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Weekly Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 19 – 23, 2024, and Posted on the New York Appellate Digest Website on Monday, August 26, 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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CIVIL PROCEDURE, CIVIL RIGHTS LAW, DEFAMATION.

THE DEFAMATION ACTION AGAINST A REPORTER AND A MEDIA COMPANY WAS PROPERLY DISMISSED PURSUANT TO THE ANTI-SLAPP STATUTE; PLAINTIFFS FAILED TO DEMONSTRATE THE SUIT HAD A "SUBSTANTIAL BASIS IN LAW;" CRITERIA EXPLAINED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, over a two-justice concurrence, determined plaintiffs failed to demonstrate their defamation action against a reporter and a media company had a "substantial basis in law" under the anti-SLAPP law. Therefore the complaint was dismissed pursuant to CPLR 3211 [g] [1] and defendants were entitled to attorney's fees and costs. The articles published by defendants concerned plaintiff Karl Reeves' divorce and custody dispute. The facts are too detailed to fairly summarize here:

… [T]he anti-SLAPP law creates an accelerated summary dismissal procedure, which applies when a defendant in a SLAPP suit moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. Upon such a motion, the defendant bears the initial burden of showing that the action or claim is a SLAPP suit (see CPLR 3211[g][1]). Once the defendant makes that showing, the burden shifts to the plaintiff to demonstrate that the claim has a "substantial basis in law" (id.). If the claim is dismissed, the defendant recovers a mandatory award of attorneys' fees.

This case presents the issue of what constitutes a "substantial basis in law" under the anti-SLAPP law. We hold, based on our reading of CPLR 3211(g) and (h), that "substantial basis" under the anti-SLAPP law means "such relevant proof as a

reasonable mind may accept as adequate to support a conclusion or ultimate fact" … , a phrase drawn from the relevant legislative history. We further find that, because the complaint in this case fails to survive ordinary CPLR 3211(a)(7) analysis, plaintiffs have failed to meet the higher burden under CPLR 3211(g) of showing that their SLAPP suit has a substantial basis in law. Accordingly, defendants — a media entity and a reporter — are entitled to mandatory costs and attorneys' fees pursuant to Civil Rights Law § 70-a. We remand the case solely for calculation of those costs and fees. Reeves v Associated Newspapers, Ltd., 2024 NY Slip Op 04286, First Dept 8-22-24

Practice Point: To overcome a motion to dismiss a defamation action under the anti-SLAPP statute, the plaintiff must demonstrate the action has a "substantial basis in law." This decision fleshes out the meaning of that phrase.

AUGUST 22, 2024

CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

THE SIX-MONTH EXTENSION FOR COMMENCEMENT OF AN ACTION UNDER CPLR 205(A) IS NOT AVAILABLE WHEN THE PRIOR ACTION WAS VOLUNTARILY DISCONTINUED; HERE THE CPLR 205(A) EXTENSION WAS NOT AVAILABLE FOR A STATE ACTION WHICH PLAINTIFF ATTEMPTED TO COMMENCE AFTER VOLUNTARILY DISCONTINUING A SIMILAR FEDERAL ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the six-month extension for the commencement of an action codified in CPLR 205 (a) was not available to the plaintiff because a similar federal action had been voluntarily discontinued by the plaintiff. Plaintiff had sued in federal court for violations of the Fair Labor Standards Act and the Labor Law. Plaintiff discontinued that action and brought a state action under the Labor Law. Because plaintiff could not take advantage of CPLR 205 (a), the state action was time-barred:

"CPLR 205(a) extends the time to commence an action after the termination of an earlier related action, where both actions involve the same transaction or occurrence or series of transactions or occurrences" … . However, the six-month grace period provided under CPLR 205(a) is not available where the previous

action has been terminated by "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" … .

CPLR 205(a) was not applicable to this action, since the similar and timely commenced federal action was terminated by means of a voluntary discontinuance. A discontinuance effectuated pursuant to either CPLR 3217(a) or (b) constitutes a voluntary discontinuance for purposes of CPLR 205(a) … . Pursuant to a similar provision in the Federal Rules of Civil Procedure, an action may be voluntarily dismissed either by a stipulation or notice, pursuant to Federal Rules of Civil Procedure rule 41(a)(1), or by a court order, pursuant to Federal Rules of Civil Procedure rule 41(a)(2). Thus, since the discontinuance here was affirmatively requested by the plaintiff and was granted pursuant to Federal Rules of Civil Procedure rule 41(a)(2), CPLR 205(a) was not available to extend the limitations period beyond the termination of the federal action … . Castillo v Suffolk Paving Corp., 2024 NY Slip Op 04239, Second Dept 8-21-24

Practice Point: Here plaintiff voluntarily discontinued a federal action and brought a similar action in state court. Because the federal action was voluntarily discontinued, the six month extension for commencing an action under CPLR 205 (a) was not available to plaintiff and the state action was time-barred.

AUGUST 21, 2024

CIVIL PROCEDURE, INSURANCE LAW, NEGLIGENCE.

THE UNINSURED PLAINTIFF WAS AWARDED TENS OF MILLIONS OF DOLLARS, INCLUDING FUTURE MEDICAL COSTS, AFTER TRIAL FOR AN INJURY WHICH LEFT HIM PARALYZED; DEFENDANT REQUESTED A COLLATERAL SOURCE HEARING PURSUANT TO CPLR 4545 BECAUSE PLAINTIFF MAY BE ABLE TO RECOVER FUTURE MEDICAL COSTS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT; IN A MATTER OF FIRST IMPRESSION THE SECOND DEPARTMENT HELD DEFENDANT WAS ENTITLED TO A COLLATERAL SOURCE HEARING (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ventura, in a matter of first impression, determined defendant in this negligence action was entitled to a hearing pursuant to CPLR 4545 concerning damages awarded for future medical expenses. Plaintiff, a bicyclist, was struck by a railroad tie which was dropped from above, and was paralyzed. Plaintiff was awarded tens of millions of dollars after trial. Defendant argued the uninsured plaintiff may be entitled to future medical costs under the Patient Protection and Affordable Care Act and requested a CPLR 4545 collateral source hearing:

This appeal presents a question of first impression in New York involving the effect of the Patient Protection and Affordable Care Act on collateral source offsets in personal injury actions, to wit: whether a defendant may be entitled to a collateral source hearing pursuant to CPLR 4545 for the purpose of establishing that an uninsured plaintiff's future medical expenses will, with reasonable certainty, be covered in part by a private health insurance policy, as long as the plaintiff takes the steps necessary to procure the policy. Among other reasons, since providing a defendant an offset under such circumstances would serve the "ultimate goal of CPLR 4545 to eliminate duplicate recovery by a plaintiff" … , we conclude that the defendant was entitled to a hearing pursuant to CPLR 4545 to demonstrate the extent, if any, to which the plaintiff's future medical expenses would be reduced by available insurance coverage. We express no opinion, however, about the appropriate outcome following the hearing.

… [W]e modify the amended judgment by deleting the award of damages for the plaintiff's future medical expenses and … remit this matter to the Supreme Court

… , for a collateral source hearing on the issue of those expenses, with entry of an appropriate second amended judgment thereafter. Liciaga v New York City Tr. Auth., 2024 NY Slip Op 04257, Second Dept 8-21-24

Practice Point: If an uninsured plaintiff, who was awarded damages to cover future medical costs, may be entitled to future medical costs under the Patient Protection and Affordable Care Act, defendant may be entitled to a CPLR 4545 collateral source hearing.

AUGUST 21, 2024

CIVIL PROCEDURE, MUNICIPAL LAW, NEGLIGENCE.

THE COVID TOLL OF THE STATUTE OF LIMITATIONS RENDERED THIS NEGLIGENCE ACTION AGAINST A MUNICIPALITY TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the COVID toll of the statute of limitations applied and the negligence action against defendant municipality was timely commenced:

The plaintiff alleged that he was injured on May 24, 2019, when he was seated on a swing that collapsed at a playground owned and operated by the defendants, causing him to fall to the ground. Thereafter, the defendants moved for summary judgment dismissing the complaint as time-barred, arguing that the action was not timely commenced within the applicable one-year and 90-day statute of limitations. In an order dated August 3, 2022, the Supreme Court granted the defendants' motion. The plaintiff appeals.

Pursuant to General Municipal Law § 50-i and CPLR 217-a, an action against a municipality to recover damages for personal injuries must be commenced within one year and 90 days after the happening of the event upon which the claim is based. Here, the defendants established, prima facie, that the applicable statute of limitations started to run from January 5, 2020, the date on which the plaintiff turned 18 years old (see CPLR 208), and that the action was not timely commenced within one year and 90 days from that date by April 5, 2021 … . However, in opposition, the plaintiff established that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8), which was issued in connection with the COVID-19 public health crisis, and subsequent executive orders extending the duration

thereof, tolled the applicable statute of limitations for a 228-day period from March 20, 2020, to November 3, 2020, and thus, the action was timely commenced prior to the expiration of the statute of limitations on November 19, 2021 … . Fuhrmann v Town of Riverhead, 2024 NY Slip Op 04248, Second Dept 8-21-24

Practice Point: Here the COVID toll of the statute of limitations extended the time for commencing the negligence action against the municipality by 228 days.

AUGUST 21, 2024

CORPORATION LAW, EMPLOYMENT LAW, MEDICAL MALPRACTICE, NEGLIGENCE.

HERE THERE WAS A QUESTION OF FACT WHETHER THE CORPORATE VEIL SHOULD BE PIERCED SUCH THAT THE DEFENDANT HOSPITAL WOULD BE DEEMED VICARIOUSLY LIABLE FOR THE ALLEGED MALPRACTICE BY A CORPORATION OWNED BY A HOSPITAL EMPLOYEE AND WHOSE OFFICE WAS IN THE HOSPITAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant hospital was vicariously liable for the purported medical malpractice by a corporation (Meeting House) under a piercing-the-corporate-veil theory:

Generally, … piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" … . "'[T]he corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego'" … . In determining whether to pierce the corporate veil, "[g]enerally considered are such factors as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the

corporate form, such that one of the corporations is a mere instrumentality, agent and alter ego of the other" … .

… Meeting House failed to adhere to corporate formalities, such as holding board of directors' meetings. Meeting House was owned and controlled by an employee of the hospital, whose office was in the hospital, pursuant to a contract with the hospital. The hospital had sole discretion over the number of shares and who would be the shareholders. Meeting House was also undercapitalized, since it appears that its assets consisted of a non-interest-bearing loan from the hospital … . Its budget and any amendments thereto had to be approved by the hospital. The common ownership, leadership, and control, and the common location on the grounds of the hospital and in the hospital itself, raised a triable issue of fact as to whether the corporate veil should be pierced … . Midson v Meeting House Lane Med. Practice, P.C., 2024 NY Slip Op 04261, Second Dept 8-21-24

Practice Point: Consult this decision for what it takes to raise a question of fact whether the corporate veil should be pierced in support of a vicarious liability theory.

AUGUST 21, 2024

DEFAMATION, PRIVILEGE.

STATEMENTS ATTRIBUTED TO DEFENDANT CONSTITUTED NONACTIONABLE OPINION; TO THE EXTENT ANY OF THE STATEMENTS COULD BE REGARDED AS FACT RATHER THAN OPINION, THE STATEMENTS WERE PROTECTED BY QUALIFIED PRIVILEGE; PLAINTIFF DID NOT DEMONSTRATE THE STATEMENTS WERE MADE WITH ACTUAL MALICE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined the statements attributed to defendant New York State Assemblyman Jeffrey Dinowitz constituted nonactionable opinion and plaintiff (Verdi) did not demonstrate Dinowitz acted with actual malice. The facts are far too detailed to summarize here:

Given the history of the hyperbolic and public finger-pointing between the parties, a reasonable reader would conclude that Dinowitz's statements were opinion and

merely "the product of passionate advocacy," especially considering that he was in the midst of litigation involving accusations of him manipulating student registration to advance a racist agenda … . Although Dinowitz's status as an assemblyman may lead an average reader to interpret his statements as those of fact known to him through his involvement with the school and the community … , "[e]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in . . . circumstances in which an 'audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole' " … . * * *

Even if some of Dinowitz's statements could be regarded as fact rather than opinion, we agree with the motion court's finding that Dinowitz's statements may be entitled to a qualified privilege, as an overcrowded public school is a matter of public concern … . We also agree with the motion court's determination that the "actual malice" standard should be applied in the evaluation of whether Dinowitz's conduct went beyond that protected by the qualified privilege … . Verdi v Dinowitz, 2024 NY Slip Op 04287, First Dept 8-22-24

Practice Point: The statements attributed to defendant in this defamation action were nonactionable opinion, criteria explained.

Practice Point: To the extent any of the statements may be regarded as fact, as opposed to opinion, they were protected by qualified privilege because there was no showing the statements were made with actual malice.

AUGUST 22, 2024

ELECTION LAW, CONSTITUTIONAL LAW.

NEW YORK'S EARLY MAIL VOTER ACT IS NOT UNCONSTITUTIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge concurring opinion and a dissenting opinion, determined New York's Early Mail Voter Act is constitutional:

Plaintiffs, a coalition of elected officials, registered voters, and party officials, challenge New York's Early Mail Voter Act (the Act), which permits all registered voters to vote early by mail in any election in which the voter is eligible to vote.

Plaintiffs maintain the Act is unconstitutional and seek a declaratory judgment and a permanent injunction against its implementation and enforcement. The question raised here is difficult. Though the State Constitution contains no language that explicitly requires in-person voting, the legislative and executive branches have often proceeded as if our Constitution requires as such. Our Court has never been asked to determine what the Constitution requires in this regard. Recently, the legislature assumed that the Constitution requires in-person voting, passing concurrent resolutions culminating in the 2021 proposed amendment to authorize mail-in voting. We acknowledge that the public rejected that amendment, and we take seriously both the legislature's position in 2021 and the voters' rejection of the proposed constitutional amendment. At the same time, we may not simply defer to the legislature's assumptions about what the Constitution requires. Our task is to rigorously analyze the constitutional text and history to determine if New York's Early Mail Voter Act is unconstitutional. We now hold that it is not. Stefanik v Hochul, 2024 NY Slip Op 04236, CtApp 8-20-24

Practice Point: New York's Early Mail Voter Act is not unconstitutional.

AUGUST 22, 2024

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE, UNIFORM COMMERCIAL CODE.

BECAUSE THE ALLONGE ENDORSED IN BLANK WAS NOT FIRMLY AFFIXED TO THE NOTE AS REQUIRED BY THE UCC, THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE STANDING TO BRING THE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate iT had standing to bring the action. The purported allonge endorsed in blank was not attached to the note:

"A plaintiff may establish … its standing as the holder of the note by demonstrating that a copy of the note, including an endorsement in blank, was among the exhibits annexed to the complaint at the time the action was commenced" … . "A promissory note [is] a negotiable instrument within the meaning of the Uniform Commercial Code" (… see UCC 3-104[2][d]). A "holder" is "the person in possession of a negotiable instrument that is payable either to

bearer or to an identified person that is the person in possession" (UCC 1-201[b][21][A]; see 3-301 …). Where an instrument is endorsed in blank, it may be negotiated by delivery (see UCC 3-202[1]; 3-204[2] …). "An indorsement must be . . . on the instrument or on a paper so firmly affixed thereto as to become a part thereof" (UCC 3-202[2]).

… [T]he plaintiff failed to make a prima facie showing that it had standing to commence the action. Although the plaintiff attached a copy of the note and a purported allonge endorsed in blank to the complaint, the plaintiff failed to demonstrate that the purported allonge "was so firmly affixed [to the note] as to become a part thereof, as required by UCC 3-202(2)" … . Moreover, an affidavit of an assistant secretary of the plaintiff's servicer/attorney-in-fact, submitted in support of the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer, and for an order of reference, was also insufficient to demonstrate the plaintiff's compliance with UCC 3-302(2), as it was bereft of any reference to the purported allonge … . Lakeview Loan Servicing, LLC v Florio, 2024 NY Slip Op 04256, Second Dept 8-21-24

Practice Point: The UCC requires that an allonge endorsed in black be firmly affixed to the note.

AUGUST 21, 2024

FORECLOSURE, EVIDENCE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS INADMISSIBLE HEARSAY BECAUSE THE BUSINESS RECORDS UPON WHICH THE REPORT WAS BASED WERE NOT PRODUCED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because the business records on which the referee's calculations were based were not attached to the referee's affidavit, rendering the affidavit hearsay:

… [T]he referee's report was based upon her review … of the note and mortgage, the summons and complaint, and an affidavit of merit and amount due, which

listed the amount due to the plaintiff. However … the affidavit constituted inadmissible hearsay and lacked probative value because the affiant failed to produce the business records purportedly relied upon in making her calculations … . Countrywide Home Loans Servicing, L.P. v Weberman, 2024 NY Slip Op 04240, Second Dept 8-21-24

Practice Point: An affidavit which purports to rely on records which are not attached is inadmissible hearsay.

AUGUST 21, 2024

MUNICIPAL LAW, NEGLIGENCE, CIVIL PROCEDURE.

ALTHOUGH THE CITY HAD TIMELY KNOWLEDGE OF THE ROAD DEFECT WHICH ALLEGEDLY CAUSED PETITIONER-BUS-DRIVER'S ACCIDENT, THERE WAS NO SHOWING THE CITY HAD TIMELY KNOWLEDGE OF PETITIONER'S ACCIDENT, INJURIES OR THE FACTS UNDERLYING HER THEORY OF LIABILITY; THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN DENIED; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive dissent. determined the petition for leave to file a late notice of claim against the city should not have been granted. Although petitioner demonstrated the city had timely knowledge of the existence of the pothole which allegedly caused petitioner-bus-driver's injury, petitioner did not demonstrate the city had timely knowledge of her accident, injuries or the facts underlying her theory of liability:

… [T]he evidence submitted in support of the petition failed to establish that the appellants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter … . "'Actual knowledge of the essential facts underlying the claim means knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the [proposed] notice of claim; the public corporation need not have specific notice of the theory or theories themselves'" … . "Unsubstantiated and conclusory assertions that the municipality acquired timely actual knowledge of the essential facts

constituting the claim through the contents of reports and other documentation are insufficient" … .

Here, although the petitioner's submission of photographs and evidence that the defect was repaired after the accident may have demonstrated that the appellants had actual knowledge of the defect, actual knowledge of a defect is not tantamount to actual knowledge of the facts constituting the claim where, as here, the record did not establish that the appellants were aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability … . Matter of Ippolito v City of New York, 2024 NY Slip Op 04265, Second Dept 8-21-24

Practice Point: Here petitioner's inability to demonstrate the city had timely knowledge of her accident, injuries or the facts underlying her theory of liability supported denial of her petition for leave to file a late notice of claim. The fact that the city had timely knowledge of the road defect which allegedly caused petitioner's accident was not enough.

AUGUST 21, 2024