NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
June 17 – 24, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 17 – 21, 2024, and Posted on the New York Appellate Digest Website on Monday, June 24, 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.

Contents

CIVIL PROCEDURE, FORECLOSURE.

WHEN SERVICE OF PROCESS IS MAILED TO A BUSINESS ADDRESS, AS OPPOSED TO A RESIDENTIAL ADDRESS, THE ENVELOPE SHOULD NOT INDICATE THE CONTENTS ARE LITIGATION-RELATED; HERE THE DEFENDANT'S ADDRESS WAS BOTH HIS RESIDENTIAL AND HIS BUSINESS ADDRESS AND THE ENVELOPE INDICATED THE CONTENTS WERE LITIGATION-RELATED; THE RESIDENTIAL MAILING RULES APPLIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, determined CPLR 308(2) was not violated by mailing the foreclosure summons and complaint to defendant in an envelope which indicated the contents were litigation-related. Although the address to which the documents were mailed was defendant's business address, it also served has his residential address. The envelope-restrictions only apply to a mailing to a business address. In a matter of first impression, the First Department held the residential-address mailing-rules, not the business-address mailing restrictions, applied and CPLR 308(2) was not violated:

Defendant's argument that where a dual purpose exists the business mailing restrictions prohibiting litigation-related markings on the envelope take precedence over the residential mailing conditions is untenable. This position would improperly render meaningless one provision in favor of the other for no apparent reason other than to benefit one side over the other … . … [A] close reading of CPLR 308(2)'s mailing requirements reveals an alternative construction that would resolve this interesting dilemma … . The placement of the phrase "last known residence" before the phrase "actual place of business" signals the Legislature's clear intent to deem mailing to a defendant's residence to be primary over a place of business. Indeed, the legislative history for the 1987 amendment to CPLR 308(2) strongly supports this reasoning … . The amendment providing for mailing

to a place of business was to ameliorate the inability to locate a defendant's residence. Thus, mailing to a residential address is primary over a mailing to a place of business, an option that was intended to be secondary in effectuating service of process. Based on the foregoing, where a defendant's address is both residential and a place of business, the address may be deemed as a residential one in the affidavit of service, permitting a mailing in accordance with CPLR 308(2)'s residential mailing requirements. Under these circumstances, the mailing … did not violate CPLR 308(2)'s mailing requirements…. . AMK Capital Corp. v Plotch, 2024 NY Slip Op 03324, First Dept 6-18-24

Practice Point: Where a defendant's mailing address is both a business address and a residential address, the CPLR 308(2) "business address" rule, i.e., the envelope must not indicate the contents are litigation-related, does not apply.

JUNE 18, 2024

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

IN MOVING TO VACATE A MORE THAN $2 MILLION DEFAULT JUDGMENT IN THIS MED MAL CASE, DEFENDANT DOCTOR RAISED A QUESTION OF FACT WHETHER SHE WAS EVER SERVED WITH PROCESS; A HEARING IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing was required to determine whether defendant was properly served in this medical malpractice action. Defendant doctor never appeared and a default judgment of over $2 million had been entered:

In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service … .

Here, the affidavit of service constituted prima facie evidence of proper service. In moving … to vacate the judgment, the defendant did not merely make a conclusory denial of service, but provided specific, detailed facts that contradicted the affidavit of service. The defendant denied having an employee who had the same name or matched the physical description as the individual allegedly served, "Pearl Unan." … [T]he defendant stated that at the time of the alleged service his office was

closed and there was no one at his reception desk. The defendant's sworn, nonconclusory denial of service was sufficient to dispute the veracity or contents of the affidavit, requiring a hearing … . … [T]he affidavits of Alexis Malone and Scott Sachs, who were employed by the defendant, also provided specific and detailed facts that contradicted the affidavit of service. Harrison v Schottenstein, 2024 NY Slip Op 03418, Second Dept 6-20-24

Practice Point: Although a process server's affidavit is prima facie evidence of proper service, a sworn, nonconclusory, fact-based denial of service by the defendant requires a hearing. If defendant is never served, the court never had jurisdiction.

JUNE 20, 2024

CONTRACT LAW.

THE COURT OF APPEALS MAJORITY HELD THE APPELLATE DIVISION AND THE DISSENT WENT TOO FAR BY INTERPRETING A SHORT PHRASE WITH GRAMMATICAL AND SPELLING ERRORS TO HAVE AMENDED THE TERM OF THE CONTRACT, WHICH WAS UNAMBIGUOUS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, reversing the Appellate Division, over a three-judge dissenting opinion, determined a short unintelligible phrase in the contract did not render the contract ambiguous and therefore did not allow the interpretation applied by the Appellate Division. The central issue was the term of the contract. The expiration date of the term of the contract was unambiguous. The term had expired by the time the transaction for which plaintiff sought a fee of $1.25 million was consummated:

The muddled phrase "the with affect as of the date hereof" … does not create a factual issue with respect to the length of the Term, because that language is susceptible to only one reasonable interpretation … . … "[T]he with affect as of the date hereof" can easily be understood to mean "with effect as of the date hereof." To reach that interpretation, one need only set aside a plainly extraneous article, the word "the," and correct a common, one-letter spelling error ("effect" versus "affect") … .. Employing this common-sense reading, [the phrase] has no impact on the length of the Term. …

The Appellate Division held that an ambiguity exists because, in its view, " 'the with affect as of the date hereof' . . . could also be corrected to state 'with the Effective Date as the date hereof' " … . The dissent similarly posits that the errors could be corrected to state "with the Effective Date hereof." These strained readings treat [the phrase] as designed to amend the Effective Date of the original agreement, the primary but unstated effect of which would be to restart its three-year Term. MAK Tech. Holdings Inc. v Anyvision Interactive Tech. Ltd., 2024 NY Slip Op 03376, CtApp 6-20-24

Practice Point: Here the majority concluded a short phrase with grammatical and spelling errors did not render the contract ambiguous.

JUNE 20, 2024

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW, EVIDENCE, JUDGES.

ALTHOUGH THE NOTICE OF THE INTENT TO PRESENT PSYCHIATRIC EVIDENCE DEMONSTRATING DEFENDANT'S LACK OF CAPACITY TO COMMIT ARSON WAS "1400 DAYS LATE," THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ACCEPT THE LATE NOTICE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined the trial court abused its discretion in refusing to accept late notice of the intent to present psychiatric evidence as a defense to the arson charge. The defendant had been evaluated and treated for mental illness since childhood. When a new attorney was assigned to the defense, the notice of the intent to present psychiatric evidence was served "1400 days late." The defense sought to introduce expert testimony to demonstrate defendant did not have the capacity to commit arson at the time of the offense:

We … hold that the trial court's application of CPL 250.10 precluding Mr. Sidbury's [defendant's] psychiatric defense was an abuse of discretion. We have been clear that the governing principle animating CPL 250.10 is "procedural fairness and orderliness" with the intention of "eliminating the element of surprise" for the prosecution … . The statute formulates a procedure for defendants to serve notice of their intent to present psychiatric evidence that is "prepared and presented

manageably and efficiently," such that it allows for "proper notification, adversarial examination, and preclusion when appropriate" … . * * *

Although the statute provides for service of the notice within 30 days of the defendant's not-guilty plea, the court has discretion to permit service of a late notice "[i]n the interest of justice and for good cause shown" … . Late notice is permissible "at any time prior to the close of evidence"—including after trial has commenced … .

The decision to permit late notice is within the discretion of the trial court … . That discretion, however, is "not absolute," because "[e]xclusion of relevant and probative testimony as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in [their] own defense" … . Instead, the trial court must "weigh [the defendant's constitutional] right against the resultant prejudice to the People from the belated notice" … . People v Sidbury, 2024 NY Slip Op 03318, CtApp 6-18-24

Practice Point: Although service of notice of intent to present psychiatric evidence as a defense should be made within 30 days of the not-guilty plea, the court has the discretion to accept late notice at any time prior to the close of evidence (because the constitutional right to present a defense is at stake).

JUNE 18, 2024

CRIMINAL LAW, ATTORNEYS.

THE STATUTE REQUIRING THE PEOPLE TO FILE A CERTIFICATE OF COMPLIANCE WITH THEIR DISCOVERY OBLIGATIONS IN ORDER TO BE READY FOR TRIAL WENT INTO EFFECT ON JANUARY 1, 2020; REVERSING THE APPELLATE DIVISION, THE COURT OF APPEALS HELD A VALID READY-FOR-TRIAL ANNOUNCEMENT MADE PRIOR TO JANUARY 1, 2020, WAS NOT AFFECTED BY THE NEW STATUTE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Singas, over a concurring opinion and a dissenting opinion, determined the new statutory discovery obligations imposed upon the People, effective January 1, 2020, did not affect a valid ready-for-trial announcement made prior to January

1, 2020. The Appellate Division held the new statute required the People to file a Certificate of Compliance to be ready for trial and the failure to do so mandated dismissal on speedy-trial grounds:

On January 1, 2020, amendments to New York's discovery (CPL art 245) and statutory speedy trial (CPL 30.30) rules went into effect, and the old discovery rules (CPL former art 240) were repealed … . On January 27, the first day of trial, defendant moved to dismiss the indictment on statutory speedy trial grounds, arguing that the People had become unready for trial when the amendments came into effect and had failed to file a certificate of compliance with the new discovery rules (COC) as required by the amendments and announce their readiness before their statutory speedy trial time expired. * * *

There is no evidence, in the plain language of the amendments or the legislative history, that the legislature intended to—or did—revert the People to a state of unreadiness on January 1, 2020. Rather, the amendments specifically tie the COC requirement to the People's ability to state ready and be deemed ready. Because the legislature established the COC requirement as a condition precedent to declaring ready for trial and did not indicate an intent to undo the People's prior readiness statements, there is no basis to apply that requirement prospectively to a case such as the present one where the People were in a trial-ready posture when it went into effect. In other words, the People are not required to fulfill a prerequisite to declaring trial readiness when they have already validly declared ready for trial. Accordingly, the only way to apply the COC requirement to this case would be to wholesale invalidate the People's pre-2020 readiness statement—not to render the People unready as of January 1, 2020. Because the language of the amendments does not "expressly or by necessary implication require" this plainly retroactive application, we cannot conclude that the legislature intended for the COC requirement to apply in this manner … . Consequently, the People are not chargeable for any delay after January 1, 2020, and thus remained within the applicable 181-day statutory speedy trial limit … . People v King, 2024 NY Slip Op 03322, CtApp 6-18-24

Practice Point: Here the People made a valid ready-for-trial announcement before the new discovery statute went into effect on January 1, 2020. The trial started on January 27, 2021, and the defense moved to dismiss on speedy trial grounds because the People never filed a certificate of compliance, a new statutory requirement for readiness for trial. The Appellate Division dismissed the case on

that ground. The Court of Appeals reversed, finding the pre-January 1, 2020, ready-for-trial announcement was unaffected by the new statutory requirements.

JUNE 18, 2024

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE TRIAL COURT PROPERLY RULED THE PEOPLE PROVIDED RACE-NEUTRAL REASONS FOR STRIKING TWO BLACK JURORS; THE TRIAL COURT PROPERLY RULED THE HANDCUFFED DEFENDANT'S SHOW-UP IDENTIFICATION PROCEDURE WAS PROPER (CT APP).

The Court of Appeals, affirming the trial court's Batson and suppression rulings, in a full-fledged opinion by Judge Cannataro, over a three-judge dissenting opinion, determined the trial court's rulings (1) the People demonstrated race-neutral reasons for striking two Black jurors and (2) the show-up identification of the defendant, who was handcuffed, was proper:

Overall, C.C.'s responses gave rise to a reasonable inference that: (1) he viewed the arrest of his cousin for marijuana possession as a crime against his cousin; (2) he viewed the arrest of his cousin as a "raid" by police; and (3) his negative feelings towards police could affect his view of police witnesses in the case, regardless of any contradictory assurances he might have given. These inferences are patently reasonable and the trial court's determination that the non-discriminatory reasons offered by the People in support of their peremptory strike of C.C. were credible and non-pretextual finds ample support in the record … . * * *

The People expressed concern that K.C.'s job duties would cause her to be inappropriately sympathetic to defendant. K.C.'s job involved determining whether juvenile offenders would be entitled to intake diversion, or face prosecution, and she was previously employed as a caseworker. We have previously recognized that a party may permissibly strike a juror "who works in a certain field . . . because that party believes—for reasons unrelated to the facts of the case—that such individual may have a more sympathetic attitude or view toward the opposing party" … . * * *

Although this Court has stated that a showup procedure in which a suspect is handcuffed and in the presence of police is "suggestive and not preferred" and "presses judicial tolerance to its limits" … , we have concluded that, such a showup is "reasonable under the circumstances" when it is conducted in close geographic and temporal proximity to the crime … . When a showup is done as part of "one unbroken chain of events—crime, escape, pursuit, apprehension and identifications" such a procedure is acceptable … . As we have recognized, " 'prompt showup identifications by witnesses following a defendant's arrest at or near the crime scene have been generally allowed" ,,, . Moreover, "[w]hether a crime scene showup is unduly suggestive is a mixed question of law and fact. Thus, if record evidence supports the determination below, this Court's review is at an end" …. . People v Wright, 2024 NY Slip Op 03320, CtApp 6-18-24

Practice Point: A show-up identification procedure in close geographical and temporal proximity to the crime can be proper, even when the defendant is handcuffed.

JUNE 18, 2024

CRIMINAL LAW, EVIDENCE, JUDGES.

AFTER A VALID TRAFFIC STOP, DEFENDANT WAS DETAINED WHILE HIS PAROLE OFFICER WAS CALLED TO THE SCENE; DEFENDANT'S CAR WAS THEN SEARCHED AND HEROIN WAS FOUND; THE MATTER WAS REMITTED TO DETERMINE WHETHER DEFENDANT WAS PROPERLY DETAINED UNDER THE "REASONABLE SUSPICION" STANDARD, NOT THE "RIGHT TO INQUIRE" STANDARD APPLIED BY THE SUPPRESSION COURT (CT APP).

The Court of Appeals, remitting the case for a determination of the suppression motion under the "reasonable suspicion" standard, in a full-fledged opinion by Judge Cannataro, over an extensive dissenting opinion, determined there was a question whether the defendant was illegally detained after a valid traffic stop to allow investigation of a possible parole violation. The parole officer was called to the scene, the defendant's car was searched, and heroin was found:

The proper standard for detaining an individual beyond "the time reasonably required" to complete a traffic stop is reasonable suspicion … . Given that a traffic stop is a "limited seizure" of the occupants of a vehicle, "[f]or a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance" … . A "continued involuntary detention of [a] defendant . . . constitute[s] a seizure in violation of their constitutional rights, unless circumstances coming to [the officer's] attention following the initial stop furnishe[s] . . . reasonable suspicion that they were engaged in criminal activity" … . Likewise, the United States Supreme Court has held that "[a] seizure justified only by a police-observed traffic violation . . . become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ticket for the violation" … . In this vein, although that "mission" encompasses " 'ordinary inquiries incident to [the traffic] stop,' " it does not include additional measures designed to detect evidence of criminality … . Thus, an otherwise lawful traffic stop may not be prolonged "absent the reasonable suspicion ordinarily demanded to justify detaining an individual" … .

… [T]here is record support for the affirmed finding that the traffic stop was justified at its inception, based upon the police officer's observation that defendant committed a traffic infraction … . However, the courts below evaluated whether the traffic stop was prolonged beyond the time reasonably required for its completion under the founded suspicion standard applicable to the common law right to inquire … , a lesser standard than the reasonable suspicion necessary to prolong a traffic stop. As a result, remittal is necessary to allow for consideration of this issue under the proper standard. People v Thomas, 2024 NY Slip Op 03319, CtApp 6-18-24

Practice Point: After a valid traffic stop, the question whether defendant was properly detained to allow inquiry into suspected crimes unrelated to the traffic infraction is analyzed under the "reasonable suspicion" standard, not the lesser "right to inquire" standard.

JUNE 18, 2024

CRIMINAL LAW, MENTAL HYGIENE LAW.

ALTHOUGH RESPONDENT SEX OFFENDER VIOLATED RULES IMPOSED BY THE "STRICT AND INTENSIVE SUPERVISION" (SIST) REGIMEN, HE DID NOT EXHIBIT ANY DANGEROUS SEXUAL BEHAVIOR; THEREFORE RESPONDENT SHOULD NOT HAVE BEEN CONFINED AND SHOULD BE RELEASED AND MANAGED UNDER "SIST" (FIRST DEPT).

The First Department, reversing Supreme Court, determined that, although respondent sex offender violated some of the rules associated with his released into the community, the violations were not related to sexual behavior. Therefore respondent should not be confined and should be released to the community and managed under SIST (strict and intensive supervision):

It is undisputed that, during the relevant period, respondent made no sexual threats, did not approach any treatment staff in a sexual manner, and did not express any sexual impulses or urges. We agree with our sister department that "in the absence of evidence of sexually inappropriate conduct while on SIST, it becomes incumbent on the State to demonstrate a persuasive link between a nonsexual SIST violation and the offender's ability to control his sexual behavior" … . "A mere tendency to engage in risky or socially undesirable conduct — even if that conduct provides an opportunity for, or increases the likelihood of, sexual offending — is quintessentially insufficient to establish 'inability' under the Michael M. formulation" (George N., 160 AD3d at 31 …). Finally, a respondent's mere struggling with sexual urges is insufficient to show inability to control … . Matter of State of New York v Anthony R., 2024 NY Slip Op 03392, First Dept 6-20-24

Practice Point: A sexual offender who has not exhibited any dangerous sexual behavior under SIST should be released and management under SIST should be continued. Confinement is not justified by non-sexual SIST violations.

JUNE 20, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

LEVEL ONE SEX OFFENDERS MUST REGISTER UNDER SORA FOR 20 YEARS; LOW RISK-LEVEL SEX OFFENDERS WHO WERE REGISTERED IN ANOTHER STATE AND WHO RELOCATE TO NEW YORK ARE NOT ENTITLED TO CREDIT FOR THE TIME THEY WERE REGISTERED OUT-OF-STATE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two dissenting opinions (three judges), determined sex offenders registered in other states who are designated level-one risks upon relocating to New York are not entitled to credit for the time they were registered in another state:

Generally, those convicted of sex offenses in other states must register under the Sex Offender Registration Act ([SORA] …) upon relocating to New York … . While the statute requires some sex offenders to register for life … , those in the lowest risk category register for a term of 20 years … . The issue here is whether the statute entitles sex offenders who are classified in that lowest risk category upon relocating to New York to credit for their time registered as sex offenders under the laws of other states. We hold that it does not … .

Defendant in each of these appeals was convicted in another state of an offense that required him to register as a sex offender under the laws of that state. Some years later, each defendant relocated to New York and was required to register as a level-one risk under SORA. Neither is designated a sexual predator, sexually violent offender, or predicate sex offender. During the risk level determination hearings under Correction Law § 168-k (2), each defendant requested that Supreme Court order him registered nunc pro tunc to the date when he registered as a sex offender in the state where he was convicted of his sex offense, in effect giving him credit for the time registered in the foreign jurisdiction against the 20-year registration period. * * *

We recognize that the statute, as written, may lead to unfair results in some circumstances. For example, an offender with a minimal risk of reoffense who has spent substantial time compliant with an effectively administered out-of-state registry scheme without having reoffended would seem to deserve credit for that time as a matter of policy. Moreover, the diversion of public resources and attention towards offenders such as these arguably undermines the state's effort to protect the public against genuinely dangerous offenders. On the other hand, not all

state registry schemes are necessarily created equal, for example, in terms of supervision and registration requirements, and there is no specific mechanism under SORA for a court to determine whether a foreign state's administration of its registry is as exacting as New York's or the extent to which a particular offender complied with his obligations under that state's statute and remained free of reoffense. People v Corr, 2024 NY Slip Op 03379, CtApp 6-20-24

Practice Point: Low risk-level sex offenders who relocate to New York are not entitled to credit for the time they were registered out-of-state. They must remain registered in New York for twenty years.

JUNE 20, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE "ESSENTIAL ELEMENTS" TEST SHOULD BE USED TO DETERMINE WHETHER AN OUT-OF-STATE NON-SEXUAL CONVICTION CAN BE USED TO ASSESS RISK-LEVEL POINTS UNDER SORA (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the "essential elements" test must be used to determine whether a defendant should be assessed risk-level points for non-sexual offenses committed out-of-state. Defendant relocated to New York and was subject to a SORA risk-level assessment based upon a Washington child molestation conviction. Defendant had been convicted of driving while intoxicated in Texas for driving in circles in a grassy area in a park. New York's DWI statutes do not criminalize such off-road driving. Therefore the Texas conviction should not have been used to assess risk-level points under SORA: In addition the commission of the Washington child molestation offense predated a Washington DWI conviction. Therefore the Washington DWI should not have been used to calculate the risk-level because it was not part of defendant's "prior criminal history:"

Pursuant to the essential elements test, a court must "compare the elements of the foreign offense with the analogous New York offense to identify points of overlap" and, "where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the [court] must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" … . … This Court and the other Departments

previously have deemed it appropriate to utilize the essential elements test to determine whether a foreign conviction falls within the scope of a New York offense to assess points under any category of risk factor 9 … .. Such application ensures that courts properly assess "prior crimes" and accurately determine a sex offender's risk level in accordance with acts that the Legislature has deemed apt to criminalize (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 6 [2006]). Consequently, to the extent that we have not expressly held that the essential elements test should be utilized to determine whether a foreign conviction supports the assessment of any points under risk factor 9, we hold so now. People v Pardee, 2024 NY Slip Op 03360, Third Dept 6-20-24

Practice Point: Here the Third Department expressly adopted the "essential elements" test for determining whether an out-of-state DWI can be used to assess risk-level points under SORA. The elements of the Texas DWI statute are different from the elements of New York's DWI statutes. Defendant's driving in circles on a grassy area of a park would not constitute DWI in New York. Therefore the Texas conviction should not have been used to assess points.

JUNE 20, 2024

EDUCATION-SCHOOL LAW.

SCHOOL DISTRICTS ARE NOT OBLIGATED TO TRANSPORT CHILDREN TO THEIR PRIVATE SCHOOLS WHEN THE PUBLIC SCHOOLS ARE CLOSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined a school district is not required to transport children to their private schools when the public schools are closed:

Education Law § 3635 (1) (a) provides: "Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children."

The issue on appeal is whether by requiring that school districts provide "sufficient" transportation, the statute obligates school districts to afford nonpublic

students transportation on days their schools are in session, including days when public schools are closed. We conclude it does not. Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist., 2024 NY Slip Op 03377, CtApp 6-20-24

Practice Point: The Education Law does not require school districts to transport students to their private schools when the public schools are closed.

JUNE 20, 2024

ENVIRONMENTAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

THE NYC DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT TOOK THE "HARD LOOK" REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT BEFORE APPROVING THE CONSTRUCTION OF SENIOR HOUSING ON GREEN SPACE (CT APP).

The Court of Appeals, over an extensive dissenting opinion, determined the NYC Department of Housing Preservation and Development (HPD) took the "hard look" required under the State Environmental Quality Review Act (SEQRA) before approving the construction of a seven-story senior housing unit on land previously used by a tenant as a green space/sculpture garden which was open to the public:

This CPLR article 78 proceeding challenges a negative declaration issued by respondent New York City Department of Housing Preservation and Development (HPD) relating to development of affordable housing on a lot in the Nolita neighborhood of Manhattan. The property is owned by the City of New York and leased on a month-to-month basis since 1991 to a corporation owned by the late petitioner Allan Reiver … . Beginning in 2005, Reiver used the lot as a green space/sculpture garden accessible through his adjacent art gallery. After the City identified the lot as a potential site for affordable senior housing in 2013, Reiver opened the space to the public directly through a gate on Elizabeth Street. The garden is currently open for a limited number of hours per week and is operated and maintained by volunteers.

* * * The Court's role is not "to weigh the desirability of any action or choose among alternatives," but to ensure that "agencies will honor their mandate

regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process" … . In other words, "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency" … .

Here, HPD identified appropriate areas of concern, took the necessary "hard look," and rationally determined that the project would not have a significant adverse impact on the environment. Matter of Elizabeth St. Garden, Inc. v City of New York, 2024 NY Slip Op 03321, Ct App 6-18-24

Practice Point: A court's role under SEQRA is limited to determining whether the agency took a "hard look" at the adverse environmental effects of a construction project before approving it.

JUNE 18, 2024

LABOR LAW-CONSTRUCTION LAW.

IF AN UNSECURED A-FRAME LADDER MOVES CAUSING PLAINTIFF TO FALL, PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this A-frame ladder-fall case. Plaintiff alleged the unsecured ladder moved causing him to fall:

… [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). The plaintiff's deposition testimony established that the unsecured ladder moved and fell, causing him to fall … . In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's own acts or omissions were the sole proximate cause of his injuries … . Paiba v 56-11 94th St. Co., LLC, 2024 NY Slip Op 03437, Second Dept 6-20-24

Practice Point: Because contributory negligence is not a defense to a Labor Law 240(1) cause of action, it is enough to allege an A-frame ladder was unsecured and moved, causing plaintiff to fall.

JUNE 20, 2024

LABOR LAW-CONSTRUCTION LAW.

IT WAS FORSEEABLE THAT A LEAKY ROOF NEEDING REPAIR WOULD COLLAPSE WHEN PLAINTIFF WAS STANDING ON IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, who fell when the roof he was working on collapsed, was entitled to summary judgment on his Labor Law 240(1) cause of action. The court noted the accident was foreseeable and no protective device was provided:

"'In order for liability to be imposed under Labor Law § 240(1), there must be a foreseeable risk of injury from an elevation-related hazard . . . as defendants are liable for all normal and foreseeable consequences of their acts'" … . "Thus, to establish a prima facie case pursuant to Labor Law § 240(1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" … .

Here, the plaintiffs demonstrated, prima facie, that the need for safety devices to protect the injured plaintiff from an elevation-related hazard was foreseeable, as the injured plaintiff was replacing wood decking on a pitched, elevated roof that had sustained water leaks, and that his injuries were proximately caused by the lack of adequate safety devices … . Sanchez v Congregation of Emanuel of Westchester, 2024 NY Slip Op 03446, Second Dept 6-20-24

Practice Point: An accident must be foreseeable to trigger liability under Labor Law 240(1). Here the court deemed it foreseeable that a roof which leaked and needed repair would collapse when plaintiff was standing on it.

JUNE 20, 2024

LANDLORD-TENANT, CONTRACT LAW.

HERE A STIPULATION BETWEEN LANDLORD AND TENANT SETTING THE RENT FOR A RENT STABILIZED LEASE VIOLATED THE RENT STABILIZATION LAW (RSL) RENDERING THE STIPULATION VOID (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Halligan, determined "an agreement waiving a benefit of the Rent Stabilization Laws is void as against public policy. This rule is not altered by the tenant's status. Accordingly, the stipulation at issue here, which required the tenant to waive his right to file a Fair Market Rent Appeal (FMRA), is void and did not provide a path to deregulation of the subject apartment:"

The Stipulation between McKinney [the tenant] and the landlord provided that McKinney "agrees to accept and the landlord agrees to offer a rent stabilized lease" in McKinney's name at a rate of "$650 per month." It also stated that "$1,650 per month is a fair rent for [the] apartment being removed from Rent Control," a proviso apparently intended to set the initial legal regulated rent under the Rent Stabilization Laws (RSL). The Stipulation further provided that "[f]or as long as Ed McKinney is the tenant, his rent shall be $650 per month plus allowable rental increases." The effect of that provision, which neither party disputes, was to ensure that McKinney would pay a preferential rate of $650, with subsequent increases tied to this number for the duration of his tenancy. McKinney also agreed "not to challenge the rent," thereby waiving his right to challenge the amount of the initial rent through a Fair Market Rent Appeal (FMRA) proceeding. * * *

By securing McKinney's explicit agreement "not to challenge the rent," the Stipulation waived his right to file an FMRA. That bargain circumvented the statutory process, and consequently the Stipulation is void in its entirety as a matter of law … . Because the Stipulation is void, [the landlord's] registration statement based on the Stipulation is as well, and therefore "neither party is entitled to rely on it" … and it cannot serve as the basis for deregulation. It remains to be determined whether the apartment was properly deregulated on some other ground. Liggett v Lew Realty LLC, 2024 NY Slip Op 03378, CtApp 6-30-24

Practice Point: Re: rent stabilized leases, a stipulation which sets the rent but provides that the tenant will not challenge the rent violates the Rent Stabilization Law rendering the stipulation void.

JUNE 20, 2024

MUNICIPAL LAW, NEGLIGENCE.

A COUNTY MAY BE LIABLE FOR NEGLIGENT SUPERVSION OF A VISIT BETWEEN MOTHER AND CHILD BY A COUNTY SOCIAL SERVICES CASEWORKER AT A PUBLIC PARK; HERE THE CHILD FELL WALKING UP A SLIDE; THE CASEWORKER DID NOT OBSERVE THE ACCIDENT BUT MOTHER WAS NEXT TO THE SLIDE AT THE TIME (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, determined the county's motion for summary judgment in this negligent supervision case was properly denied. Plaintiff father alleged the county social services caseworker (Byrne) who supervised a visit between mother and the infant plaintiff at a public playground was negligent in allowing the child to walk up a slide where the infant plaintiff fell. Byrne did not observe the accident. The Second Department held Byrne was performing a governmental function, the county owed infant plaintiff a special duty, Byrne's actions were not demonstrated to be discretionary, and the county did not demonstrate Byrne's acts or omissions were not a proximate cause of the accident. The opinion provides a clear explanation of the complex issues associated with governmental liability in this "negligent supervision" context:

"Once it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a duty to the injured party" … . "In order to sustain liability against a municipality engaged in a governmental function, 'the duty breached must be more than that owed the public generally'" … . * * *

… "[U]nder the doctrine of governmental function immunity, government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" … . * * *

… [T]he County may assume a special duty to a foster child during the course of visitation supervised by a DSS caseworker. * * *

Since Byrne acknowledged that he did not observe the infant plaintiff walking up the portion of the slide intended for children to slide down prior to the accident, it

cannot be said that he made a discretionary decision whether or not the infant plaintiff's behavior warranted his intervention. Thus, any exercise of discretion by Byrne during visitation bore no relation to the conduct on which liability is predicated. P.D. v County of Suffolk, 2024 NY Slip Op 03405, Second Dept 6-20-24

Practice Point: The complex criteria for government liability in a negligent-supervision-of-a-child case are clearly and comprehensively explained.

JUNE 20, 2024

PUBLIC HEALTH LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE PUBLIC HEALTH LAW REGULATIONS CONTROLLING HOW NURSING HOMES MUST ALLOCATE THEIR INCOME AND HOW MUCH PROFIT THEY CAN MAKE WERE DEEMED CONSTITUTIONAL TO THE EXTENT THEY WERE RIPE FOR CONSTITUTIONAL REVIEW (THIRD DEPT).

The Third Department, in a comprehensive full-fledged opinion by Justice Mackey too detailed to fairly summarize here, determined the Public Health Law regulations controlling how nursing homes must allocate their income and how much profit they can make are constitutional to the extent they are ripe for constitutional review:

On November 17, 2022, the [Public Health] Commissioner adopted a regulation, 10 NYCRR 415.34, to implement the provisions of Public Health Law § 2828, including the spending mandate and the excess-revenue cap, which applied retroactively to April 1, 2022. The regulation provides:

"By January 1, 2022, residential health care facilities shall comply with the following minimum expenditures:

(1) 70[%] of revenue shall be spent on direct resident care; and

(2) 40[%] of revenue shall be spent on resident-facing staffing.

(i) All amounts spent on resident-facing staffing shall be included as a part of amounts spent on direct resident care;

(ii) 15[%] of costs associated with resident-facing staffing that are contracted out by a facility for services provided by registered professional nurses, licensed practical nurses, or certified nurse aides shall be deducted from the calculation of the amount spent on resident-facing staffing and direct resident care" … .

The regulation further provides for recoupment by the Commissioner of "excessive total operating revenue" where "the facility's total operating revenue exceeds total operating and non-operating expenses by more than five percent of total operating revenue" … . Grand S. Point, LLC v Bassett, 2024 NY Slip Op 03364, Third Dept 6-20-24

Practice Point: The Public Health Law regulations controlling how nursing homes must allocate their income and how much profit they can make were deemed constitutional or unripe for constitutional review.

JUNE 20, 2024