NEW YORK APPELLATE DIGEST, LLP

Weekly Reversal Report
May 27 – 31, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts May 27 – 31, 2024, and Posted on the New York Appellate Digest Website on Monday, June 3, 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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CONSTITUTIONAL LAW, CIVIL PROCEDURE.

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

CRIMINAL LAW, EVIDENCE, JUDGES.

THE NEGOTIATED PLEA REQUIRED NO POST-PLEA ARRESTS; DEFENDANT WAS ARRESTED AFTER THE PLEA BUT THE PROCEEDINGS WERE DISMISSED ON SPEEDY TRIAL GROUNDS AND THE RECORDS SEALED; THE POST-PLEA ARRESTS WERE THEREFORE A NULLITY AND SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING JUDGE (SECOND DEPT).

The Second Department determined defendant's sentence was based upon post-plea arrests which resulted in dismissal on speedy trial grounds and for which the records had been sealed. Criminal records sealed pursuant to Criminal Procedure Law (CPL) 160.50(1) have thereby been rendered a nullity. Therefore the sealed proceedings can not be the basis for a sentence:

… [T]he defendant … pleaded guilty to criminal possession of a firearm … and criminal possession of a weapon in the fourth degree … as part of a negotiated disposition. It was agreed that if the defendant successfully completed one year of interim probation and complied with certain conditions during that time, including a no-arrest condition, the criminal possession of a firearm charge would be dismissed and he would be sentenced to a conditional discharge on the conviction of criminal possession of a weapon in the fourth degree. However, if the defendant failed to satisfy the conditions, he would be sentenced to a one-year term of imprisonment on the conviction of criminal possession of a firearm.

It is undisputed that during the term of the defendant's interim probation, he was arrested three times. The proceedings with regard to those arrests were dismissed on speedy trial grounds and the records sealed. However, after an Outley hearing … , the Supreme Court determined that there was "a legitimate basis for [the

defendant's] arrest" and that the defendant failed to comply with the terms of his interim probation. Based upon that determination, the court sentenced the defendant to a one-year term of imprisonment on the conviction of criminal possession of a firearm. * * *

The proceedings resulting from the defendant's postplea arrests were dismissed on speedy trial grounds, which were terminations in his favor … , and the records of those proceedings were sealed pursuant to CPL 160.50(1). Thus, the "arrest[s] and prosecution[s] [are] deemed a nullity" … , and the sealed records were "not available for consideration at sentencing" … . People v Desdunes, 2024 NY Slip Op 02932, Second Dept 5-29-24

Practice Point: Arrests and prosecutions dismissed on speedy trial grounds and sealed pursuant to CPL 160.50(1) are a nullity and cannot be considered in sentencing.

MAY 29, 2024

CRIMINAL LAW, JUDGES, APPEALS.

THE PLEA ALLOCUTION NEGATED ELEMENTS OF THE CRIME; APPEAL HEARD DESPITE FAILURE TO PRESERVE THE ISSUE BY MOVING TO WITHDRAW THE PLEA; GUILTY PLEA VACATED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined the defendant's factual recitation preceding the plea negated elements of the offense. The court heard the appeal despite a failure to preserve the error by moving to withdraw the plea:

Although the defendant failed to preserve for appellate review his contention concerning the factual recitation with respect to the charge of attempted burglary in the second degree, where, as here, the defendant's factual recitation clearly casts significant doubt upon his guilt or otherwise calls into question the voluntariness of the plea, the defendant may challenge the sufficiency of the plea allocution on direct appeal despite the failure to move to withdraw his plea of guilty on that ground … .

The crime of attempted burglary in the second degree provides, in relevant part, that a person is guilty of that offense when, inter alia, he or she knowingly enters a dwelling unlawfully with the intent to commit a crime therein (Penal Law §§ 110.00, 140.25[2]). During his plea allocution, the defendant stated that he did not enter the home knowingly. Upon further questioning by the County Court, the defendant stated that he had "no intent" to commit the crime. The defendant's factual recitation therefore negated an essential element of attempted burglary in the second degree, which was not corrected by further inquiry by the court, thereby calling into question the voluntariness of the defendant's plea … . People v Martinez, 2024 NY Slip Op 02938, Second Dept 5-29-24

Practice Point: When the plea allocution negates elements of the crime and the judge does not inquire further, the question whether the plea was voluntary is raised.

Practice Point: When it is clear from the record that the plea allocution negated elements of the crime, the issue will be heard on direct appeal even if not preserved by a motion to withdraw the plea.

MAY 29, 2024

CRIMINAL LAW, JUDGES.

THE STATUTORY PROCEDURE FOR SENTENCING A DEFENDANT AS A PERSISTENT FELONY OFFENDER WAS NOT FOLLOWED BY THE JUDGE; SENTENCE VACATED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the judge did not follow the procedure for sentencing a defendant as a persistent felony offender:

The Supreme Court erred in failing to comply with the procedural requirements of Penal Law § 70.10(2) when resentencing the defendant as a persistent felony offender. The procedure for determining whether a defendant may be subjected to increased punishment as a persistent felony offender requires a two-pronged analysis (see CPL 400.20[1] …). "Initially, the court must determine whether the defendant is a persistent felony offender as defined in subdivision 1 of section

70.10 of the Penal Law, namely, that he [or she] previously has been convicted of at least two felonies, and secondly, the court must determine if it 'is of the opinion that the history and character of the defendant and the nature and circumstances of his [or her] criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest'" … . Before imposing such sentence, "the court is obliged to set forth on the record the reasons it found this second element satisfied" … .

Here, the Supreme Court failed to comply with the second prong of the analysis by failing to set forth, on the record, the reasons why it was "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate[d] that extended incarceration and life-time supervision [would] best serve the public interest" (Penal Law § 70.10[2] …). People v Acevedo, 2024 NY Slip Op 02927, Second Dept 5-29-24

Practice Point: A judge's failure to set forth on the record the reasons for sentencing defendant as a persistent felony offender will result in vacation of the sentence and remittal.

MAY 29, 2024

CRIMINAL LAW.

THE COVID TOLL OF THE SPEEDY TRIAL STATUTE RENDERED THE INDICTMENT TIMELY (SECOND DEPT).

The Second Department, reversing County Court, determined that the COVID toll of the speedy trial statute rendered the indictment timely:

Contrary to the determination of the County Court, while it was in effect, Executive Order No. 202.87 constituted a toll of the time within which the People must be ready for trial for the period from the date a felony complaint was filed through the date of a defendant's arraignment on the indictment, with no requirement that the People establish necessity for a toll in each particular case … .

Because Executive Order No. 202.87 served to toll the speedy trial statute, the period from December 30, 2020, to January 25, 2021, was not chargeable to the People … . People v Fuentes, 2024 NY Slip Op 02933, Second Dept 5-29-24

Practice Point: The Executive Order imposing the COVID toll of the speedy trial statute rendered the indictment in this case timely.

Same issue and result in People v Lawson, 2024 NY Slip Op 02937, Second Dept 5-29-24.

Same Issue and result in People v McPhaul, 2024 NY Slip Op 02939, Second Dept 5-29-24.

MAY 29, 2024

JUDGES, CIVIL PROCEDURE, 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

NEGLIGENCE, EVIDENCE.

A LOOSE DOOR HANDLE CAUSED THE GLASS DOOR TO SHATTER; DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE OF WHEN THE DOOR HANDLE WAS LAST INSPECTED AND THEREFORE DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants did not demonstrate the glass door which shattered had been inspected close in time to the incident. Therefore a question of fact remained whether defendants had constructive knowledge of the loose handle which caused the door to shatter when plaintiff attempted to open it:

Although 730-Gen's urban portfolio manager testified that he inspected the interior vestibule doors following an incident that involved the exterior doors in the weeks prior to plaintiff's accident, his testimony only provided a vague description of the inspection performed. Importantly, he could not identify exactly when the

inspection occurred, and he did not indicate that any steps were taken to examine the door's metal handle.

The urban portfolio manager further testified that defendants had a daily inspection protocol in place to inspect the vestibule doors. However, he admitted that he had never seen anyone perform a daily inspection and he could not identify when the last inspection occurred prior to plaintiff's accident. …

730-Gen also asserts that the doors received cursory inspections, in that they were used on a daily basis. Yet, there is no record of these cursory inspections taking place … , or any indication that they involved a reasonable inspection of the door handle … .

… 730-Gen's reliance on the urban portfolio manager's inspection, which occurred almost two weeks prior to plaintiff's accident, failed to establish, prima facie, that inspecting the door handle on a biweekly basis is reasonable, especially in light of the daily inspection protocol defendant contends was in place to ensure the handles were tightly secured … . Doherty v 730 Fifth Upper, LLC, 2024 NY Slip Op 02979, First Dept 5-30-24

Practice Point: Unless the defendant can show the instrumentality which caused plaintiff's injury was inspected and found safe close in time to the injury, a defendant's motion for summary judgment will not be granted.

MAY 30, 2024

NEGLIGENCE, EVIDENCE.

ALTHOUGH PLAINTIFF DID NOT KNOW WHICH STEP SHE SLIPPED AND FELL FROM, THERE WAS EVIDENCE ALL THE STEPS WERE UNLEVEL AND SLOPING; DEFENDANT DID NOT DEMONSTRATE THE CONDITION OF THE STAIRWAY WAS LATENT AND NOT DISCOVERABLE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not demonstrate plaintiff could not identify the cause of her stairway fall and defendant did not demonstrate the nonlevel and sloping condition of the steps was latent and could not have been discovered:

… [T]he plaintiff testified that her fall was caused by the fact that the "stairs were not level . . . not straight." Although the plaintiff testified that she might have lost her balance on either the fourth step from the top of the staircase or the fourth step from the bottom of the staircase, the report of the plaintiff's expert witness … stated that the treads on the staircase were "uneven and pitched forward," creating an "inherent walking hazard," and that the "out-of-level and sloping condition" affected "the entire staircase."

* * * "In moving for summary judgment on the ground that [a] defect was latent, a defendant must establish, prima facie, that the defect was indeed latent—i.e., that it was not visible or apparent and would not have been discoverable upon a reasonable inspection"….. Here, the evidence proffered in support of the defendant's motion failed to establish, prima facie, that the nonlevel and sloping condition that allegedly caused the plaintiff to fall amounted to a latent condition and could not have been discovered upon a reasonable inspection. Toro v McComish, 2024 NY Slip Op 02945, Second Dept 5-29-24

Practice Point: Here the unlevel and sloping condition of the steps in the stairway where plaintiff fell was not shown to be latent and undiscoverable upon inspection.

MAY 29, 2024

NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

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

WORKERS' COMPENSATION, EVIDENCE.

A SCHEDULE LOSS OF USE (SLU) EVALUATION BASED UPON THE EXPIRED 2012 GUIDELINES SHOULD NOT HAVE BEEN CONSIDERED BY THE WORKER'S COMPENSATION BOARD; A SECOND SLU EVALUATION BASED UPON THE CURRENT 2018 GUIDELINES HAD BEEN SUBMITTED BUT WAS NOT RELIED UPON BY THE BOARD (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the fact that the claimant's treating physician's (Harley's) initial schedule loss of use (SLU) evaluation was based on the expired 2012 guidelines, not the most recent 2018 guidelines, and therefore should not have been considered. The treating physician had subsequently submitted another SLU evaluation based on the 2018 guidelines with a significantly higher percentage of loss:

Inasmuch as Harley's permanency examination of claimant was "the first medical evaluation of SLU" and occurred after January 1, 2018, Harley improperly relied upon and applied the 2012 Guidelines in rendering his SLU opinion. As such, the Board's reliance upon Harley's medical report and testimony was erroneous; its decision is therefore not supported by substantial evidence and must be reversed … . Matter of Garofalo v Verizon N.Y., Inc., 2024 NY Slip Op 02961, Third Dept 5-30-24

Practice Point: A schedule loss of use (SLU) evaluation based upon expired guidelines should not be relied upon in a Worders' Compensation proceeding.

MAY 30, 2024