NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
June 2024

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BANKRUPTCY, JUDICIAL ESTOPPEL, NOTICE OF PERSONAL INJURY ACTION.

PLANTIFF HAD NOT INFORMED THE BANKRUPTCY COURT OF THIS PERSONAL INJURY CAUSE OF ACTION; DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT PURSUANT TO THE DOCTRINE OF JUDICIAL ESTOPPEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to inform the Bankruptcy Court of this personal injury action triggered the doctrine of judicial estoppel entitling defendants to summary judgment dismissing the complaint:

While a chapter 13 bankruptcy debtor has standing to litigate cases that belong to the estate … , here the "[p]laintiff's prolonged failure to disclose this lawsuit to the [b]ankruptcy [c]ourt renders him judicially estopped from pursuing it" … . The plaintiff took an inconsistent position in the bankruptcy proceeding by, in effect, representing that he did not have the instant legal claim. The characterization of his assets was accepted and endorsed by the bankruptcy court throughout the duration of the bankruptcy proceeding, which included, among other things, confirmation of the plaintiff's plan … .

Based on the defense of judicial estoppel, [defendants] established their prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against each of them … . Cussick v R.L. Baxter Bldg. Corp., 2024 NY Slip Op 03028, Second Dept 6-5-24

Practice Point: Failure to inform the Bankruptcy Court of a cause of action (here a personal-injury suit) triggers the doctrine of judicial estoppel, prohibiting the plaintiff from bringing the suit.

JUNE 5, 2024

CHILD VICTIMS ACT, COURT OF CLAIMS, NO ALLEGATION ABUSE WAS FORESEEABLE.

THE CLAIM IN THIS CHILD VICTIMS ACT PROCEEDING DID NOT SET FORTH ANY FACTUAL BASIS FOR THE ALLEGATION THE STATE WAS OR SHOULD HAVE BEEN AWARE OF SEXUAL ABUSE BY ANOTHER CHILD IN A FOSTER HOME AND BY AN EMPLOYEE OF A CHILDREN'S FACILITY; THE CLAIM SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing the Court of Claims in this Child Victims Act proceeding, determined the claim did not set forth any factual basis for the allegation defendants were or should have been aware of the abuse by a child in a foster home and by a staff member of a children's facility. The claim, therefore, should have been dismissed:

Here, as to the abuse alleged at the foster home, the verified claim alleges only bare legal conclusions and lacks any factual specificity as to how defendant was put on notice of the danger posed by the minor perpetrator. As to the facility, the

allegation that other staff members knew about the adult perpetrator's participation in the off-campus overnight trips would not have put defendant on notice about the adult perpetrator's propensity to sexually abuse children … . Although the allegation that a counselor discovered the sexual abuse may suffice to provide actual notice about the foreseeability of future abuse, the claim fails to allege that any such subsequent abuse took place … . Even granting the verified claim a liberal construction, presuming its allegations true and providing claimant the benefit of every possible inference, said claim failed to set forth any factual basis upon which defendant could have reasonably anticipated the perpetrators' harmful conduct and, thus, it failed to "provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" … . As such, the Court of Claims erred in denying defendant's motion to dismiss … . Berg v State of New York, 2024 NY Slip Op 03206, Third Dept 6-13-24

Practice Point: Here the allegation that the state was aware or should have been aware of the sexual abuse of the claimant by another child in a foster home and by a staff member of a children's facility were not supported by any facts which would allow the state to investigate. Therefore the claim should have been dismissed by the Court of Claims.

JUNE 13, 2024

CHILD VICTIMS ACT, CRIMINAL LAW.

PLAINTIFF MODEL SUFFICIENTLY ALLEGED PHOTOSHOOTS DONE WHEN SHE WAS 16 AND 17 FOR A SUNTANNING-PRODUCT MARKETING CAMPAIGN CONSTITUTED "SEXUAL PERFORMANCES" TRIGGERING THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Higgitt, determined certain causes of action against the modeling agency which represented plaintiff and the seller of suntanning products which used the photos of plaintiff should not have been dismissed as time-barred under the extended statute of limitations in the Child Victims Act [CVA] (CPLR 214-g). The photoshoots took place when plaintiff was 16 and 17. One of the issues

was whether the complaint adequately alleged the photoshoots constituted a "sexual performance" with triggered the applicability of the CVA. After a comprehensive discussion too detailed to summarize here, the First Department held the complaint stated causes of action based on the "sexual performance" criteria in Penal Law 263.05:

At the pleading stage, as to both defendants, we find that a reasonable inference to be drawn from plaintiff's allegations regarding the photographing of her while she was unclothed is that the resulting photographs may have captured plaintiff's genitalia, thus satisfying the "sexual conduct" component of a Penal Law § 263.05 sexual performance. It is not merely the allegation of nudity that suffices, but the permissible inference that nudity occasioned the exhibition of genitalia, lewdly, in a photographic performance. We need not and do not reach whether plaintiff will ultimately be successful … , and at this stage, in light of the allegations contained in the complaint and the reasonable inferences to be drawn therefrom, we need not confine our analysis of the allegations to photographs that were ultimately used in Cal Tan's marketing campaign, as submitted on the appeal. * * *

We … find that a plaintiff's age at the time of the alleged acts, so long as under 18 years of age, does not prevent application of the CVA to revive claims otherwise meeting CPLR 214-g's requirements. Thus, plaintiff adequately pleaded that, with respect to her age at the time of the alleged acts, the CVA applies to her. Doe v Wilhelmina Models, Inc., 2024 NY Slip Op 03081, First Dept 6-6-24

Practice Point: Here photoshoots for a suntanning-product marketing campaign were sufficiently alleged to constitute "sexual performances' triggering the extended statute of limitations in the Child Victims Act.

JUNE 6, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

IN THIS CHILD VICTIMS ACT CASE ALLEGING SEXUAL ABUSE BY A TEACHER DURING THE SCHOOL DAY OVER THE COURSE OF A YEAR, PLAINTIFF RAISED QUESTIONS OF FACT UNDER BOTH RESPONDEAT SUPERIOR AND NEGLIGENT SUPERVISION CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act action, determined the respondeat superior and negligent supervision causes of action against the school alleging sexual abuse of the plaintiff by a teacher should not have been dismissed. Essentially the complaint alleged negligent supervision of both the teacher and the child. The defendant school did not demonstrate a lack of constructive notice of the abuse which allegedly took place over the course of a year in the same classroom during the school day:

"The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring, . . . retention, or supervision of the employee" … .

… "[A] school has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" … . * * *

… [T]he defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . "In particular, given the frequency of the alleged abuse, which occurred over" the entirety of a school year, "and always occurred inside the same classroom during the school day, the defendants did not eliminate triable issues of fact as to whether they should have known of the abuse" … .. The defendants similarly failed to demonstrate, prima facie, that their supervision of both the teacher and the plaintiff was not negligent … . Sayegh v City of Yonkers, 2024 NY Slip Op 03065, Second Dept 6-5-24

Practice Point: Here it was alleged plaintiff was sexually abused by a teacher repeatedly over a year during the school day. There were questions of fact whether

the school had constructive notice of the abuse which supported causes of action under a respondeat superior theory (negligent supervision of the teacher) and a negligent supervision theory (negligent supervision of the child).

JUNE 5, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW, CRIMINAL LAW.

HERE IN THIS CHILD VICTIMS ACT (CVA) CASE, THE ALLEGATIONS OF ABUSE OF PLAINTIFF BY A TEACHER WERE BASED ON HER INABILITY TO CONSENT UNDER THE PENAL LAW; THEREFORE THE SCHOOL COULD ONLY BE LIABLE FOR NEGLIGENT SUPERVISION UNTIL PLAINTIFF TURNED 17; ALTHOUGH THE ABUSE WAS ALLEGED TO HAVE TAKEN PLACE OFF SCHOOL GROUNDS, THE TEACHER, DURING SCHOOL HOURS, ALLEGEDLY MADE PUBLIC COMMENTS ABOUT PLAINTIFF'S APPEARANCE AND MADE ARRANGEMENTS TO MEET HER AFTER SCHOOL; THE NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST THE SCHOOL SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision cause of action against the school based upon alleged conduct by a teacher should not have been dismissed, despite the fact the abuse allegedly took place off school grounds: The abuse was alleged to be conduct which would violate article 130 of the Penal Law. Plaintiff was legally incapable of consent until she turned 17. The school was deemed responsible for supervision only until plaintiff turned 17:

The allegations of criminal conduct against the teacher were based on the plaintiff's inability to consent to sexual conduct due to the plaintiff's age, which ended when the plaintiff turned 17 years old (see Penal Law § 130.05[3][a]). Accordingly, the court properly determined that the CVA did not revive so much of the cause of action alleging negligent supervision of the plaintiff as was related to alleged conduct that occurred after the plaintiff turned 17 years old … .

… The defendants' submissions included … the transcript of the plaintiff's deposition testimony, wherein the plaintiff testified that all of the sexual abuse occurred off school property and outside of school hours … . In opposition, however, the plaintiff … averred that the teacher singled her out for attention, made extended eye contact with her, winked at her, and complimented her appearance in front of other staff in school. According to the plaintiff, the teacher made comments directly to other staff and in the presence of other students about the plaintiff's appearance, and the teacher made arrangements with the plaintiff during school hours and on school grounds to meet after school where the alleged abuse took place … . Fain v Berry, 2024 NY Slip Op 03032, Second Dept 6-5-24

Practice Point: Allegations of violations of Penal Law article 130 based upon the legal incapacity to consent apply only until the victim turns 17.

Practice Point: Although the alleged abuse by a teacher took place off school grounds, the teacher, during school hours, made public comments about plaintiff's appearance and arranged to meet her after school. There the negligent supervision cause of action against the school should not have been dismissed.

JUNE 5, 2024

COMPLAINTS, MOTION TO AMEND.

PLAINTIFF MOVED TO AMEND THE COMPLAINT AFTER THE NOTE OF ISSUE AND CERTIFICATE OF READINESS HAD BEEN FILED; EVEN THOUGH THE AMENDMENT ADDED A CAUSE OF ACTION REQUIRING FURTHER DISCOVERY, THE MOTION WAS GRANTED BECAUSE DEFENDANT DID NOT DEMONSTRATE PREJUDICE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff should be allowed to amend the complaint, even though the note of issue and certificate of readiness had been filed. Defendant was unable to show any prejudice from the proposed amendment. The case was brought as a slip and fall which had been dismissed because plaintiff's decedent did not identify the cause of the fall. Plaintiff sought to add a cause of action for negligent discharge from the hospital where the slip and fall occurred, which sounds in medical malpractice:

While "[i]t is well settled that [l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" … , that policy does not apply "on the eve of trial," and once a case has been certified ready for trial "there is a heavy burden on [a] plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay" … . Inasmuch as plaintiff failed to offer any explanation for the delay, we reject plaintiff's contention that the court abused its discretion in denying the cross-motion for leave to amend the amended complaint to add a medical malpractice cause of action. Nevertheless, because defendant failed to establish any prejudice that would result from plaintiff's delay in seeking leave to amend, if further discovery is conducted, we modify the order in the exercise of our discretion by granting plaintiff leave to amend his amended complaint to assert a cause of action for the allegedly negligent discharge of decedent from defendant's facility, and, further, striking the note of issue and certificate of readiness to allow for additional discovery … . Chapman v Olean Gen. Hosp., 2024 NY Slip Op 03271, Fourth Dept 6-14-24

Practice Point: Here the post-note-of-issue motion to amend the complaint to add a cause of action requiring further discovery was granted because the defendant was unable to demonstrate any prejudice.

JUNE 14, 2024

COURT OF CLAIMS, LATE NOTICE OF CLAIM.

CLAIMANT INITIALLY BELIEVED THE ROAD WHERE HE STEPPED IN A POTHOLE AND FELL WAS OWNED BY THE VILLAGE, BUT IN FACT IT WAS OWNED BY THE STATE; CLAIMANT'S LATE NOTICE OF CLAIM SHOULD HAVE BEEN ACCEPTED BY THE COURT OF CLAIMS (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined claimant's late notice of claim in this roadway defect case should not have been rejected. Plaintiff alleged he stepped in a depression in the road and fell. Plaintiff initially believed the road was owned by the village, when, in fact, it was owned by the state. The defect in the road was patched within a week of plaintiff's fall:

The delay here was minimal, with defendant having received notice approximately three weeks after the 90-day deadline lapsed … . It is significant that when [claimant] returned to the accident scene … , he discovered that the pothole had been patched with blacktop, as shown in the photographs taken that day. Claimant further averred that the depression was "almost a foot wide and around ten feet long," specifying that it was "about three to four inches deep where [his] foot ended up." Given this postaccident development, claimant's attorney argued that "[w]hile [defendant] may not have obtained notice of the . . . accident within 90 days of its occurrence, it is highly likely that it had notice of the condition of the pavement that caused the accident as it patched it within a week of when the accident happened," emphasizing that defendant's "records should indicate precisely when it was patched as well as when the decision to patch it occurred and why." * * *

"A claim has the appearance of merit so long as it is not patently groundless, frivolous or legally defective, and the record as a whole gives reasonable cause to believe that a valid cause of action exists" … . To hold defendant liable for his injuries, claimant will need to prove that defendant either created the condition itself by affirmative acts of negligence, or had actual or constructive notice of a dangerous condition and failed to remedy such condition, thereby causing claimant's injuries … . Constructive notice exists where a depression in the roadway was "visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . Grasse v State of New York, 2024 NY Slip Op 03110, Third Dept 6-6-24

Practice Point: The criteria for acceptance or rejection of a late notice of claim in the Court of Claims is explained.

JUNE 6, 2024

COVID IMMUNITY, NURSING HOMES, PUBLIC HEALTH LAW.

ALTHOUGH THE FORMER "EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA)" PROVIDED IMMUNITY TO HEALTHCARE PROVIDERS RE: COVID-19, HERE DEFENDANT NURSING HOME DID NOT DEMONSTRATE THE THREE REQUIREMENTS FOR IMMUNITY WERE MET (SECOND DEPT).

The Second Department reversing Supreme Court, determined defendant nursing home did not demonstrate the three statutory requirements for immunity for COVID-related treatment were met. Plaintiff alleged plaintiff's decedent, during his admission to defendant's facility in March 2020, was infected with SARS-CoV-2 and COVID-19:

… [T]he EDTPA [Emergency or Disaster Treatment Protection Act] initially provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three requirements were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and the services were arranged or provided in good faith (Public Health Law former § 3082[1] …).

* * * [W]hile the EDTPA "immunized healthcare facilities from civil liability for certain acts or omissions in the treatment of patients for COVID-19 during the period of the COVID-19 emergency declaration" … , the defendant's submissions did not establish that the three requirements for immunity were satisfied … . Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc., 2024 NY Slip Op 03029, Second Dept 6-5-24

Practice Point: The repeal of the former Emergency or Disaster Treatment Protection Act (EDTPA) does not apply retroactively.

Practice Point: A healthcare provider asserting immunity from COVID-related injury under the former EDTPA must demonstrate the three statutory requirements for immunity have been met.

JUNE 5, 2024

DISCOVERY, TRAFFIC ACCIDENTS, STATEMENTS MADE TO CARRIER.

STATEMENTS DEFENDANT MADE TO HIS INSURANCE CARRIER IN THIS TRAFFIC ACCIDENT CASE ARE NOT DISCOVERABLE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this traffic-accident case, determined plaintiff's request for discovery of statements made by defendant to his insurance carrier should have been denied:

The statements sought in plaintiff's cross-motion constitute materials "produced solely in connection with the report of an accident to a liability insurance carrier . . . with respect to plaintiff's claim [that] are not discoverable under CPLR 3101 (g), but rather are conditionally immunized from discovery under CPLR 3101 (d) (2)" … . Plaintiff failed to establish either that he has a "substantial need of the materials" or that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2] …). Fusco v Hansen, 2024 NY Slip Op 03262, Fourth Dept 6-14-24

Practice Point; Here in this traffic-accident case, plaintiff did not demonstrate a need for discovery of statements made by defendant to his insurance carrier (CPLR 3101(d)(2)).

JUNE 14, 2024

ENVIRONMENTAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

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

FORECLOSURE, COVID FORECLOSURE MORATORIUM.

THE COVID FORECLOSURE MORATORIUM INSTITUTED BY HUD FOR FHA INSURED MORTGAGES APPLIED TO RENDER THE REVERSE MORTGAGE FORECLOSURE IN THIS CASE TIMELY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, addressing a question of first impression, determined that the COVID foreclosure moratorium instituted by the US Department of Housing and Urban Development (HUD)

which stayed foreclosures on mortgages issued by the Federal Housing Administration (FHA) applied to render an action to foreclose a reverse mortgage timely:

Courts and the legal community are now likely familiar with the 2020 executive orders that tolled time limitations due to the COVID-19 pandemic … . On this appeal, we are asked to consider another governmental pause on business as usual that was spurred by the COVID-19 pandemic. On March 18, 2020, the United States Department of Housing and Urban Development (hereinafter HUD) instituted a COVID-19-related moratorium that effectively stayed foreclosures with respect to mortgages insured by the Federal Housing Administration (hereinafter FHA). This moratorium (hereinafter the FHA COVID-19 moratorium) remained in effect until July 31, 2021. This appeal presents an issue of apparent first impression for an appellate court in this State, namely, whether the statute of limitations for commencing a foreclosure action may be tolled by virtue of the FHA COVID-19 moratorium. We hold that the FHA COVID-19 moratorium, which constituted a stay of foreclosures of federally backed mortgages, may indeed toll the statute of limitations for commencing a foreclosure action, and, on the facts of this case, the FHA COVID-19 moratorium did toll the applicable limitations period. Given the benefit of the toll, one of the defendants timely commenced a separate but related action to foreclose a home equity conversion mortgage, also known as a reverse mortgage, and the Supreme Court properly granted the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint, seeking to quiet title, brought by the alleged owner of the property encumbered by the reverse mortgage. Trento 67, LLC v OneWest Bank, N.A., 2024 NY Slip Op 03198, Second Dept 6-12-24

Practice Point: Here the COVID foreclosure moratorium instituted by HUD for FHA-insured mortgages rendered the reverse mortgage foreclosure timely.

JUNE 12, 2024

INJUNCTIONS, MUNICIPAL LAW, SEALING CRIMINAL RECORDS.

THE ORDER IMPLEMENTING THE PLAINTIFFS' PLAN FOR THE SEALING OF NYPD'S RECORDS OF FAVORABLY TERMINATED CRIMINAL PROCEEDINGS AMOUNTED TO A PERMANENT INJUNCTION WITHOUT A DETERMINATION ON THE MERITS; MATTER REMITTED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kern, over a dissenting opinion, determined the order by Supreme Court implementing plaintiffs' plan for sealing the New York City Police Department's (NYPD's) records of criminal prosecutions which are favorably terminated amounted to a permanent injunction issued without a determination on the merits, either by way of a summary judgment motion or a trial:

The New York sealing statutes at issue here, enacted in 1976, require that upon the favorable termination of a criminal proceeding or a noncriminal conviction, unless the government demonstrates to the satisfaction of the court that the interests of justice require otherwise, "arrest information," including photos, palm and fingerprints of arrestees, and official records and papers relating to an arrest or prosecution, will be "sealed and not made available" to any person or public or private agency, subject to six statutorily enumerated exceptions (Criminal Procedure Law §§ 160.50, 160.55 [Sealing Statutes]). * * *

We find that Supreme Court erred by prematurely issuing an overbroad permanent injunction without first making a final determination on the merits of the claim after a trial or summary judgment motion. Contrary to plaintiffs' argument, the Implementing Order is a permanent injunction rather than a preliminary injunction. The purpose of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" … . Conversely, a permanent injunction is a type of final judgment that is issued on the merits of the claims asserted … . R.C. v City of New York, 2024 NY Slip Op 03017, First Dept 6-4-24

Practice Point: An order which includes no indication it is temporary is a permanent, not a preliminary, injunction which should not issue without a determination on the merits by summary judgment motion or trial.

JUNE 4, 2024

JUDGES, SUA SPONTE DISMISSAL, FORECLOSURE.

SUA SPONTE DISMISSAL OF THE COMPLAINT WAS NOT SUPPORTED BY EXTRAORDINARY CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were no extraordinary circumstances justifying a sua sponte dismissal of the complaint in this foreclosure action:

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 was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint … . HSBC Bank USA, N.A. v Badalamenti, 2024 NY Slip Op 03034, Second Dept 6-5-24

Practice Point: A sua sponte dismissal of a complaint is rarely upheld on appeal.

JUNE 5, 2024

JUDGES, SUA SPONTE DISMISSAL, FORECLOSURE.

PLAINTIFF'S FAILURE TO MEET THE COURT'S FILING DEADLINE WAS NOT A SUFFICIENT REASON FOR SUA SPONTE DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this foreclosure case did not have sufficient cause to dismiss the complaint sua sponte (another reminder that sua sponte dismissals of complaints rarely survive appeal);

"'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . "[A] court may not sua sponte dismiss a complaint for failure to move for a judgment of foreclosure and sale by an arbitrary date set by the court" … . "To obtain appellate review of an order or portion of an order issued sua sponte, a party may move to vacate the order or portion of the order and appeal as of right to the Appellate Division if that motion to vacate is denied" … .

Here, the Supreme Court erred in denying the plaintiff's motion to vacate the … order and to restore the action to the court's active calendar, as the plaintiff's failure to comply with the directive to file an application for a judgment of foreclosure and sale by July 26, 2017, was not a sufficient ground upon which to sua sponte direct dismissal of the complaint … . James B. Nutter & Co. v Heirs & distributees of the estate of Rose Middleton, 2024 NY Slip Op 03472, Second Dept 6-26-24

Practice Point; Failure to meet a filing deadline set by the court was not an adequate reason for the judge's sua sponte dismissal of the foreclosure complaint.

JUNE 25, 2024

MOTIONS "WITHOUT PREJUDICE TO RENEW."

WHEN A PRIOR MOTION HAS BEEN DENIED ON PROCEDURAL GOUNDS "WITHOUT PREJUDICE TO RENEW," THE MOTION FOR LEAVE TO RENEW THE PRIOR MOTION DOES NOT HAVE TO BE SUPPORTED BY REASONABLE JUSTIFICATION FOR PRESENTING NEW FACTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for leave to renew its prior motion should not have been denied. The judge had denied the prior motion on procedural grounds "without prejudice to renew:"

… Supreme Court improvidently exercised its discretion in denying, on procedural grounds, the plaintiff's motion for leave to renew its prior motion pursuant to CPLR 5225 … . Since the court had denied the plaintiff's prior motion without prejudice to renew, the plaintiff was not required to demonstrate a reasonable justification for its failure to present alleged new facts on the prior motion … . Key Growth Invest LP v 1499 Fulton Realty, LLC, 2024 NY Slip Op 03036, Second Dept 6-5-24

Practice Point: If a judge denies a motion on procedural grounds "without prejudice to renew," the motion for leave to renew does not have to provide a reasonable justification for the presentation of new facts.

JUNE 5, 2024

NECESSARY PARTIES, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ALL OF THE PROPERTY OWNERS POTENTIALLY AFFECTED BY THE DECLARATION OF RIGHTS TO A RECREATIONAL EASEMENT ARE NECESSARY PARTIES BUT NOT ALL WERE INCLUDED AS PLAINTIFFS; ALTHOUGH THE JUDGMENT WAS REVERSED, THE ACTION MAY BE RECOMMENCED WITH ALL THE PROPER PARTIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined all the necessary parties were not included in this suit seeking a declaration of the rights of property owners with respect to a recreational easement:

CPLR 1001 (a) provides, in relevant part, that all "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." It is well established that "[t]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion" … . In an action seeking to determine the extent of a recreational easement, the owners of all parcels of land burdened or benefitted by the easement are necessary parties because there is a potential that their real property rights will be affected by the outcome of the litigation … . Inasmuch as owners of real property who are not currently named as parties may be affected by the outcome of litigation concerning the subject parcel, we reverse the judgment and dismiss the complaint without prejudice (see CPLR 1003). Plaintiffs are thus "not precluded from recommencing the action in the proper manner naming all necessary parties" … . Follett v Dumond, 2024 NY Slip Op 03272, Fourth Dept 6-4-24

Practice Point: All property owners who may be affected by a declaration of rights to a recreational easement are necessary parties.

JUNE 14, 2024

REAL PROPERTY TAX LAW, FAILURE TO SERVE COUNTY.

THE FAILURE TO TIMELY SERVE THE COUNTY TREASURER WITH THE PETITION SEEKING JUDICIAL REVIEW OF A PROPERTY TAX ASSESSMENT, A VIOLATION OF RPTL 708 (3), REQUIRED DISMISSAL OF THE PETITION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the petitioners in this action seeking judicial review of a property tax assessment did not demonstrate good cause for failing to timely serve the county treasurer. The petition should have been dismissed:

RPTL 708 (3) requires that "one copy of the petition and notice shall be mailed within [10] days from the date of service thereof . . . to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located" … . "Failure to strictly comply with the statute's notice requirements 'shall result in the dismissal of the petition, unless excused for good cause shown' " … .

The inquiry before us … distills to whether petitioners have demonstrated sufficient good cause to avoid mandatory dismissal. Petitioners rely on the affidavit of their counsel's employee, who avers that she was unable to find the treasurer's address on Sullivan County's website and, consequently, she determined that she could send the petition and notice to the local school district's superintendent and two unrelated county agencies based upon her evaluation of the responsibilities of those agencies pertaining to the assessment of properties in Sullivan County. … [T]he failure to locate the treasurer's contact information on the County website neither provides justification for the conclusion that service on a different County office could be made in lieu of the treasurer, nor does it establish that respondents made some affirmative misrepresentation as to the proper location to serve the treasurer … . … [T]here is no indication that petitioners undertook any additional action to ascertain the appropriate contact information for the County treasurer before resorting to service on other government officials, thus negating petitioners' contention that they engaged in diligent efforts … . Matter of Tribeca Estates LLC v Town of Fallsburg, 2024 NY Slip Op 03214, Third Dept 6-13-24

Practice Point: RPTL 708(3) is strictly construed. Here petitioner could not demonstrate good cause for failing to timely serve the county treasurer with the petition seeking judicial review of a tax assessment and the petition was dismissed.

JUNE 13, 2024

SERVICE OF PROCESS, MAIL, 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

SERVICE OF PROCESS, MEDICAL MALPRACTICE, DISMISSAL.

DEFENDANT IN THIS MED MAL CASE WAS NOT PROPERLY SERVED AND PLAINTIFF WAS NOT ENTITLED TO AN EXTENSION OF THE TIME TO SERVE IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this medical malpractice case was entitled to dismissal of all claims because he was not properly served:

Defendant Michael B. Shannon, M.D. contends that this action should have been dismissed as against him for lack of timely service under CPLR 306-b … . It is undisputed on appeal that plaintiff failed to properly serve Shannon within 120 days of commencement of this action. Plaintiff does not purport to have demonstrated good cause for the delay. We find that an extension of time to serve Shannon was not warranted in the interest of justice.

Shannon's unrebutted affidavit reflects that service was attempted at an office where he worked only as an independent contractor and that his residence and principal place of business were in Ohio. Plaintiff failed to make any effort to investigate further or to correct this error when Shannon failed to appear or answer. She did not file her default motion until nearly two years after commencing this action, which is well over the one-year deadline to make such a motion (see CPLR

3215[c]). The motion was also filed after discovery and motion practice were well underway. Diaz v Nasir, 2024 NY Slip Op 03536, First Dept 6-27-24

Practice Point: Plaintiff did not exercise due diligence in attempting to serve defendant and did not make a timely motion to extend the time to serve, complaint dismissed.

JUNE 27, 2024

SERVICE OF PROCESS, MEDICAL MALPRACTICE. MOTION TO VACATE DEFAULT JUDGMENT.

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

TRUSTS AND ESTATES, TRAFFIC ACCIDENTS, DECEASED DEFENDANT.

IN THIS TRAFFIC ACCIDENT CASE, THE COURT DID NOT HAVE JURISDICTION TO HEAR A MOTION TO DISMISS BROUGHT ON BEHALF OF THE DECEASED DEFENDANT BY DECEDENT'S FORMER ATTORNEYS WHO HAD NOT BEEN SUBSTITUTED FOR THE DECEDENT; PLAINTIFF'S MOTION TO HAVE DECEDENT'S DAUGHTER SUBSITITUTED AS A REPRESENTATIVE FOR THE DECEDENT REQUIRED NOTICE TO ALL PERSONS INTERESTED IN DECEDENT'S ESTATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the death of the defendant in this traffic accident case divested the court of jurisdiction and the motion to dismiss by the decedent's former attorneys, who had not been substituted for the decedent, should not have been considered by the court. The Appellate Division also noted that plaintiff's motion to substitute decedent's daughter as a representative for the decedent required notice to all persons interested in decedent's estate:

"The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a). Moreover, any determination rendered without such substitution will generally be deemed a nullity" … . "The death of a party terminates his or her attorney's authority to act on behalf of the deceased party" … . Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court's lack of jurisdiction, here, the motion, inter alia, pursuant to CPLR 1021 to dismiss the complaint was made by the former attorneys for the decedent purportedly on behalf of the decedent. Since the former attorneys lacked the authority to act, the Supreme Court lacked jurisdiction to

consider the motion … . Accordingly, so much of the order as granted the motion purportedly made on behalf of the decedent is a nullity.

Further, any motion pursuant to CPLR 1021 requires that notice be provided to persons interested in the decedent's estate … . Here, the plaintiff failed to provide notice to persons interested in the decedent's estate. Accordingly, the Supreme Court should have denied the plaintiff's cross-motion with leave to renew upon service on persons interested in the decedent's estate. Fazilov v Acosta, 2024 NY Slip Op 03470, Second Deppt 6-26-24

Practice Point: Here the defendant in a traffic accident case died. The decedent's former attorneys did not have the authority to make a motion to dismiss and the court should not have considered it.

Practice Point: Here plaintiff's motion to have decedent's daughter substituted for decedent required notice all persons interested in decedent's estate.

JUNE 26, 2024