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ADMINISTRATIVE LAW, PRIMARY JURISDICTION DOCTRINE.

PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE, PLAINTIFFS' COMPLAINTS ABOUT FINES IMPOSED BY DEFENDANT NATURAL-GAS PROVIDER MUST FIRST BE HEARD BY THE PUBLIC SERVICE COMMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "primary jurisdiction" doctrine required that plaintiffs bring their complaint against defendant natural-gas provider before the Public Service Commission:

"The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" … . "[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding" … .

Here, the Public Service Commission has primary jurisdiction over the plaintiff's claims … . The defendant was permitted to impose a $100 fine on any customer who prevented or hindered Brooklyn Union from inspecting the gas meters and gas lines of a building (see Public Service Law § 65[9][b]). Thus, the plaintiff's claim that she and other members of the prospective class were improperly charged a fine involves intricate questions of fact, thereby requiring the specialized knowledge

and expertise of the Public Service Commission … . Calle v National Grid USA Serv. Co., Inc., 2024 NY Slip Op 04190, Second Dept 8-4-24

Practice Point: Here plaintiffs' complaint against defendant natural-gas provider raised issues within the expertise of the Public Service Commission. The doctrine of primary jurisdiction required that the Commission, not the court, hear the case first.

AUGUST 14, 2024

BILL OF PARTICULARS, REFERENCES TO UNPLEADED CAUSES OF ACTION IN THE BILL OF PARTICULARS DID NOT SAVE THE COMPLAINT.

DEFENDANT, AS AN OUT-OF-POSSESSION LANDLORD, WAS NOT LIABLE FOR AN ALLEGED DANGEROUS CONDITION ON THE PROPERTY; PLAINTIFF'S REFERENCES TO UNPLEADED CAUSES OF ACTION (LABOR LAW 240(1) AND LABOR LAW 241(6)) IN THE BILL OF PARTICULARS WERE UNSUPPORTED; THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court and dismissing plaintiff's complaint, determined defendant was an out-of-possession landlord who was not responsible for the alleged dangerous condition on the property and the Labor Law 240(1) and 241(6) causes of action, although mentioned in the bill of particulars, were not pleaded. Plaintiff was doing work on cabinets when she was struck by a piece of wood that flew off a table saw operated by another worker. She sued under a negligence theory (dangerous condition) and under Labor Law section 200 (which codifies common law negligence):

"[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" … . "'An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct'" … .

… [T]he evidence … , including … the written lease … and transcripts of the deposition testimony … established … that the defendant was an out-of-possession landlord that had relinquished control of the subject property to Tobin and had not assumed a duty to maintain the property in a reasonably safe condition by a course of conduct … . Although the defendant reserved a right of entry under the lease, this did not provide a sufficient basis on which to impose liability upon the defendant for injuries caused by a dangerous condition, as the condition did not violate a specific statute, nor was it a significant structural or design defect … .

Modern practice permits a plaintiff, in some circumstances, to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action that is supported by the plaintiff's submissions, where the plaintiff has not engaged in unexcused protracted delay in presenting the new theory of liability… . … Here … the plaintiff's unpleaded causes of action alleging violations of Labor Law §§ 240(1) and 241(6) are not supported by the plaintiff's submissions, as the record demonstrates that the plaintiff's work at the time of her injury did not involve "construction, excavation or demolition work" within the meaning of Labor Law § 241(6), or "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" within the meaning of Labor Law § 240(1) … . Miranda v 1320 Entertainment, Inc., 2024 NY Slip Op 04313, Second Dept 8-28-24

Practice Point: Here the defendant demonstrated out-of-possession landlord status and was therefore not liable for an alleged dangerous condition on the property.

Practice Point: Although unpleaded causes of action mentioned for the first time in the bill of particulars can be considered in opposition to a summary judgment motion, here the unpleaded Labor Law 240(1) and 241(6) causes of action were unsupported by the plaintiff's submissions. The complaint should have been dismissed.

AUGUST 28, 2024

CHILD VICTIMS ACT, COURT OF CLAIMS, COMPLAINT NEED NOT ALLEGE SPECIAL DUTY OWED BY THE STATE.

HERE THE COMPLAINT STATED A CHILD-VICTIMS-ACT CAUSE OF ACTION AGAINST THE STATE; THE STATE ASSUMES A DUTY OF PROTECTION AGAINST HARM FOR A CHILD IN ITS CUSTODY; THE COMPLAINT WAS NOT DEFECTIVE FOR FAILURE TO ALLEGE THE STATE OWED PLAINTIFF A SPECIAL DUTY, OVER AND ABOVE THAT OWED THE GENERAL PUBLIC (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, over a concurrence, determined the complaint in this Child Victims Act action alleging sexual abuse which under the care of the state should not have been dismissed. The issue was whether the complaint must allege a special duty owed by the government to the plaintiff. The Third Department found that a special duty need not be alleged to survive a motion to dismiss under the facts alleged:

A cause of action for negligence requires proof that defendant owed the claimant a legally recognized duty, that "defendant breached that duty and that such breach was a proximate cause of an injury suffered by the [claimant]" … . That said, "an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public" … . "A special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" … . Claimant does not dispute that he has not pleaded one of those three bases for a special duty, instead contending that he was not required to so plead because he was in OCFS's [Office of Children's and Family Services'] custody.

We agree. Mindful that our review requires us to determine "whether the alleged facts fit within any cognizable legal theory" … , claimant's failure to plead a special duty is not fatal to the extent his claim alleges negligence in the performance of obligations stemming from OCFS's custody of him during his placement at the Schenectady facility … . When a government entity assumes custody of a person, thus diminishing that person's ability to self-protect or access those usually charged with such protection, that entity owes to that person a duty of

protection against harms that are reasonably foreseeable under the circumstances … . The duty of protection is coextensive with the entity's "physical custody of and control" of the person, terminating at the point the person passes out of the "orbit of [the entity's] authority" … . Thus, we have held that "[a] governmental foster care agency is under a duty to adequately supervise the children in its charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision," including "negligence in the selection of foster parents and in supervision of the foster home" … . A.J. v State of New York, 2024 NY Slip Op 04231, Third Dept 8-15-24

Practice Point; When the state assumes custody of a child, it owes the child a duty of protection against harm. Under the facts of this case, the plaintiff was not required to alleged the state owed a special duty to the plaintiff.

AUGUST 15, 2024

CONSTITUTIONAL LAW, STATE ACTION PREEMPTED BY FEDERAL STATUTE.

STATE DESIGN DEFECT AND FAILURE TO WARN ACTION IS PREEMPTED BY THE FEDERAL HAZARDOUS MATERIALS TRANSPORTATION ACT (HMTA), CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Rodriguez, determined the state defective-design and failure-to-warn action stemming from an allegedly defective compressed gas cylinder was preempted by the federal Hazardous Materials Transportation Act (HMTA). …"… [T]he HMTA's express preemption provision encompasses state law claims 'about' 'the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing [of] a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce' … ":

… Federal preemption is based on the US Constitution's Supremacy Clause … …

The issue of federal preemption is a question of law …, since it concerns whether, as a matter of statutory interpretation … , Congress has enacted a law for which a particular state rule is "to the Contrary" … .

An “inquiry into the scope of a statute’s pre-emptive effect is guided by the rule that ‘the purpose of Congress is the ultimate touchstone’ in every pre-emption case” … .. “If a federal law contains an express pre-emption clause,” as here, “it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains” …

Whether dealing with “express or implied pre-emption, we begin our analysis ‘with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'” … . “That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States” … . “Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption'” … .

Notwithstanding the above, “[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent” … .

Accordingly, although courts will not hesitate to hold that state common-law claims are preempted by federal legislation, the analysis in each express preemption case must turn on the precise language of the relevant preemption provision … .

… [T]he defense of preemption may be raised at any time … .Malerba v New York City Tr. Auth., 2024 NY Slip Op 04344, First Dept 8-29-24

Practice Point: Consult this opinion for the analysis of and criteria for preemption of a state action by a federal statute.

AUGUST 29, 2024

CPLR 205(A) SIX-MONTH EXTENSION FOR COMMENCING A NEW ACTION NOT AVAILABLE WHERE SIMILAR FEDERAL ACTION WAS VOLUNTARILY DISCONTINUED.

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

DEFAMATION, ANTI-SLAPP STATUTE, SUIT HAD NO "SUBSTANTIAL BASIS IN LAW."

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

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, MUNICIPAL LAW, EXEMPTION FROM COVID MANDATE.

THE NYC DEPARTMENT OF EDUCATION PROPERLY DENIED PETITIONER-TEACHER'S REQUEST FOR AN EXTENSION OF AN EXEMPTION FROM THE COVID VACCINE MANDATE BECAUSE THE MANDATE IS NO LONGER IN EFFECT; SUPREME COURT SHOULD NOT HAVE ISSUED AN ADVISORY OPINION TO THE CONTRARY; THE AWARD OF ATTORNEY'S FEES WAS IMPROPER; THE PETITION DID NOT MEET THE CRITERIA FOR AN EXCEPTION TO THE MOOTNESS DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitioner, at teacher, was not entitled to an extension of an exemption from the COVID vaccine mandate (denied by the NYC Department of Education) and the award of over $24,000 in attorney's fees. The vaccine mandate is no longer in force, and the matter did not meet the criteria for an exception to the mootness doctrine:

Courts are prohibited from rendering advisory opinions, and a matter will be considered academic unless the rights of the parties will be directly affected by the determination of the matter and the interest of the parties is an immediate consequence of the judgment … . Here, the vaccine mandate, which was never

enforced against the petitioner, was repealed on February 9, 2023. Accordingly, the petition is academic … .

Furthermore, the exception to the mootness doctrine, which permits judicial review where the case presents a significant issue that is likely to recur and evade review, is inapplicable here … . The issue is not likely to repeat, as the vaccine mandate has been repealed and the possibility that some form of vaccine mandate might be enforced against the petitioner at some unknown time in the future is entirely speculative, and the petitioner does not raise novel questions … .

Since an award of attorneys' fees is not authorized by agreement between the parties, by statute, or by court rule, the Supreme Court improperly awarded attorneys' fees to the petitioner … .. Matter of Ferrera v New York City Dept. of Educ., 2024 NY Slip Op 04317, Second Dept 8-28-24

Practice Point: Because the vaccine mandate for NYC teachers is no longer in force, the petitioner-teacher's request for an extension of an exemption from the mandate was properly denied by the NYC Department of Education. Supreme Court grant of the extension and award of attorney's fees was improper because courts are prohibited from issuing advisory opinions. In addition, the criteria for an exception to the mootness doctrine were not met.

AUGUST 28, 2024

FAMILY LAW, CHILD CUSTODY, VACATION OF ORDERS ISSUED UPON DEFAULT.

THE USUAL PROHIBITIONS RE: VACATING ORDERS ISSUED OPON A PARTY'S DEFAULT DO NOT APPLY IN CHILD CUSTODY MATTERS; TO MODIFY CUSTODY, A FULL AND PLENARY HEARING IS NECESSARY; IF A PARTY DOES NOT APPEAR IN A MODIFICATION PROCEEDING, AN INQUEST SHOULD BE HELD TO CREATE A RECORD (SECOND DEPT).

The Second Department, reversing Family Court, noted that courts should be more willing to vacate orders issued upon a party's default in child custody matters. Mother had defaulted and custody was modified awarding custody to father. Mother's motion to vacate the modification order should have been granted:

Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court … , "the law favors resolution on the merits in child custody proceedings" … . "Thus, the 'general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody'" … .

Moreover, modification of an existing order of custody and parental access may be made only "'upon a showing that there has been a subsequent change [in] circumstances such that modification is required to protect the best interests of the child'" … . "'A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record'" … . "Generally, the court's determination should be made only after a full and plenary hearing and inquiry, or, where a party failed to appear, after an inquest" … . Matter of Paez v Bambauer, 2024 NY Slip Op 04205, Second Dept 8-14-24

Practice Point: Child custody should not be modified without a full and plenary hearing, or an inquest (if a party fails to appear).

Practice Point: The rigorous rules re: vacating an order issued upon a party's default are relaxed in child custody matters.

AUGUST 14, 2024

FIDUCIARY DUTY, FRAUD, STATUTE OF LIMITATIONS.

HERE ALLEGATIONS OF FRAUD WERE ESSENTIAL TO THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION; THEREFORE THE SIX-YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIED AND THE CAUSE OF ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the six-year statute of limitations for fraud controlled the breach of a fiduciary duty cause of action (which was therefore time-barred):

… [T]he six-year statute of limitations governing actions based on fraud applies (see CPLR 213[8]). "'[W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)'" … . Here, the defendants alleged that Hollander was part owner of a limited liability company that competed directly with the defendants, that

Hollander failed to disclose that alleged conflict, and that Hollander used confidential information obtained from the defendants to directly compete with them. The plaintiffs allegedly denied GFR and Friedman Group, LLC, the opportunity to purchase at least four specific properties and used trade secrets to compete with GFR and Friedman Group, LLC, on at least three specific properties. The allegations of fraud are thus essential to the breach of fiduciary duty counterclaim, and the six-year statute of limitations applies. South Shore Estates, Inc. v Guy Friedman Realty Corp., 2024 NY Slip Op 04156, Second Dept 8-7-24

Practice Point: Where allegations of fraud are essential to a breach of fiduciary duty cause of action, the six-year statute of limitations for fraud applies.

AUGUST 7, 2024

FORECLOSURE ABUSE PREVENTION ACT.

HERE THE FORECLOSURE ABUSE PREVENTION ACT (CPLR 213(4)) ESTOPPED PLAINTIFF FROM ARGUING THE DEBT HAD NOT BEEN ACCELERATED ON A GROUND NOT RAISED AND ADJUDICATED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Foreclosure Abuse Prevention Act (FAPA) (CPLR 213(4)) prohibited plaintiff mortgage company from asserting a defense to dismissal of the foreclosure action on statute-of-limitations grounds which had not been timely raised and adjudicated. Plaintiff tried to argue the debt was not validly accelerated because of a prior dismissal based on reference to the wrong property address:

Contrary to the plaintiff's contention, it failed to raise such a triable issue of fact on the asserted basis that the prior action did not constitute a valid acceleration of the debt in light of BOA's [Bank of America's] use of the improper property address and the resulting dismissal of the action. "[T]he recently enacted Foreclosure Abuse Prevention Act … amended CPLR 213(4) by adding paragraph (a), which provides that "'[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that

the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated'" … .

Here, the prior action was not dismissed "on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated" … . Thus, under FAPA, the plaintiff is estopped from asserting that the debt was not validly accelerated by the commencement of the prior action … . Reverse Mtge. Solutions, Inc. v Gipson, 2024 NY Slip Op 04335, Second Dept 8-28-24

Practice Point: This decision illustrates the effect of the Foreclosure Abuse Prevention Act which prohibits attacking a statute-of-limitations defense to a foreclosure action on a ground not timely raised and adjudicated prior to the expiration of the statute of limitations.

AUGUST 28, 2024

FORECLOSURE, FAILURE TO PROVE STANDING, BUSINESS RECORDS NOT ATTACHED.

ONCE AGAIN, BECAUSE THE RELEVANT BUSINESS RECORDS WERE NOT ATTACHED TO THE AFFIDAVITS, THE STATEMENTS IN THE AFFIDAVITS WERE HEARSAY; PLAINTIFF BANK DID NOT PROVE STANDING TO FORECLOSE OR DEFENDANT'S DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not prove standing and did not prove defendant's default because the relevant business records were not attached to the relevant affidavits (yet another of the hundreds of reversals on this issue):

… "'[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'" … . Thus, "[w]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay" … . In addition, "'[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices

and procedures'" … . Here, neither affidavit relied upon by the plaintiff to establish its physical possession of the note stated that the affiant had personal knowledge of … the plaintiff's record-keeping practices, and the affiants did not annex the records that they relied upon to their affidavits. Thus, the affidavits were inadmissible hearsay lacking in evidentiary value.

Likewise, without the submission of the business records upon which she relied, Ballard's assertions regarding the defendant's alleged default on the loan were inadmissible … . HSBC Bank USA, N.A. v Pacifico, 2024 NY Slip Op 04198, Second Dept 8-14-24

Practice Point: If the business records described in an affidavit are not attached, the statements in the affidavit about the records are inadmissible hearsay.

AUGUST 14, 2024

FORECLOSURE, FAILURE TO PROVE STANDING, ALLONGE NOT FIRMLY ATTACHED.

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

INSURANCE LAW, MEDICAL COSTS AS DAMAGES, AFFORDABLE CARE ACT MAY BE A COLLATERAL SOURCE, DEFENDANT ENTITLED TO A HEARING.

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

JUDGES, SUA SPONTE EXTENSION OF TIME TO ANSWER, DEFENDANTS FAILED TO APPEAR OR ANSWER.

HERE THE DEFENDANTS DID NOT PRESENT A REASONABLE EXCUSE FOR FAILING TO APPEAR OR ANSWER AND DID NOT DEMONSTRATE THE EXISTENCE OF A POTENTIALLY MERITORIOUS DEFENSE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted defendants an extension of time to answer the complaint in the face of plaintiff's cross-motion to enter a default judgment, The defendants did not demonstrate a reasonable excuse for failing to appear or answer or the existence of a potentially meritorious defense:

… [I]n support of that branch of the plaintiff's cross-motion which was for leave to enter a default judgment on the issue of liability against the defendants, the plaintiff submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendants' default in answering or appearing … . The defendants' motion, which was, in effect, pursuant to CPLR 3211(a)(4), was untimely, since it was made after the time to file an answer had lapsed … . By not opposing the facially adequate branch of the plaintiff's cross-motion which for leave to enter a default judgment, in form or in effect, the defendants did not meet their burden of establishing a reasonable excuse for their

default and demonstrating the existence of a potentially meritorious defense to the action. Accordingly, that branch of the plaintiff's cross-motion which was for leave to enter a default judgment on the issue of liability against the defendants should have been granted … , and the Supreme Court erred by, sua sponte, granting the defendants an extension of time to answer the complaint … . Digital Direct & More, Inc. v Dialectic Distrib., LLC, 2024 NY Slip Op 04196, Second Dept 8-14-24

Practice Point: Here is another example of the appellate courts cracking down on "sua sponte" rulings on motions which have no support in the record.

AUGUST 14, 2024

JUDGES, SUA SPONTE RULING ON A GROUND NOT RAISED BY THE PARTIES, FORECLOSURE.

TO, SUA SPONTE, DECIDE BRANCHES OF A MOTION AND CROSS-MOTION ON A GROUND NOT RAISED BY THE PARTIES DEPRIVED PLAIINTIFF OF THE OPPORTUNITY TO REFUTE THE JUDGE'S DETERMINATION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined the judge should not have decided branches of a motion and cross-motion on a ground not raised by the parties, i.e. "in the interest of justice" on the ground the action was commenced "when foreclosures were stayed due to [the[Covid-19 pandemic:"

"The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" … . As the plaintiff correctly contends, the Supreme Court improperly determined the subject branches of the parties' motion and cross-motion on the ground that the action was commenced when "foreclosures were stayed due to [the] Covid-19 pandemic." Sino [defendant] did not argue in support of the cross-motion that the plaintiff improperly commenced the action during any COVID-19-related stay or that it was prejudiced because the action was commenced during any COVID-19-related stay. Thus, the plaintiff was prejudiced, since it was "never afforded the opportunity to present evidence refuting the court's sua sponte determination" … . Accordingly, the court should not have determined the subject branches of the motion and cross-motion

on a ground that was never raised by the parties … . Austin 26 Dental Group, PLLC v Sino Northeast Metals (U.S.A.), Inc., 2024 NY Slip Op 04187, Second Dept 8-14-24

Practice Point: Judges cannot decide motions on a ground not raised by the parties.

AUGUST 14, 2024

LIEN LAW, MUST ATTEMPT PERSONAL SERVICE BEFORE RESORTING TO SERVICE BY MAIL.

HERE THE MARINA OWNER SERVED THE BOAT OWNER WITH A NOTICE OF SALE (FOR FAILURE TO PAY STORAGE FEES) BY MAIL; THE LIEN LAW REQUIRES AN INITIAL ATTEMPT AT PERSONAL SERVICE OF THE NOTICE OF SALE BEFORE RESORTING TO SERVICE BY MAIL; THE FAILURE TO MAKE AN ATTEMPT AT PERSONAL SERVICE BEFORE SELLING THE BOAT VIOLATED THE LIEN LAW; THE SALE OF THE BOAT THEREFORE CONSTITUTED CONVERSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant did not properly serve the plaintiff pursuant to the Lien Law. Defendant, a marina-owner, sought to satisfy a garagekeeper's lien by selling plaintiff's boat because plaintiff had stopped making payments for storage of the boat. Defendant did not attempt personal service, as required by the Lien Law, and instead served plaintiff by mail. Plaintiff was entitled to summary judgment on the conversion cause of action:

A lienor may satisfy a lien against personal property by selling such property … . However, before such sale is held, the lienor "must serve a notice of sale, by personal service, within the county where [the] lien arose, unless the person to be served cannot with due diligence be found within such county" (… see Lien Law § 201). After exercising due diligence in attempting personal service of the notice of sale, a lienor may then resort to service "by certified mail, return receipt requested, and by first-class mail" to the owner's last known place of residence … . "[I]nasmuch as a garagekeeper's lien is a statutory creation in derogation of common law," the failure to comply with the statutory service requirements "renders service defective" … . The unauthorized disposition of property by a

lienor to a third party without proper notice to the owner entitles the owner to damages for conversion … . …

… Since the defendant admitted that it had not exercised due diligence in attempting to serve the notice of sale by personal service before resorting to the statutory alternative of service by mail, the defendant failed to raise a triable issue of fact as to whether it properly served the plaintiff with the notice of sale before disposing of the plaintiff's boat … . Slattery v Strong's Mar., LLC, 2024 NY Slip Op 04219, Second Dept 8-14-24

Practice Point: The Lien Law requires a garagekeeper to attempt to personally serve a notice of sale before resorting to service by mail. The failure to attempt personal service of the notice of sale essentially nullifies the notice. A subsequent sale of the property to satisfy the garagekeeper's lien constitutes conversion.

AUGUST 14, 2024

MUNICIPAL LAW, LATE NOTICE OF CLAIM.

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

MUNICIPAL LAW, STATUTE OF LIMITATIONS, COVID TOLL.

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

PHARMACIST MALPRACTICE, COMPLAINT STATED A CAUSE OF ACTION.

ALTHOUGH THE MEDICATION DISPENSED BY DEFENDANT PHARMACY WAS PRESCRIBED, THE COMPLAINT ALLEGED THE MEDICATION WAS CLEARLY CONTRAINDICATED; THE PHARMACIST MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMSSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the pharmacist malpractice lawsuit should not have been dismissed, despite the fact that the medication was duly prescribed, criteria explained:

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint is to be afforded a liberal construction, the

facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable theory" … .

"[W]hen a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, that pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication" … . Here, the amended complaint does not allege that the pharmacy exercised independent professional judgment or that it did not fill the prescriptions as directed by Gibson. Nevertheless, accepting the facts as alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference, the amended complaint sufficiently alleges that the prescriptions were so clearly contraindicated that ordinary prudence required the pharmacy to take additional measures before dispensing the medication. Bistrian v Gibson, 2024 NY Slip Op 04303, Second Dept 8-28-24

Practice Point: Usually a pharmacist cannot be held liable for dispensing a duly prescribed medication (as was the case here), but the allegation that the medication was clearly contraindicated was deemed sufficient to state a cause of action for pharmacist malpractice.

AUGUST 28, 2024

SLIP AND FALL, EVIDENCE, SPOLIATION, MOTION TO STRIKE ANSWER.

PLAINTFF'S MOTION TO STRIKE DEFENDANTS' ANSWER FOR SPOLIATION OF EVIDENCE IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN CONSIDERED BY THE MOTION COURT BEFORE GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the motion court should have first considered plaintiff's (decedent's) motion to strike defendants' answer (for spoliation of evidence) before considering

defendants' motion for summary judgment (which was granted). Decedent alleged there was video footage showing the slip and fall which was overwritten 72 hours after the fall:

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" … . The Supreme Court has broad discretion in determining what, if any, sanction would be imposed for spoliation of evidence … . "The sanction of dismissal of a pleading may be imposed even absent willful and contumacious conduct if a party has been so prejudiced that dismissal is necessary as a matter of fundamental fairness" … "However, a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" … .

A defendant whose answer is stricken is "deemed to admit all traversable allegations in the complaint, including the basic allegation of liability" … , and summary judgment is warranted in favor of the plaintiff on the issue of liability upon the appropriate motion … .

Here, since the decedent's motion pursuant to CPLR 3126 to strike the defendants' answer or, in the alternative, for an adverse inference instruction at trial for spoliation of evidence sought sanctions that would impact the defendants' ability to establish, prima facie, that they were entitled to judgment as a matter of law on the issue of liability, the Supreme Court should have considered the merits of the decedent's motion before rendering a determination on the issue of liability on the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them … . Hudesman v Dawson Holding Co., 2024 NY Slip Op 04307, Second Dept 8-28-24

Practice Point: Where a plaintiff's motion can affect a defendant's ability to defend an action (here a motion to strike the answer for spoliation of evidence), that motion should be considered first, before considering a defendant's motion for summary judgment.

AUGUST 28, 2024

TAX LAW, SECRECY PROVISIONS PROHIBITED THE TAX DEPARTMENT FROM DISCLOSING CORPORATE DEFENDANTS' TAX FORMS.

ABSENT AN ORDER BASED UPON AN EXCEPTION TO THE SECRECY PROVSIONS IN TAX LAW SECTION 697, THE NYS DEPARTMENT OF TAXATION AND FINANCE WAS NOT REQUIRED TO TURN OVER TAX FORMS SUBMITTED BY THE CORPORATE DEFENDANTS IN THIS LABOR LAW ACTION TO RECOVER UNPAID WAGES AND TIPS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' subpoena demanding that the nonparty NYS Department of Taxation and Finance turn over tax forms submitted by the corporate defendants should have been quashed. The plaintiffs brought a class action to recover unpaid wages and tips pursuant to Labor Law 196-d. The relevant portion of the Tax Law prohibits disclosure of the tax forms absent an order based upon an exception in the controlling statute:

The Supreme Court should have granted that branch of the Department's motion which was to quash so much of the subpoena as sought "All Form NYS-45 for each quarter from 2009 until present submitted by or related to" the corporate defendants pursuant to Tax Law § 697 (see CPLR 2304). The Department established that it should not be required to disclose the information contained in any return filed with it, as, pursuant to Tax Law § 697(e)(1) and (2), "'[e]xcept in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful' for the [D]epartment or any of its officers to divulge the information contained in any return filed with it, and . . . it 'shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court'" … . "[A] 'proper order' is one which either effectuates the enumerated exceptions within the statute or which arises out of a case in which the report is itself at issue, as in a forgery or perjury prosecution" … . In opposition, the plaintiffs failed to identify any exceptions to the statute … or demonstrate extraordinary circumstances … . Cornejo v Rose Castle Corp., 2024 NY Slip Op 04193, Second Dept 8-14-24

Practice Point: The NYS Department of Taxation and Finance is not required to turn over tax forms pursuant to a subpoena absent a court order based upon an exception to the privacy/secrecy provisions in Tax Law section 697.

AUGUST 14, 2024

TRAFFIC ACCIDENTS, EVIDENCE, CERTIFIED BUT UNSIGNED DEPOSITION TRANSCRIPTS.

THE MOTION COURT IN THIS REAR-END TRAFFIC-ACCIDENT CASE SHOULD HAVE CONSIDERED THE CERTIFIED BUT UNSIGNED DEPOSITION TRANSCRIPTS SUBMITTED BY DEFENDANT; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AND DISMISSAL OF THE CROSS-CLAIMS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion court should have considered the deposition transcripts, which were certified but unsigned, and should have granted defendant driver's (Jara Mejia's) motions for summary judgment and dismissal of the cross-claims. Jara Mejia's car was stopped when it was struck from behind:

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" … . In support of his motion, Jara Mejia submitted, inter alia, a transcript of his deposition testimony and transcripts of the deposition testimony of the plaintiffs, Tsering, and Cruz Arce. Contrary to the Supreme Court's determination, Jara Mejia's unsigned but certified deposition transcript was admissible, "since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent" … . In addition, while the remaining deposition transcripts were also unsigned, they were certified and their accuracy was not challenged … . Thus, the deposition transcripts were admissible and should have been considered by the court on Jara Mejia's motion. Gironza v Macedonio, 2024 NY Slip Op 04306, Second Dept 8-28-24

Practice Point: Certified but unsigned deposition transcripts are admissible in support of summary judgment when submitted by the party deponent himself.

Practice Point: Certified but unsigned deposition transcripts are admissible in support of summary judgment when their accuracy is not challenged.

AUGUST 28, 2024

TRAFFIC ACCIDENTS, INNOCENT PASSENGER, SUMMARY JUDGMENT.

PLAINTIFF, AN INNOCENT PASSENGER IN THIS TRAFFIC ACCIDENT CASE, WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING, DEFENDANT'S AFFIRMATIVE DEFENSES AS AGAINST HER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff (Brizan), a passenger in a car involved in an accident, was entitled to summary judgment dismissing defendant's affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct on Brizan's part:

The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] …). Brizan demonstrated, prima facie, that she did not engage in any culpable conduct that contributed to the happening of the accident … . Husbands v City of New York, 2024 NY Slip Op 04126, Second Dept 8-7-24

Practice Point: An innocent passenger in a traffic accident is not subject to the affirmative defenses raised by the defendant against the driver of the car in which plaintiff was riding.

AUGUST 7, 2024

ZONING, CONSTITUTIONAL LAW, STANDING TO CONTEST REGULATION.

NYU SUFFICIENTLY ALLEGED AN INJURY-IN-FACT ENTITLING IT TO LITIGATE THE CONSTITUTIONALITY OF A NYC ZONING RESOLUTION PROHIBITING THE CONSTRUCTION OF CLASSROOMS AND DORMITORIES IN THE SPECIAL DISTRICT; THERE WAS A COMPREHENSIVE DISSENT (FIRST DEPT).

The First Department, over an extensive dissent, reversing Supreme Court, determined plaintiff New York University (NYU) had demonstrated an "injury in fact" which provided standing to contest the constitutionality of a New York City Zoning Regulation (ZR) prohibiting the construction of classrooms and dormitories:

NYU has sufficiently alleged an injury in fact. As stated by the Court of Appeals … , "[t]he injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention"; while this requirement "is closely aligned with [the] policy not to render advisory opinions," "standing rules should not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" … . * * *

NYU … has alleged not just an interference with its ability or abstract interest but with its actual present intentions and desires, a showing of specific plans is not a necessary additional requirement for an injury-in-fact showing. NYU's claim that it has had a long-standing and continuing interest in expanding educational uses in the Special District whose implementation has been limited by the variance requirement is further evidenced by the fact that NYU previously put one of its Special District properties to educational use after obtaining a variance. There is no valid basis for predicating the injury-in-fact showing on evidence that NYU has expended time, money and other resources developing a particular plan for the renovation or conversion of a particular Special District property to educational uses. Judicial consideration of NYU's claim seeking a declaration as to the unconstitutionality of the ZR amendment should not require that it first experience the harm it seeks to avoid by challenging the amendment. New York Univ. v City of New York, 2024 NY Slip Op 04183, First Dept 8-7-24

Practice Point: Consult this decision for an explanation of what constitutes an injury-in-fact providing a party with standing to litigate the constitutionality of a zoning provision.

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