case before a court will allow testing, either nondestructive of destructive testing, of the product. Those standards were not met by the motion papers in this case.

MAY 3, 2024

REAL PROPERTY LAW, LANDLORD-TENANT.

THE RESTRICTIVE COVENANT LIMITED THE USE OF THE PROPERTY TO ONLY "SINGLE-FAMILY RESIDENTIAL PURPOSES;" USE OF THE PROPERTY FOR SHORT-TERM RENTALS THROUGH AIRBNB VIOLATES THE RESTRICTIVE COVENANT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Powers, determined that a restrictive covenant from a common grantor restricting the use of the property to only "single-family residential purposes" prohibited plaintiff from using the property for short-term rentals through Airbnb. Such use is not "residential:"

… [T]he restrictive covenant limits the permissible use to only "single[-]family residential purposes." This phrase unambiguously directs that all properties within the subdivision must be used for only residential purposes, and, thus, any and all rentals must be to those who would utilize the property for residential purposes — i.e., as a residence. A residence is the location where an individual "actually lives" and is established by "[t]he act or fact of living in a given place for some time" (Black's Law Dictionary [11th ed 2019], residence). Although there is no express durational requirement, a stay in a short-term rental property does not meet this definition … . Lodgers in short-term rental properties do not live on the premises but are instead on a short trip and often maintain a residence elsewhere where they "actually live[ ]" (Black's Law Dictionary [11th ed 2019], residence). This is true even though lodgers may have access to the entirety of the property and may use it in the same manner as a resident, including by cooking meals and sleeping as plaintiff highlighted. West Mtn. Assets LLC v Dobkowski, 2024 NY Slip Op 02355, Third Dept 5-2-24

Practice Point: Here the restrictive covenant limited the use of the property to "residential" use. A "residence" is where someone actually lives, not where someone stays for a short time while on a trip. Therefore the restrictive covenant precluded short-term rentals of the property through Airbnb.

MAY 2, 2024