NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
September 16 – 20, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts September 16 – 20, 2024, and Released on Monday, September 23, 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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ADMINISTRATIVE LAW, LANDLORD-TENANT, MUNICIPAL LAW.

EVEN WHERE, AS HERE, THE REVIEWING COURT WOULD HAVE DECIDED THE MATTER DIFFERENTLY, THE COURT MUST AFFIRM AN ADMINISTRATIVE AGENCY'S RULING WHICH HAS A RATIONAL BASIS; THE TWO-JUSTICE DISSENT ARGUED THE PROOF PETITIO R RESIDED WITH HIS BROTHER IN THE MITCHELL-LAMA APARTMENT WAS SUFFICIENT AND PETITIONER WAS ENTITLED TO SUCCESSION RIGHTS (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined Supreme Court should not have annulled the NYC Department of Housing Preservation and Development's (HPD) denial of petitioner's application seeking succession rights to his brother's Mitchell-Lama apartment. Even where, as here, the court reviewing an administrative agency's ruling would have decided the matter differently, the ruling must be upheld if there is a rational basis for it:

A careful review of the record shows that HPD had a rational basis to affirm the denial of petitioner's succession rights. Petitioner failed to meet his burden to produce documents that would establish his primary residence was the New York apartment. He never provided any tax returns or proof that he was not required to file, which is a necessary component of any succession rights application … . Instead, he argued for the first time in his petition that he was not required to file tax returns due to his low income. Petitioner cannot fault HPD for failing to consider an argument that was not raised before it. Matter of Mantilla v New York City Dept. of Hous. Preserv. & Dev., 2024 NY Slip Op 04484, First Dept 9-19-24

Practice Point: An administrative agency's ruling must be affirmed by the reviewing court if there is a rational basis for it, even when the reviewing court would have decided the matter differently. Here the dissent agreed with Supreme Court and argued petitioner presented sufficient proof that he resided with his brother in a Mitchell-Lama apartment and was therefore entitled to succession rights. The majority, however, upheld the city housing agency's denial of the petition.

September 19, 2024

CIVIL PROCEDURE, CONDOMINIUMS, CONTRACT LAW, EVIDENCE.

THE PRE-ANSWER MOTION TO DISMISS CERTAIN CAUSES OF ACTION BASED UPON DOCUMENTARY EVIDENCE SHOULD HAVE BEEN GRANTED; THE CAUSES OF ACTION WERE PRECLUDED BY CONTRACT PROVISIONS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined certain causes of action should have been dismissed based upon documentary evidence, i.e., the purchase agreement and warranty. The plaintiff Board of Managers sued the sponsor and developer of defendant condominium alleging defective construction in common areas:

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" … . "'A motion to dismiss a complaint pursuant to CPR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law'" … . "On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" … . "[T]he criterion is whether the proponent of [a] pleading has a cause of action, not whether he [or she] has stated one" … .

… [T]he defendants submitted, among other things, a limited warranty that had been incorporated into the purchase agreements between the sponsor and unit owners, which expressly stated, "[t]he [s]ponsor's [l]imited [w]arranty excludes all consequential, incidental, special damages and indirect damages." This documentary evidence conclusively established a defense to so much of that cause of action as sought consequential damages as a matter of law … .

… [D]efendants' motion … to dismiss the … causes of action, sounding in unjust enrichment, breach of implied housing merchant warranty, and negligence [should have been granted}. … [T]he defendants conclusively established that these causes of action are precluded by the purchase agreement and limited warranty … . Board

of Mgrs. of the 37, 39 Madison St. Condominium v 31 Madison Dev., LLC, 2024 NY Slip Op 04451, Second Dept 9-18-24

Practice Point: Here the pre-answer motion to dismiss based on documentary evidence should have been granted. The relevant causes of action were precluded by the terms of a purchase agreement and warranty.

September 18, 2024

CIVIL PROCEDURE, EVIDENCE, FORECLOSURE.

HERE DEFENDANT'S FAILURE TO UPDATE HIS ADDRESS WITH THE DMV OR USPS WAS NOT "AFFIRMATIVE CONDUCT" DESIGNED TO AVOID SERVICE OF PROCESS; THEREFORE DEFENDANT SHOULD HAVE BEEN AFFORDED A HEARING ON WHETHER HE WAS PROPERLY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a partial dissent, determined the fact that defendant did not update his address with the Department of Motor Vehicles or the United States Postal Service did not demonstrate "affirmative conduct" designed to mislead a party into serving process at an incorrect address. Here the service was by "nail and mail" and defendant contended he no longer resided at that address. Defendant was entitled to a hearing:

"A defendant may be estopped from contesting the propriety of an address where service was attempted when the defendant has engaged in 'affirmative conduct which misleads a party into serving process at an incorrect address'" … . However, as the Court of Appeals has recognized, "potential defendants ordinarily have no affirmative duty to keep those who might sue them abreast of their whereabouts" … . Thus, a defendant's mere inaction—such as failing to update his or her address with the plaintiff, the Department of Motor Vehicles (hereinafter DMV), or the United States Postal Service (hereinafter USPS)—without more, may not be equated with affirmative or deliberate conduct designed to avoid service … . Here, the defendant's failure to update his address with the plaintiff, DMV, or USPS, or to update his voting records with a new address, did not constitute "affirmative conduct" … , and such failure was insufficient to establish, without a hearing, that

the defendant should be estopped from contesting service as a matter of law … . Citimortgage, Inc. v Goldstein, 2024 NY Slip Op 04453, Second Dept 9-18-24

Practice Point: Failure to update one's address with the DMV or USPS is not affirmative conduct designed to avoid service of process, therefore defendant was not estopped from contesting service.

September 18, 2024

CIVIL PROCEDURE, JUDGES.

TO BE ENTITLED TO A CHANGE OF VENUE AS OF RIGHT, THE DEMAND MUST BE SERVED WITH THE ANSWER OR BEFORE THE ANSWER IS SERVED; TO BE ENTITLED TO A DISCRETIONAY CHANGE OF VENUE, THE MOTION MUST BE MADE PROMPTLY AFTER LEARNING OF THE GROUND FOR THE CHANGE; HERE THE MOTION SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to change venue should not have been granted. The summons indicated plaintiff's residence was the basis of venue in Kings County. Defendants did not serve a demand to change venue with their answer or before the answer was served. The motion to change venue was based upon plaintiff's deposition testimony that he lived at an address in Richmond County. The defendants were not entitled to a change of venue as of right (because the demand was not served with the answer or before the answer was served), and the defendants were not entitled to a discretionary change of venue because the motion to change venue was not made promptly after plaintiff's deposition testimony:

A demand to change venue based upon the designation of an improper county must be "served with the answer or before the answer is served" (CPLR 511[a]). Here, since no demand to change venue was served with the answer or before the answer had been served, that branch of the defendants' motion which was to change venue on the ground that the county designated was improper (see CPLR 510[1]) was untimely (see CPLR 511[a] …). Thus, the defendants were not entitled to change venue as of right, and their motion became one addressed to the Supreme Court's discretion … .

Contrary to the defendants' contention, the Supreme Court improvidently exercised its discretion in granting that branch of their motion which was to change venue, since the defendants failed to demonstrate that they moved promptly for a change of venue after the plaintiff testified at his deposition that he lived at an address in Richmond County … . Aguilar v Reback, 2024 NY Slip Op 04444, Second Dept 9-18-24

Practice Point: For a change of venue as of right the demand must be served with the answer or before the answer is served.

Practice Point: For a discretionary change of venue, the motion must be made promptly after learning of the ground for the change.

September 18, 2024

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

PLAINTIFF'S MOTION FOR LEAVE TO SERVE A SUPPLEMENTAL BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED BECAUSE IT MERELY AMPLIFIED THE ALLEGATIONS IN THE COMPLAINT AND BILL OF PARTICULARS; HOWEVER, THE NEW CAUSES OF ACTION IN THE AMENDED BILLS OF PARTICULARS WERE PROPERLY STRUCK (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this medical malpractice action should have been allowed to serve a supplemental bill of particulars which amplified the allegations in the complaint and noted that plaintiff's mislabeling an amended bill of particulars as a supplemental bill of particulars could be overlooked:

A party is entitled to amend their bill of particulars "once as of right at any time prior to filing the note of issue" … . A bill of particulars "may be used to amplify the allegations in a complaint [but] may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint" … . Nor can a bill of particulars "add or substitute a new theory or cause of action" not asserted in the complaint … .

Although the second amended bill was denominated as a "Supplemental Bill of Particulars," we may disregard the plaintiff's mistake in labeling her bill of particulars where, as here, a substantial right of a party will not be prejudiced (see CPLR 2001 …).

The Supreme Court properly granted that branch of [defendant's] motion … to strike the first amended bill, as the plaintiff alleged a new cause of action alleging malpractice and negligence in performing the knee replacement surgery, which was not previously set forth in the complaint or original bill of particulars … . Further, the court properly granted that branch of [defendant's] motion … to strike that portion of the second amended bill that alleged malpractice and negligence in the plaintiff's preoperative care, as well as malpractice and negligence in performing the knee replacement surgery, as these causes of action were not previously set forth in the complaint or original bill of particulars … . However, the court should have granted the plaintiff leave to serve a supplemental bill of particulars with respect to the allegations included in the second amended bill related to postoperative physical therapy and care, as they only served to amplify the allegations in the complaint … , and should have denied that branch of [defendant's] motion which was to preclude the plaintiff from offering evidence at trial relating to her postoperative physical therapy and care. Quinones v Long Is. Jewish Med. Ctr., 2024 NY Slip Op 04471, Second Dept 9-18-24

Practice Point: Here a motion for leave to serve a supplemental bill of particulars which only amplified the allegations in the complaint and bill of particulars should have been granted. But new causes of action included in the amended bills of particulars were properly struck.

September 18, 2024

CIVIL PROCEDURE.

FAILURE TO FILE PROOF OF SERVICE WITHIN TWENTY DAYS OF DELIVERY OR MAILING OF THE SUMMONS IS NOT A JURISDICTIONAL DEFECT WHICH DEPRIVES THE COURT OF JURISDICTION OVER THE SERVED PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the failure to file proof of service within twenty days of delivery or mailing of the summons does

not negate the validity of the service, i.e., the failure to file does not deprive the court of jurisdiction over the defendant:

"Where, as here, service was made pursuant to CPLR 308(2), 'proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later,' and 'service shall be complete ten days after such filing'" … . "Nevertheless, [t]he [*2]purpose of requiring filing of proof of service, along with the 10-day grace period, pertains solely to the time within which a defendant must answer, and does not relate to the jurisdiction acquired by service of the summons" … . * * *

… [T]he defendants failed to rebut the presumption of proper service … which was established by the plaintiff's process server's affidavit … . Contrary to the defendants' contention, the plaintiff's "failure to timely file proof of service [wa]s a mere procedural irregularity, not a jurisdictional defect" … .Palma v Apatow, 2024 NY Slip Op 04465, Second Dept 9-18-24

Practice Point: Failure to file proof of service of the summons within twenty days does not invalidate the service.

September 18, 2024

CRIMINAL LAW, EVIDENCE, JUDGES.

DEFENDANT'S MENTAL ILLNESS WARRANTED REDUCING DEFENDANT'S SENTENCE FOR ROBBERY TO THE MINIMUM, STRONG DISSENT (FIRST DEPT).

The First Department, reducing defendant's sentence to the minimum for robbery, in a full-fledged opinion by Justice Gesmer, over a strong dissent, determined defendant's (Mr. Sparks') mental illness warranted a sentence reduction:

… [C]ontinued incarceration of Mr. Sparks serves none of the objectives of criminal punishment. In order to best protect the public, Mr. Sparks must get appropriate mental health treatment to rehabilitate him to a healthier mental state. His 12 years of imprisonment has only served to exacerbate his mental difficulties. There is no reason to believe that further incarceration will rehabilitate him, and the record clearly demonstrates that Mr. Sparks needs rehabilitation, not punitive incarceration.

Treating incarceration as the default response for individuals like Mr. Sparks has outsized deleterious consequences that, ultimately, make our communities less safe. As Chief Justice Wilson noted in his concurring opinion in People v Greene, "the cycle of incarceration further destabilizes these individuals; mental health treatment in prison is costlier than community-based treatment; individuals with mental illness are at greater risk of detention in prison and extended incarceration; prison mental health resources are often inadequate; and individuals living with mental illness face greater risk of harm and abuse while behind bars" (41 NY3d 950, 954 [2024] [Wilson, J. concurring]). While Greene involved a nonserious crime, the principle remains: default incarceration for crimes caused by mental illness is antithetical to the interests of our penal system. Deterrence cannot be accomplished for a person who was delusional at the time of a crime; and punishment for a person operating under delusions is not just. People v Sparks, 2024 NY Slip Op 04488, First Dept 9-19-24

Practice Point: The court here made the point that incarceration may not be the appropriate response for the mentally ill. The court noted that it has the power to reduce a defendant's sentence for a violent crime, even when the defendant pleads guilty, based upon the defendant's mental health.

September 19, 2024

CRIMINAL LAW, EVIDENCE.

THE GRAND JURY EVIDENCE SUPPORTED THE INDICTMENT COUNTS CHARGING DEFENDANT STATE TROOPER WITH "DEPRAVED INDIFFERENCE" CRIMES STEMMING FROM HIGH-SPEED CHASES OF PURPORTED SPEEDERS WHICH RESULTED IN CRASHES AND THE DEATH OF A CHILD; THERE WAS A COMPREHENSIVE DISSENT WHICH ARGUED THE CRITERIA FOR "DEPRAVED INDIFFERENCE" WERE NOT MET (THIRD DEPT).

The Third Department, over a dissent, reversed County Court and reinstated the depraved indifference murder and first-degree reckless endangerment (which also requires "depraved indifference") counts. County Court, after reviewing the grand jury evidence, had dismissed the depraved indifference murder count and reduced the first-degree reckless endangerment counts to second degree reckless

endangerment. The charges against defendant, a State trooper, stemmed from two separate high-speed chases, about a year apart, which resulted in crashes and the death of an 11-year-old passenger. The chases began because the drivers were allegedly speeding on a highway. In one instance the driver stopped, but fled when defendant allegedly pepper-sprayed everyone in the car, including the 11-year-old. Both the majority and the dissent focused on detailed versions of the events which cannot be fairly summarized here. As an example:

The grand jury heard from witnesses that, around 11:40 p.m., defendant was "see[ing] if he could get one last ticket" before meeting his partner when he stopped an SUV for speeding. The SUV pulled over, and, as told by Tristin Goods, who was driving the SUV, along with Goods' wife, who was seated in the front passenger seat, defendant began the traffic stop by angrily and profanely accusing Goods of traveling over 100 miles per hour. An argument between defendant and Goods ensued in front of Goods' wife and two children, who tried to calm him. Witnesses testified that, after defendant stepped away upon Goods' request to summon a supervisor, defendant returned and, without warning or provocation, pepper-sprayed the passenger cabin of the SUV, and Goods' wife and two children began screaming in pain. Goods, who had shielded his eyes from the spray, fled the traffic stop; in the commotion, defendant's pepper spray canister ended up inside the passenger cabin of the SUV.

Defendant radioed that the SUV was "taking off" with his pepper spray. According to the grand jury record, defendant pursued and caught up to the SUV and, without activating his siren, intentionally rammed the back of the SUV at 130 miles per hour. Defendant radioed dispatch, however, that the SUV had "just f***ing rammed me." The collision caused the SUV to fishtail, and pieces of it fell onto the road. The SUV continued on, so defendant intentionally rammed the back of the SUV again, this time at 100 miles per hour. Defendant radioed dispatch that the SUV "rammed me again."

The second collision caused Goods to lose control of the SUV, and the SUV flipped over, coming to a stop upside down in the grass next to the Thruway with Goods, his wife and two children inside. Defendant, seeing this, radioed that a car was overturned.[FN1] Testimony established that defendant drew his gun, instructed the occupants of the SUV to put their hands out of the windows and asked repeatedly whether they possessed weapons or drugs. Defendant did not inquire if anyone inside was injured in the crash and, when Goods' 11-year-old

child could not be located, defendant did not assist him in looking for her. According to Goods, who had sustained arm, hand and head injuries, defendant "did not care." The child was later found pinned inside the wreck of the SUV, having already died from severe injuries sustained in the accident. People v Baldner, 2024 NY Slip Op 04495, Third Dept 9-19-24

Practice Point: This is a detailed, fact-specific decision, with an extensive fact-specific dissent, which should be consulted re: the legal sufficiency of evidence of a "depraved indifference" state of mind (at the grand jury stage).

September 19, 2024

CRIMINAL LAW, EVIDENCE.

THE OBSERVATIONS BY THE POLICE OF THE INTERACTIONS BETWEEN DEFENDANT AND A WOMAN WHO WAS A "KNOWN DRUG USER" PROVIDED PROBABLE CAUSE TO ARREST FOR A DRUG SALE; STRONG, EXTENSIVE DISSENT (FIRST DEPT).

The First Department, affirming the denial of defendant's suppression motion, over an extensive dissent, determined the police had probable cause to arrest defendant for a drug sale based upon their observations of the interaction between defendant and a woman, "a known drug user," outside a motel:

In determining whether probable cause exists in a drug sale case, courts must consider factors such as: "telltale signs" of a drug transaction (for example, an exchange of a glassine envelope for money); whether the area has a high incidence of drug trafficking; the police officer's "experience and training" in drug sale investigations; and "additional evidence of furtive or evasive behavior on the part of the participants" … . Another factor to consider is an officer's knowledge of a participant's past involvement in drug crimes … . Here, in a locale known for drug sales, an experienced officer witnessed a woman who was a known drug user give defendant something, saw defendant put his hands into his pants, and saw defendant touch hands with the woman. Based upon this testimony, the hearing court properly found that the officers had probable cause to arrest defendant. This peculiar interaction between defendant and the woman, under the circumstances, is not susceptible to innocent interpretation. People v Tapia, 2024 NY Slip Op 04487, First Dept 9-19-24

Practice Point: Here the police observed only body movements and did not see any identifiable objects exchanged between defendant and a woman who was "a known drug user." The police saw the defendant and the woman "touch hands" and defendant had reached inside his pants before "touching hands" with the woman. The majority concluded the police had probable cause to arrest for a drug sale. There was a strong, extensive dissent.

September 19, 2024

FAMILY LAW, JUDGES.

FAMILY COURT ACT SECTION 1028 REQUIRES THAT THE COURT EXPEDITE A HEARING ON MOTHER'S PETITION TO HAVE HER CHILDREN RETURNED TO HER; HERE THE HEARING WAS STARTED WITHIN THREE DAYS OF THE APPLICATION AS REQUIRED BUT WAS THEREAFTER ADJOURNED SEVERAL TIMES OVER A PERIOD OF MONTHS, A VIOLATION OF THE STATUTE (FIRST DEPT).

The First Department, ordering Family Court to expedite a Family Court Act Section 1028 hearing on mother's application to have her children returned to her, determined the adjournments of the continuation of the hearing over a period of months violated section 1028:

Family Court Act § 1028 "provides for an expedited hearing to determine whether a child who has been temporarily removed from a parent's care and custody should be reunited with that parent pending the ultimate determination of the child protective proceeding" … . Upon an application of a parent whose child has been temporarily removed, "[e]xcept for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned" … .

… [A]lthough the 1028 hearing commenced within three court days of the mother's application, it did not proceed expeditiously. It is currently calendared with continued hearing dates through late October 2024, at which time the infant subject children will have spent more than half their lives in foster care. … The plain language of the statute requires expediency. Family Court Act § 1028 is distinguishable from other sections of article 10 wherein those sections call for

hearings to be conducted within the Family Court's discretion … . No such discretion is provided by the plain language of Family Court Act § 1028.

Under the specific time constraints detailed by the plain language of Family Court Act § 1028 and given the potential and persistent harms of family separation, the mother is entitled to prompt judicial review of the children's removal "measured in hours and days, not weeks and months" … . Conducting this 1028 hearing over a period of 30 minutes of hearing time scheduled in March, four hours scheduled in April, three hours in May, and four hours in June cannot be deemed prompt or expeditious judicial review. Matter of Emmanuel C.F. (Patrice M. D. F.), 2024 NY Slip Op 04482, First Dept 9-19-24

Practice Point: Family Court does not have the discretion to keep adjourning a Family Court Act 1028 hearing on mother's petition to have her children returned to her. Mother is entitled, by the terms of the statute, to an expedited hearing.

September 19, 2024

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

THE FOIL REQUEST FOR THE EMAIL ADDRESSES OF ALL NEW YORK CITY EMPLOYEES PROPERLY DENIED UNDER THE CYBERSECURITY EXEMPTION (FIRST DEPT).

The First Department, affirming Supreme Court's denial of petitioner's FOIL request for the email addresses of all New York City employees, determined the information was covered by the cybersecurity exemption from disclosure under FOIL. The petitioner is a foundation which seeks to inform those city employees who are public-employee-union members of their right to opt out of union membership:

… DCAS's [NYC Department of Citywide Administrative Services'] General Counsel "articulat[ed] a particularized and specific justification for denying access" … under the cybersecurity exemption by explaining that "disclosure would create a substantial risk to the information technology infrastructure of the City of New York, including computer hardware, software, and data."

The City Cyber Command's Deputy Chief Information Security Officer further explained that disclosing "all New York City employees' email addresses would

relinquish control of the City's information technology assets and jeopardize the security of those assets and of City infrastructure" by "mak[ing] it substantially easier for threat actors to successfully attack City . . . employees" in "[p]hishing and other email-based attacks." Phishing and other confidence-based attempts at fraud prey on a target's trust. The other information sought herein concerning employee's names, titles, and other employment-related information could be used in conjunction with an email address to dupe unsuspecting targets. Of course, we do not find that the Foundation has any intention of phishing or committing any other type of fraud; it seeks to advance its mission. We note these facts only to point out the risks that can ensue from mass release of public employee contact information should the information fall into the wrong hands.

For these reasons, DCAS "articulate[d] a legitimate concern covered by the exemption"— that disclosure of email addresses could "breach or compromise [the agency's] information technology infrastructure" or enable attackers to "gain access to or manipulate information maintained by" DCAS … . Matter of Freedom Found. v New York City Dept. of Citywide Admin. Servs., 2024 NY Slip Op 04483, First Dept 9-19-24

Practice Point: Here the FOIL request for the email addresses of all NYC employees was properly denied under the cybersecurity exemption because of the possibility of "phishing and other email-based attacks."

September 19, 2024

NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

THE COVID-19 TOLLS AND THE COURT'S DELAY IN SIGNING THE ORDER TO SHOW CAUSE PROVIDED A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM IN THIS BUS ACCIDENT CASE; THE POLICE REPORT TIMELY NOTIFIED THE CITY OF THE RELEVANT FACTS; THE MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioners' motion for leave to serve a late notice of claim in this bus accident case should have been granted. The COVID-19 tolls, and the court's delay in signing the order to show

cause, provided a reasonable excuse and the police report timely notified the city of the relevant facts:

In determining whether to grant a petition for leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether "(1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits" … .

Here the petitioner demonstrated a reasonable excuse for the delay, i.e., the COVID-19 pandemic, the tolls resulting therefrom, and the delay by the Supreme Court in signing the petitioner's order to show cause.

Further, the petitioners met their burden of providing a plausible argument supporting a finding of no substantial prejudice. The happening of the accident and relevant facts were documented in a police report, and any prejudice was the result of delays resulting from the COVID-19 pandemic, not the petitioner's conduct. Matter of Ortiz v New York City Tr. Auth., 2024 NY Slip Op 04464, Second Dept 9-18-24

Practice Point: The COVID-19 tolls and the judge's delay in signing the order to show cause provided a reasonable excuse for failure to timely file a notice of claim in this bus accident case.

Practice Point: The police report provided the city with timely notice of the relevant facts. Therefore the city was not prejudiced by the late notice.

September 18, 2024

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

HERE THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE MOUND OF SNOW AND ICE WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL, WHICH ORDINARILY WOULD SUPPORT SUMMARY JUDGMENT IN FAVOR OF THE CITY; HOWEVER PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION BY PLOWING, AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this ice and snow slip and fall case raised a question of fact whether the city created the dangerous condition by creating a mound of ice and snow when plowing. The defendant city's "written notice" requirement for liability in slip and fall cases did not apply because plaintiff alleged the dangerous condition was created by the city:

"When a municipality has adopted a prior written notice law, the municipality 'cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies'" … . Where the municipality makes a prima facie showing that it lacked prior written notice of the alleged defect, "'the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality'" … .

… [T]he City established … that it did not receive prior written notice of the snow/ice mound, thereby shifting the burden to the plaintiffs to demonstrate either that a triable issue of fact existed in that regard or that one of the … exceptions applied … . … [T]he plaintiffs' submissions, including photos of the snow/ice mound and an affidavit of an expert, were sufficient to raise a triable issue of fact as to whether the City's snow plowing operations affirmatively created the snow/ice mound that allegedly caused the injured plaintiff to slip and fall … . Reynolds v City of Poughkeepsie, 2024 NY Slip Op 04472, Second Dept 9-18-24

Practice Point: A city can require written notice of a dangerous condition as a condition precedent to suing the city for a slip and fall. However, where the plaintiff raises a question of fact about whether the city created the dangerous condition, here by plowing snow, the written notice requirement does not apply.

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