NEW YORK APPELLATE DIGEST

Weekly Reversal Report
July 29 – August 2, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released July 29 – August 2, 2024, by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website on Monday, August 5, 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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CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD HAVE DECLARED A MISTRIAL AFTER THE JURY'S REPEATED COMMUNICATIONS EXPLAINING THEY COULD NOT REACH A UNANIMOUS VERDICT; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the judge should have ordered a mistrial after the jury's repeated communications stating they could not reach a unanimous verdict:

The jury sent its third note regarding deadlock on the fourth day of deliberations, which not only stated that the jurors were "hopelessly deadlocked," but also that "[a] unanimous decision would only be able to be achieved by the abandonment" of the jurors' "firm . . . convictions," and that "any change in their decisions would be untrue and unjust" … . Thus, the jury unequivocally informed the court that any unanimous verdict would be the result of jurors abandoning their genuine beliefs about the defendant's guilt or innocence in order to achieve a unanimous verdict, which demonstrated that it would have served no purpose to provide additional instructions to the jury to continue deliberating … . Moreover, portions of the court's instructions delivered after that note were potentially coercive, including the court's statements that "some of you are locked into your positions and you're fixed in those positions and inflexible and that's contrary to what jurors have to do during jury deliberations," and that "when you were selected as jurors you promised me that you would deliberate and discuss your views with your other jurors, so if you refuse to deliberate or close off your mind then you're violating your promise and your oath to me" … . Notably, the jury returned a unanimous verdict later on the same day the court gave those instructions. Thus, under the circumstances, the court should have discharged the jury and declared a mistrial. People v Calixte, 2024 NY Slip Op 04079, Second Dept 7-31-24

Practice Point: Here the jury sent out three articulate and detailed notes explaining they could not reach a unanimous verdict. The judge should have declared a mistrial.

JULY 31, 2024

FREEDOM OF INFORMATION LAW (FOIL).

THE NEWSPAPER'S FOIL REQUEST FOR POLICE DISCIPLINARY RECORDS, INCLUDING RECORDS OF UNSUBSTANTIATED ALLEGATIONS AND RECORDS CREATED BEFORE THE REPEAL OF CIVIL RIGHTS LAW 50-A, SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner-newspaper's FOIL request for police disciplinary records, including records of

allegations ruled unsubstantiated and records created before the repeal of Civil Rights Law 50-a, should have been granted:

… [T]he Supreme Court erred in concluding that the privacy exemption under Public Officers Law § 87(2)(b) creates a blanket exemption allowing the respondents to categorically withhold the disciplinary records of unsubstantiated allegations of misconduct … . Inasmuch as the respondents withheld the requested records containing unsubstantiated allegations of misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, the respondents did not meet their burden of establishing that the privacy exemption applies … . The respondents further failed to establish that "identifying details" in the records containing unsubstantiated allegations or complaints of misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" … .

… [E]ffective June 12, 2020, the New York State Legislature repealed Civil Rights Law § 50-a and amended the Public Officers Law to make specific provisions relating to the disclosure of law enforcement disciplinary records and the types of redactions to be made thereto prior to disclosure … . Thus, the statutory exemption under Public Officers Law § 87(2)(a) no longer applies to law enforcement personnel records. The bill repealing Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies … . Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining "[l]aw enforcement disciplinary records" and a "[l]aw enforcement disciplinary proceeding."

Here, as the petitioner made the subject FOIL requests after the legislative amendments were enacted, the petitioner was not seeking retroactive application of the statutory amendments to a pending FOIL request … . Moreover, for the reasons set forth in Matter of Newsday, LLC v Nassau County Police Dept. (222 AD3d at 92-93), we reject the respondents' contention that in amending the Public Officers Law to provide for the disclosure of records relating to law enforcement disciplinary proceedings, the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020 … .. Matter of Gannett Co., Inc. v Town of Greenburgh Police Dept., 2024 NY Slip Op 04071, Second Dept 7-31-24

Practice Point: Absent proof of some privacy exemption, police disciplinary records, including those involving unsubstantiated allegations and those created

before the repeal of Civil Rights Law 50-a, may be provided pursuant to a FOIL request.

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LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF FAILED TO TIE OFF HIS LANYARD, THAT FAILURE WAS NOT THE SOLE PROXIMATE CAUSE OF HIS INJURY; PLAINTIFF FELL WHEN A PLANK ON THE SCAFFOLD BROKE; PLAINTIFF SHOULD HAVE BEEN AWARDED 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. Plaintiff was wearing a safety harness with a lanyard when a coworker asked for help in securing the scaffold to the wall. Plaintiff was not able to hook his lanyard to the scaffold because he was carrying a pipe and a clamp, the lanyard was only four feet long, and he had to walk 20 feet to the wall. A plank on the scaffold broke and plaintiff fell. Supreme Court found that were questions of fact whether plaintiff was the sole proximate cause of his injury and whether he was a recalcitrant worker. Because the plank broke, plaintiff's actions or omissions could not be the sole proximate cause of his injury:

… [T]he plaintiffs established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of the injured plaintiff's injuries. The undisputed evidence established that the injured plaintiff was subjected to the elevation-related risk of the wooden plank which broke suddenly, causing the injured plaintiff to fall … .

In opposition to the plaintiffs' prima facie showing, the defendants failed to raise a triable issue of fact as to whether the injured plaintiff's own conduct was the sole proximate cause of his injuries. Since the plaintiffs established a violation of Labor Law § 240(1) and that the violation was a proximate cause of the injured plaintiff's fall, the injured plaintiff's comparative negligence, if any, is not a defense to the cause of action alleging a violation of that statute … . Further, the defendants did not present evidence that the injured plaintiff was recalcitrant in the sense that he

was instructed to tie and untie his lanyard to traverse the scaffold and refused to do so … . Amaro v New York City Sch. Constr. Auth., 2024 NY Slip Op 04052, Second Dept 7-31-24

Practice Point: As long as an elevation hazard is a cause of plaintiff's injury (here a scaffold plank broke), whether an act or omission on plaintiff's part (here the failure to hook up his lanyard) contributed to his injury is not an issue under Labor Law 240(1).

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MEDICAL MALPRACTICE, EVIDENCE.

IN A MED MAL CASE, AN EXPERT AFFIDAVIT WHICH MAKES ASSERTIONS UNSUPPORTED AND BELIED BY THE RECORD AND, FOR THE FIRST TIME, ASSERTS ISSUES NOT ENCOMPASSED BY THE COMPLAINT OR BILL OF PARTICULARS, DOES NOT RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Mendez, determined the plaintiffs' expert did not raise a question of fact on whether the defendants (the Golden defendants) met the appropriate standard of care in this medical malpractice action:

Opinion evidence must be based on facts in the record. An expert cannot speculate, guess, or reach their conclusion by assuming material facts not supported by the evidence. The opinion must be supported either by facts disclosed by the evidence or by facts known to the expert personally. It is essential that the facts upon which the opinion is based be established, or fairly inferable, from the evidence … .

Here, the Golden defendants' expert's affirmation, which is based on information contained in the relevant medical records and deposition testimony, established prima facie their entitlement to summary judgment. In opposition, plaintiffs' expert affirmations as pertain to the Golden defendants are refuted by the medical records and deposition testimony … , do not specifically controvert the opinion of defendants' expert … , are conclusory and speculative, and fail to raise a triable issue of fact … .

An expert's affirmation that sets forth general conclusions, misstatements of evidence, and unsupported assertions, and which fails to address the opinions of defendant's expert, is insufficient to defeat summary judgment … . As is one which raises for the first time in opposition to summary judgment a new theory of liability that has not been set forth in the bills of particulars or in the complaint … . Plaintiffs' expert affirmations state for the first time in opposition to summary judgment that the Golden defendants departed from accepted practice when, after learning that decedent's headache had lasted from two to four days, Dr. Golden failed to refer him to the emergency room for a CT scan. This theory is neither in plaintiffs' complaints nor bills of particulars; is speculative, conclusory, and contradicted by the record; and should not have been considered by Supreme Court … . Cabrera v Golden, 2024 NY Slip Op 04112, First Dept 7-31-24

Practice Point: Many med mal decisions reject without explanation expert opinion affidavits which are deemed "speculative" or "conclusory." This opinion provides insight into the meaning of those terms.

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REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CIVIL PROCEDURE, EVIDENCE.

THE BANK DID NOT DEMONSTRATE IT WAS THE HOLDER OR ASSIGNEE OF THE NOTE AT THE TIME THE ACTION TO RECORD THE MORTGAGE WAS BROUGHT; THE BANK DID NOT HAVE STANDING TO BRING THE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing in 2017 to record a mortgage securing a note issued in 2008:

A plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced … . "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the . . . action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" … . "[A]n assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" .. .

Here, the affidavits of Fernandez were insufficient to establish the plaintiff's standing to record the mortgage. Although Fernandez's second affidavit provided a proper foundation for the admission of business records, and attached a business record … , "[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . The business record attached to Fernandez's second affidavit failed to establish, prima facie, that the plaintiff had possession of the note prior to commencing the instant action, as it failed to mention the defendant or otherwise identify the note to which it was referring. Moreover, the business record identifies itself merely as a "Certification." It does not state when the note was either delivered to or assigned to the plaintiff. Bayview Loan Servicing, LLC v Healey, 2024 NY Slip Op 04054, Second Dept 7-31-24

Practice Point: Here the note was issued in 2008 and plaintiff bank sought to record the mortgage in 2017. The bank did not have standing to record the mortgage because it did not present proof it was the holder or assignee of the note when the action was brought.

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