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Civil Procedure
Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in May, 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

CONSTITUTIONAL LAW, DEFAMATION.

THE NONPARTY OPERATOR OF AN ANONYMOUS WEBSITE WHICH POSTED ALLEGEDLY DEFAMATORY STATEMENTS ABOUT RESPONDENT BUSINESS WAS ENTITLED TO MAINTAIN HER ANONYMITY PURSUANT TO THE FIRST AMENDMENT; HER MOTION TO QUASH SUBPOENAS AIMED AT REVEALING HER IDENTITY SHOULD HAVE BEEN GRANTED (FISRT DEPT).

The First Department, reversing Supreme Court, determined nonparty BehindMLM, the anonymous operator of a website which posts articles, was entitled to her anonymity. The respondent GSB had obtained a default judgment in Germany in a defamation action against Google (which hosts the website) and GoDaddy where the site's domain name is registered. The defamation action was based on articles posted by BehindMLM. BehindMLM was never notified of GSB suit. GSB brought the instant action pursuant to CPLR 3102(c) to compel Google and GoDaddy to reveal BehindMLM's identity and served subpoenas on Google and GoDaddy for the relevant documents.. After learning of the action, BehindMLM moved to quash the subpoenas:

BehindMLM posted four articles stating that various corporate entities were engaged in a "Ponzi scheme," frauds, and scams. In 2022, one of the companies mentioned in one of those articles, petitioner GSB Gold Standard (GSB), brought two separate actions against Google in a German court … . * * *

The issue of whether BehindMLM's statements were defamatory was not actually litigated and determined in that action, since the German orders were issued on default … . BehindMLM was not a party to the German proceedings, was not notified of the proceedings and was not given an opportunity to litigate the matter … . * * *

We hold that when a party seeks an anonymous online speaker's identifying information, courts must first require the party to take reasonable efforts to provide the speaker with notice and an opportunity to appear in the action or proceeding … . * * *

When a speaker asserts a First Amendment right to anonymous online speech … , a court should consider the First Amendment rights at stake, whether the party seeking disclosure has stated a showing of a prima facie defamation claim, and the

balance of the equities … . This Court has stated that "we should protect against the use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics, which threatens to stifle the free exchange of ideas" … . * * *

… [E]ven if GSB had stated a valid claim of defamation per se by alleging that the statements were false and harmed its business … , the broad and conclusory allegations in the verified petition did not sufficiently establish the falsity of BehindMLM's statements … . Upon our consideration of all relevant factors, including the weak evidentiary showing and BehindMLM's asserted First Amendment right to speak anonymously on matters of public concern, we conclude that, on the record as now presented, BehindMLM is constitutionally entitled to maintain her anonymity. Matter of GSB Gold Std. Corp. AG v Google LLC, 2024 NY Slip Op 02983, First Dept 5-30-24

Practice Point: Here the First Department protected the First Amendment rights of the nonparty anonymous operator of a website which published allegedly defamatory articles about respondent. The respondent's subpoenas for documents which would reveal the nonparty's identity were quashed.

MAY 30, 2024

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

CORPORATION LAW, FIDUCIARY DUTY, JUDGES.

DISPUTES INVOLVING THE INTERNAL AFFAIRS OF FOREIGN CORPORATIONS ARE RESOLVED UNDER THE LAW OF THE PLACE OF INCORPORATION (SCOTS LAW HERE); COURTS CAN TAKE JUDICIAL NOTICE OF THE FOREIGN LAW; HERE PLAINTIFFS STATED A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY UNDER SCOTS LAW (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Singas, determined (1) in international business disputes involving the internal affairs of foreign corporations, the law of the place of incorporation (Scots law here) applies; (2) the court can take judicial of the foreign law; and (3) plaintiffs stated a cause of action for breach of fiduciary duty under Scots law:

Consistent with our precedent, we clarify that the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal affairs. Moreover, because of the important interests that the internal affairs doctrine represents, we decline to create any broad exceptions to that presumption. Rather, in order to overcome this presumption and establish the applicability of New York law, a party must demonstrate both that (1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law … . * * *

CPLR 4511 gives courts "substantial flexibility in determining whether to take judicial notice of foreign law and ascertaining its content" … . As the statutory language notes, a court must take judicial notice of foreign law upon request and if the court is furnished with sufficient information to do so; otherwise, a court may take judicial notice of foreign law in its discretion … . * * *

Plaintiffs' allegations—viewed in their most favorable light and according them every possible favorable inference—are sufficient to state a claim that the director

defendants at least owed limited fiduciary duties to plaintiffs. Eccles v Shamrock Capital Advisors, LLC, 2024 NY Slip Op 02841, CtApp 5-23-24

Practice Point: Disputes involving the internal affairs of foreign corporation are resolved under the law of the place of incorporation (Scots law here).

Practice Point: Courts can take judicial notice of foreign law.

Practice Point: Here plaintiffs stated a cause of action for breach of fiduciary duty under Scots law.

MAY 23, 2024

EDUCATION-SCHOOL LAW, CONSTITUTIONAL 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

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, CONTRACT LAW.

A STIPULATIION OF SETTLEMENT DOES NOT IMPOSE A DUTY UPON A PERSON NOT A PARTY TO THE STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a person who was not a party to the stipulation of settlement in a divorce action (Kamaras) cannot be sued for an alleged violation of the stipulation:

The plaintiff opposed Kamaras's motion for summary judgment, contending, among other things, that Kamaras knew of the stipulation and its terms and that Kamaras had a "duty" to "have [Chantal] execute the transfer documents to the marital property and return same to [Walner's counsel]." … .

"'A stipulation of settlement which is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation'" … . "It is well-settled law that parties to a contract cannot, under its terms, impose any liability upon a stranger to that contract" … . "One cannot be held liable under a contract to which he or she is not a party" … .

Here, Kamaras demonstrated his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by demonstrating that he was not a party to the stipulation and had not assumed any obligations under the stipulation … . Tema v Tema, 2024 NY Slip Op 02720, Second Dept 5-15-24

Practice Point: Even if a person is aware of the terms of a stipulation of settlement, if that person is not a party to the stipulation, the stipulation does not impose a duty to act on them.

MAY 15, 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

JUDGES, APPEALS, FORECLOSURE.

SECOND DEPARTMENT TO JUDGES: DON'T DISMISS A COMPLAINT SUA SPONTE (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, made the following point explicit: a sua sponte dismissal of a complaint is almost never appropriate and almost always will be reversed:

Sua sponte dismissals are not appealable as of right (see CPLR 5701[a][2] …). The reason is that such dismissals are not, by definition, the product of motions made on notice for that particular relief as otherwise statutorily required. Nevertheless, the Second Department has consistently recognized the gravity of sua sponte dismissals and the lack of opportunity for aggrieved parties to have been heard on the dispositive issue at the trial level. Those circumstances have caused the Second Department to typically grant discretionary applications for leave to appeal (see CPLR 5701[c]), or relatedly, to deem notices of appeal to be applications for leave to appeal, which have been liberally granted … . * * *

The importance that courts not dismiss actions sua sponte absent extraordinary circumstances is grounded in a fundamental concept that lawyers and judges know well—that due process requires parties to be given notice and an opportunity to be heard about litigation issues … . Courts are to be bastions of due process. It is not the role of the court, within the moat of that bastion, to seize upon an issue not raised by any party in a motion and to unilaterally dismiss an action on the basis of that discrete issue, without providing the party whose claim is dismissed so much as notice of the issue and an opportunity for all parties to be heard on it. The Court of Appeals has cautioned the judiciary that "[w]e are not in the business of blindsiding litigants, who expect us to decide [matters] on rationales advanced by the parties, not arguments their adversaries never made" … . Wells Fargo Bank, N.A. v Louis, 2024 NY Slip Op 02948, Second Dept 5-29-24

Practice Point: Judges should not dismiss complaints sua sponte because the parties are not given proper notice of the relevant issue and the parties do not have the opportunity to be heard on it.

MAY 29, 2024

JUDGES, CONTRACT LAW.

ALTHOUGH PLAINTIFF WAS AWARDED SUMMARY JUDGMENT IN THIS QUANTUM MERUIT CASE. DEFENDANT DID NOT WAIVE A JURY TRIAL AND WAS THEREFORE ENTITLED TO A JURY TRIAL ON DAMAGES; BENCH-TRIAL VERDICT REVERSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant never waived a jury trial in this quantum-meruit action. Therefor, although plaintiff was granted summary judgment, defendant was entitled to a jury trial on damages:

… [T]he order awarding damages must be reversed, and the judgment vacated … . Upon granting plaintiff summary judgment for liability on its quantum meruit claim, Supreme Court conducted a hearing on attorneys' fees. However, claims seeking recovery under the "quasi-contractual theory of quantum meruit" for "only money damages" are considered "actions at law" entitling parties to a trial by jury … . Defendant did not waive a jury trial, but instead filed his jury demand "within

fifteen days after service of the note of issue," and more than a year before the purported attorney fee hearing was held (CPLR 4102[a]). Defendant's "right to a jury trial [wa]s not lost, when [the] motion [and cross-motion] for summary judgment [were] decided against [him]" … , yet Supreme Court deprived him of this right by conducting a bench trial on damages … . Hilton Wiener LLC v Zenk, 2024 NY Slip Op 02595, First Dept 5-9-24

Practice Point: Quantum meruit is an action at law entitling parties to a jury trial.

Practice Point: Here defendant never waived a jury trial and, although summary judgment was awarded to plaintiff, defendant was entitled to a jury trial on damages.

MAY 9, 2024

JUDGES, CRIMINAL LAW, CONSTITUTIONAL LAW.

FORMER PRESIDENT TRUMP'S PETITION FOR A WRIT OF PROHIBITION CHALLENGING A RESTRAINING ORDER RESTRICTING HIS ABILITY TO MAKE STATEMENTS DIRECTED AT POTENTIAL WITNESSES IN A CRIMINAL TRIAL DENIED (FIRST DEPT).

The First Department determined the restraining order restricting former President Donald Trump's speech during his criminal trial was valid. Trump's petition for a writ of prohibition was denied:

The Federal Restraining Order is nearly identical to the Restraining Order issued against petitioner in the underlying criminal case … .

Petitioner brings this petition because he disagrees with where the circuit court drew the line in balancing the competing considerations of his First Amendment rights to free expression and the effective functioning of the judicial, prosecutorial and defense processes … . Weighing these concerns, the circuit court ultimately concluded that, given the record, the court had "a duty to act proactively to prevent the creation of an atmosphere of fear or intimidation aimed at preventing trial participants and staff from performing their functions within the trial process" … .

This Court adopts the reasoning in the circuit court's Federal Restraining Order Decision.

The Federal Restraining Order Decision properly found that the order was necessary under the circumstances, holding that "Trump's documented pattern of speech and its demonstrated real-time, real-world consequences pose a significant and imminent threat to the functioning of the criminal trial process" … . First, the circuit court concluded that petitioner's directed statements at potential witnesses concerning their participation in the criminal proceeding posed a significant and imminent threat to their willingness to participate fully and candidly, and that courts have a duty to shield witnesses from influences that could affect their testimony and undermine the integrity of the trial process … . Justice Merchan properly determined that petitioner's public statements posed a significant threat to the integrity of the testimony of witnesses and potential witnesses in this case as well. Matter of Trump v Merchan, 2024 NY Slip Op 02680, First Dept 5-14-24

Practice Point: A court has the power to restrict speech by a defendant in a criminal trial which is directed at potential trial witnesses and which could threaten the witnesses' willingness to testify.

MAY 14, 2024

JUDGES, FAMILY LAW.

SUPREME COURT DID NOT CITE ANY "EXTRAORDINARY CIRCUMSTANCES" TO JUSTIFY ITS SUA-SPONTE DISMISSAL OF THE COMPLAINT IN THIS DIVORCE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined there was no demonstration of "extraordinary circumstances" to justify Supreme Court's sua sponte dismissal of the complaint:

"A court's power to dismiss a [complaint], sua sponte, is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal" … . Here, the Supreme Court did not identify any extraordinary circumstances warranting sua sponte dismissal of the complaint … . The plaintiff moved, inter alia, to

consolidate custody and family offense proceedings that were pending in the Family Court, Queens County, and the Family Court, Kings County, with the instant action. There was no motion to dismiss the complaint in its entirety or to change venue before the court … . Ivashchenko v Borukhov, 2024 NY Slip Op 02526, Second Dept 5-8-24

Practice Point: This decision illustrates the appellate-courts' discomfort with sua sponte dismissals of complaints (dismissal in the absence of a motion requesting it).

MAY 8, 2024

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

JUDGES, INSURANCE LAW.

THE INSURER'S OBLIGATION TO INDEMNIFY SHOULD NOT HAVE BEEN DETERMINED BASED UPON THE ALLEGATIONS IN THE PLEADINGS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that although the insurer (Everest) was required to defend the plaintiff (CCM) in the underlying action, the ruling that Everest must indemnify CCM was premature:

Supreme Court should not have found that Everest was required to indemnify CCM. Although Everest concedes that it must defend CCM, "the duty to defend is broader than the duty to indemnify," because only the latter "is determined by the actual basis for the insured's liability to a third person and is not measured by the allegations of the pleadings" … . In the underlying action, there has been no determination whether the plaintiff's injury was "caused, in whole or in part, by" the acts or omissions of the named insured or of those acting on its behalf … . Therefore, any declaration of the duty to indemnify was premature (… see … Axis Surplus Ins. Co. v GTJ Co., Inc., 139 AD3d 604, 605 [1st Dept 2016] ["It is after the resolution of that action where the extent of plaintiff's indemnification obligations can be fully determined"]). Harleysville Ins. Co. v United Fire Protection, Inc., 2024 NY Slip Op 02663, First Dept 5-14-24

Practice Point: An insurer's obligation to indemnify cannot be determined based on the allegations in the pleadings.

MAY 14, 2024

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

JUDGES.

"GOOD CAUSE" FOR FILING A LATE SUMMARY JUDGMENT MOTION MUST BE DEMONSTRATED IN THE INITIAL MOTION PAPERS, NOT IN THE REPLY PAPERS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's late summary judgment motion should not have been granted because the initial papers did not demonstrate "good cause" for the late filing. The "good cause" allegations in defendant's reply papers should not have been considered:

Defendant's motion was … untimely … and, thus, defendant was required to demonstrate "good cause" for the untimeliness of the motion in its initial motion papers (CPLR 3212 [a] …). Indeed, "[i]t is well settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first time in reply papers" … . Inasmuch as it is undisputed here that defendant did not proffer any good cause for the delay in its initial motion papers, the court erred in considering the motion and should have denied it as untimely … . Worden v City of Utica, 2024 NY Slip Op 02628, Fourth Dept 5-10-24

Practice Point: If you make a late summary judgment motion, you must demonstrate "good cause" for being late in the initial motion papers. A "good cause" demonstration in the reply papers should not be considered by the judge.

MAY 10, 2024

JUDGES.

A DEPOSITION ERRATA SHEET SUBMITTED PAST THE 60-DAY DEADLINE SHOULD HAVE BEEN STRUCK (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the deposition errata sheet should have been struck because it was submitted after the 60-day period expired:

Supreme Court erred in denying their joint motion to the extent that it seeks to strike plaintiff's errata sheet inasmuch as the errata sheet was untimely (see CPLR 3116 [a]). We therefore modify the order accordingly. CPLR 3116 (a) provides, in relevant part, that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." It is undisputed that plaintiff did not submit the errata sheet within 60 days of her deposition, and submitted it over a month after the 60-day period expired, in opposition to defendants' motions for summary judgment. Plaintiff's reasons for the lateness under the circumstances did not constitute a good cause for the delay (see CPLR 2004 …). We note that we did not consider the errata sheet when reviewing defendants' contentions regarding their motions for summary judgment. Pagan v GPK, LLC, 2024 NY Slip Op 02631, Fourth Dept 5-10-24

Practice Point: A motion to strike a deposition errata sheet submitted past the 60-day deadline should be granted.

MAY 10, 2024

LABOR LAW-CONSTRUCTION LAW.

LABOR LAW 240(1) DOES NOT APPLY TO SLIPPING ON A STAIRCASE STEP, THE PERMANENT STAIRCASE IS NOT A SAFETY DEVICE; PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO ADD AN INDUSTRIAL CODE VIOLATION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined (1) Labor Law 240(1) does not apply to slipping on a staircase step; and (2) plaintiff should have been allowed to amend the pleadings to assert a violation the Industrial Code in support of the Labor Law 241(6) cause of action:

"'[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" … . "Mere lateness is not a barrier" to amendment, absent prejudice … , which exists where the nonmoving party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" … .

Here, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to allege a violation of 12 NYCRR 23-3.3(e) with regard to the Labor Law § 241(6) cause of action. The plaintiff made a showing of merit, the amendment presented no new factual allegations or new theories of liability, and the amendment did not prejudice the defendants. The defendants were put on sufficient notice through the complaint, the bill of particulars, and the plaintiff's deposition testimony that the Labor Law § 241(6) cause of action related to the defendants' alleged failure to provide proper safety devices, such as a chute or hoist, to be used in the removal of demolition debris from the building during demolition operations. * * *

… [D]efendants established, prima facie, that Labor Law § 240(1) was inapplicable to the facts of this case … . The permanent staircase from which the

plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk … . Verdi v SP Irving Owner, LLC, 2024 NY Slip Op 02721, Second Dept 5-15-24

Practice Point: A permanent staircase is not a safety device within the meaning of Labor Law 240(1).

Practice Point: Amendment of pleadings alleging a violation of Labor Law 241(6) to add the violation of an Industrial Code provision should generally be allowed, even if late.

MAY 15, 2024

MUNICIPAL LAW, NEGLIGENCE. PHYSICAL INCAPACITY CAN BE A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM, BUT THE PERIOD OF DISABILITY DOES NOT TOLL THE ONE YEAR AND 90 DAY PERIOD FOR FILING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion for leave to file a late notice claim against the NYC Transit Authority should not have been granted because the motion was made more than one year and 90 days after the cause of action accrued. Although physical incapacity can be a reasonable excuse for failing to file a notice of claim withing 90 days, it does not toll the period for making a timely motion for leave to file a late notice of claim:

The court erred … in concluding that plaintiff's hospitalization from the February 12, 2020 accident until April 11, 2020 rendered timely plaintiff's January 25, 2021 notice of claim upon defendant NYC Transit Authority … . Although physical incapacity may be properly considered as a reasonable excuse under General Municipal Law § 50-e (5) for the failure to timely file a notice of claim … , it is relevant only upon timely motion for leave to file a late notice of claim "made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued" … . Melgarejo v City of New York, 2024 NY Slip Op 02892, First Dept 5-28-24

Practice Point: A period of physical incapacity may be a reasonable excuse for failing to file a timely notice of claim, but it does not toll the one year and 90 day statute of limitations for filing a motion for leave to file a late notice of claim.

MAY 28, 2024

PRODUCTS LIABILITY, 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 ESTATE, CONTRACT LAW.

THE LAWSUIT SOUGHT RETURN OF A DOWN PAYMENT UNDER A REAL ESTATE CONTRACT; BECAUSE THE LAWSUIT DID NOT AFFECT TITLE, POSSESSION, USE OR ENJOYMENT OF THE PROPERTY A NOTICE OF PENDENCY IS NOT APPROPRIATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the notice of pendency should have been cancelled because the lawsuit, which sought the return of a down payment under a real estate contract, did not affect title, possession, use or enjoyment of the real property:

Pursuant to CPLR 6501, "[a] notice of pendency may be filed only when 'the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property'" … . "When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself; 'the court's analysis is to be limited to the pleading's face'" … .

Here, the complaint, on its face, only asserts causes of action to recover monetary damages and does not seek relief that would affect the title to, or the possession, use, or enjoyment of, the property. Mallek v Felmine, 2024 NY Slip Op 02808, Second Dept 5-22-24

Practice Point: A notice of pendency is appropriate only when the underlying lawsuit involves title, possession, use or enjoyment of real property. A suit for the return of a down payment does not warrant a notice of pendency.

MAY 22, 2024

ZONING, EDUCATION-SCHOOL LAW.

RESIDENTS WHO DO NOT LIVE IN CLOSE PROXIMITY TO THE CHALLENGED FENCE DO NOT HAVE STANDING TO ASSERT A ZONING VIOLATION; BECAUSE THE NYS DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION APPROVED CONSTRUCTION OF THE FENCE, THEY ARE NECESSARY PARTIES IN THIS ZONING-VIOLATION PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) plaintiff property owners who did not live in close proximity to the proposed fence around school property did not have standing to assert a zoning violation; and (2) the NYS Department of Education (SED) and the Commissioner of Education, which authorized construction of the fence, are necessary parties. The plaintiffs alleged the local school district violated local zoning laws by not seeking approval from the village before starting construction of the fence:

A party seeking standing to challenge an administrative action must establish that the injury it sustained was "different in kind and degree from the community generally" … . A party residing "in the immediate vicinity" of the subject property suffers harm greater than the community at large when the subject property violates a zoning law because "loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood" … . …

… "[N]ecessary parties are persons who might be inequitably affected by a judgment in the action and must be made plaintiffs or defendants" (… CPLR 1001[a]). SED and the Commissioner are necessary parties because the Supreme Court's determination would necessarily determine their rights to set school safety standards and approve plans for school construction … . Matter of Cuomo v East Williston Union Free Sch. Dist., 2024 NY Slip Op 02702, Second Dept 5-15-24

Practice Point: Only residents who live in close proximity to property alleged to violate zoning laws have standing to assert a zoning violation.

Practice Point: When necessary parties have not been included in a lawsuit, the court should try to make them parties.

MAY 15, 2024