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Weekly Reversal Report
September 9 – 13, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts September 9 – 13, 2024, and Posted on the New York Appellate Digest Website on Monday, September 16, 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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DEFENDANTS OFFERED A REASONABLE EXCUSE FOR DEFAULT IN THIS EVICTION ACTION, INCLUDING THE COVID-19-RELATED DELAYS; THE COVID-19 EMERGENCY RENTAL ASSISTANCE PROGRAM (CERAP) APPLIES TO EVICTION PROCEEDINGS IN SUPREME COURT, AS WELL AS HOLDOVER PROCEEDINGS IN CIVIL COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to vacate the default judgment in this eviction action should have been granted. In addition, the Second Department held the COVID-19 Emergency Rental Assistance Program (CERAP) applied to eviction actions in Supreme Court (not just to holdover proceedings in Civil Court) and remitted the matter for consideration of the merits of defendants' motion for a stay pursuant to CERAP:

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer . . . must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense" … . "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the

delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" … . Under the circumstances of this case, including the lack of prejudice to the plaintiff, the minor delay when accounting for the COVID-19-related stays, the plaintiff's failure to disclose the related holdover proceeding, and the strong public policy of resolving cases on the merits, the defendants' proffered excuse was reasonable … . In addition, the defendants demonstrated a potentially meritorious defense to the action. ZG Palmetto, LLC v Alongi, 2024 NY Slip Op 04419, Second Dept 9-11-24

Practice Point: In this eviction action, the COVID-19-related delays, the lack of prejudice to plaintiff, plaintiff's failure to disclose the related holdover proceeding, and the potentially meritorious defense warranted vacation of the default judgment.

Practice Point: The COVID-19 Emergency Rental Assistance Program (CERAP) applies to eviction actions in Supreme Court, not just to holdover proceedings in Civil Court.

SEPTEMBER 11, 2024

CORPORATION LAW, CIVIL PROCEDURE.

DESPITE THE FACT THAT THE ADDRESS FOR DEFENDANT CORPORATION ON FILE WITH THE SECRETARY OF STATE WAS INCORRECT, DEFENDANT WAS ENTITLED TO VACATE THE DEFAULT JUDGMENT ON THE GROUND DEFENDANT WAS NOT MADE AWARE OF THE ACTION IN TIME TO DEFEND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted. Defendant's address on file with the Secretary of State was incorrect and defendant alleged it did not receive actual notice of the action in time to defend. There was no evidence the failure to update the address on file with the Secretary of State was intentional, and defendant demonstrated a potentially meritorious defense:

Pursuant to CPLR 317, a party that was not personally served may defend against an action if it demonstrates that it did not have notice of the action in time to defend and that it has a meritorious defense … . "Service upon a corporation

through delivery of the summons and complaint to the Secretary of State is not 'personal delivery' to the corporation" … .

Here, the defendant established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time the summons and complaint were served was incorrect and, consequently, that it did not receive actual notice of the action in time to defend itself … . Further, "the evidence does not suggest that the defendant's failure to update its address with the Secretary of State constituted a deliberate attempt to avoid service of process" … , and there is some evidence in the record suggesting that the plaintiff had knowledge of the defendant's actual business address … . Galatro v Lake Pointe Owners, Inc., 2024 NY Slip Op 04375, Second Dept 9-11-24

Practice Point: Here defendant corporation's failure to update its address for service of process on file with the Secretary of State was deemed unintentional. The corporation's motion to vacate the default judgment on the ground it was not aware of the action should have been granted.

SEPTEMBER 11, 2024

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S BEHAVIOR BEFORE AND DURING THE TRAFFIC STOP DID NOT CREATE "REASONABLE SUSPICION" THE DEFENDANT WAS ARMED; THE FRISK AND SEIZURE OF SMALL PACKETS OF PCP FROM DEFENDANT'S SOCK WAS NOT JUSTIFIED; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a concurrence, reversing Supreme Court, determined the police, during a traffic stop, did not have "reasonable suspicion the suspect was armed" at the time defendant was frisked and small packets of PCP were seized from his sock, requiring suppression of the drugs. The concurrence argued that the evidence the officers smelled PCP provided "reasonable suspicion" sufficient to warrant a search, but, because Supreme Court did not credit that testimony, the appellate court could not consider it (the lower court's ruling on that issue was not adverse to the defendant). The facts surrounding the traffic stop and frisk are too detailed to fully summarize here:

The issue presented is … "whether the circumstances in this case support a reasonable suspicion that defendant was armed and dangerous" … , thereby justifying the level three frisk. More precisely, the issue is whether Mr. Torres's failure to produce his license and registration; his presentation as "nervous" and "fidgety"; the dark lighting under the Manhattan Bridge; the smell of PCP; and Officer McDevit's observation that the van was shaking as he approached supports, in the totality, "a reasonable view that [defendant] was armed" … .

Ultimately, the circumstances here supported, at most, a level two intrusion to gain explanatory information but not an escalation to level three. Critically, Officer Galarza testified that when he asked Mr. Torres for his license and registration, Mr. Torres was "not able to produce [them]." It was "[a]t this point" that Officer Galarza had Mr. Torres "step out of the vehicle [] for [Officer Galarza's] safety after [Officer Galarza] felt like [Mr. Torres] wasn't compliant enough" with the request. * * *

… [A]lthough Mr. Torres's failure to respond to Officer Galarza's request for his license and registration "clearly served to heightened the suspicions of the officer" … and "represented a basis for further inquiry," "it did not provide a predicate for reasonable suspicion to believe that [defendant] . . . [was] armed, thereby justifying a frisk" … . People v Torres, 2024 NY Slip Op 04442, First Dept 9-12-24

Practice Point: Here the defendant's behavior before and during the traffic stop did not raise "reasonable suspicion" that he was armed. Therefore the frisk and seizure of drugs from his sock was not justified.

Practice Point: The concurrence argued the evidence that the officers smelled drugs (PCP) warranted a search. However, because the suppression court did not credit that evidence, the appellate court could not consider it.

SEPTEMBER 12, 2024

FAMILY LAW, JUDGES, EVIDENCE.

THE RECORD DID NOT DEMONSTRATE THE PARENTS COULD NOT COMMUNICATE ABOUT THE NEEDS OF THE CHILD AND THEREFORE DID NOT SUPPORT AWARDING SOLE CUSTODY TO FATHER; THE JUDGE SHOULD NOT HAVE LEFT IT UP TO THE PARTIES TO CRAFT A PARENTING-TIME SCHEDULE; A CHILD'S TESTIMONY IN A LINCOLN HEARING HAS NO INDEPENDENT EVIDENTIARY VALUE AND MUST BE KEPT CONFIDENTIAL (THIRD DEPT).

The Third Department, reversing Family Court, determined the record did not support sole legal custody of the child by father, and the judge's delegating the arrangement of parenting time for mother was improper. In addition, the Third Department noted that statements made by the child to the court in a Lincoln hearing must remain confidential:

… [T]he record is devoid of any indication that the parties are unable to effectively communicate to meet the child's needs, or that joint legal custody has been otherwise rendered unfeasible or inappropriate … . As the record lacks support for granting the father sole legal custody, we must reverse that portion of the amended order … . …

… [P]arenting time with a noncustodial parent is presumed to be in a child's best interests, and Family Court is required to craft a schedule that allows that parent frequent and regular access to the child, unless it finds that doing so would be inimical to the child's welfare … . The court made no such finding here. Instead, Family Court improperly delegated the parenting time determination to the father, and this error requires reversal … .

… [W]e take this opportunity to remind Family Court that statements made by a child during a Lincoln hearing carry no independent evidentiary value …, and that such statements must remain confidential to protect children in custody proceedings "from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships" … . … [I]nformation shared by a child during a Lincoln hearing may serve "to corroborate other evidence adduced at a fact-finding hearing or to ascertain a child's thoughts and feelings regarding the crafting of a custodial arrangement, [but] such considerations must remain silent to ensure that the child's right to confidentiality

is protected" … . Matter of C.M. v Z.N., 2024 NY Slip Op 04427, Third Dept 9-12-24

Practice Point: Here the court noted there was no proof the parents could not communicate to meet the child's needs and, therefore, the record did not support the award of sole custody to father.

Practice Point: A parenting-time schedule must be crafted by the judge and not left up to the agreement of the parties.

Practice Point: A child's testimony in a Lincoln hearing has no independent evidentiary value and must not be revealed.

SEPTEMBER 12, 2024

FORECLOSURE, ATTORNEYS, CIVIL PROCEDURE, EVIDENCE.

IN THIS FORECLOSURE ACTION, PLAINTIFF'S COUNSEL'S AFFIDAVIT, WHICH WAS BASED SOLELY UPON READING THE COMPLAINT, DID NOT DEMONSTRATE DEFENDANT'S DEFAULT (SECOND DEPT).

he Second Department, reversing Supreme Court, determined the affidavit by plaintiff's counsel in this foreclosure action did not demonstrate defendant's default:

Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie entitlement to judgment as a matter of law through the production of the mortgage, the unpaid note, and evidence of default … . "A plaintiff may establish a payment default by an admission made in response to a notice to admit (see CPLR 3212[b]; 3123), by an affidavit from 'a person having [personal] knowledge of the facts' (CPLR 3212[b]), or by other evidence 'in admissible form'" … .

Here, in support of its motion, the plaintiff submitted the affirmation of its counsel, Jennie Shnayder, who attested to the borrower's default in payment. However, Shnayder stated that the basis of her knowledge was her review of the complaint, and she did not attest that she had personal knowledge of the defendants' alleged default in payment or annex to her affirmation any other evidence thereof in admissible form. Wilmington Sav. Fund Socy., FSB v E39 St., LLC, 2024 NY Slip Op 04417, Second Dept 9-11-24

Practice Point: A recurring evidentiary issue in foreclosure proceedings where the bank is seeking summary judgment is the sufficiency of evidence presented in the supporting affidavits. Unless the plaintiff's affiant's assertions are based on first-hand knowledge, or on business records that are attached, summary judgment is not supported.

SEPTEMBER 11, 2024

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

EVIDENCE THAT PLAINTIFF DID NOT HAVE STANDING TO FORECLOSE, SUBMITTED AFTER A JURY TRIAL AND JUDGMENT FOR THE PLAINTIFF, WARRANTED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined defendant's evidence that plaintiff did not have standing to foreclose, submitted after a jury trial and a judgment of foreclosure, raised a question of fact requiring a new trial:

The defendant cross-moved … pursuant to CPLR 4404(b) … for judgment … dismissing the complaint insofar as asserted against him, submitting evidence that Fannie Mae purchased the note subsequent to the assignment of the note to the plaintiff and prior to the commencement of this action. …

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note. Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" … . …

The evidence submitted by the defendant raised issues of fact warranting a new trial on the issue of standing, and the plaintiff does not contend that it was improper for the defendant to submit this evidence for the first time after the conclusion of the original trial … . Wendover Fin. Servs. Corp. v Steinman, 2024 NY Slip Op 04416, Second Dept 9-11-24

Practice Point: Here evidence submitted by defendant, after a jury trial and judgment for the plaintiff, raised a question of fact about whether plaintiff had

standing to foreclose requiring a new trial. Plaintiff did not object to the post-trial submission.

SEPTEMBER 11, 2024

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

IN THIS FORECLOSURE ACTION, PLAINTIFF'S AFFIANT DID NOT HAVE FIRST-HAND KNOWLEDGE OF THE MAILING PRACTICES OF THE PARTY RESPONSIBLE FOR MAILING THE RPAPL 1304 NOTICE OF FORECLOSURE TO THE DEFENDANT; JUDGMENT OF FORECLOSURE REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff in this foreclosure action did not prove the 90-day notice of foreclosure required by RPAPL 1304 was mailed to the defendant, a failure of proof which has been the ground for hundreds of reversals spanning many years:

… [P]laintiff proffered the affidavit of Trey Cook, a document execution specialist employed by the plaintiff's loan servicer, Nationstar Mortgage, LLC (hereinafter Nationstar), which was insufficient to establish compliance with RPAPL 1304. While Cook averred that he had personal knowledge of Nationstar's business records and further averred that according to the business records he reviewed, 90-day notices were served via certified and first class mail at the mortgaged premises and last known address of the borrower, he did not attest that he was familiar with the standard office mailing procedures of Walz Group, Inc. (hereinafter Walz), the third-party vendor that apparently sent the RPAPL 1304 notices on behalf of the plaintiff. Thus, Cook's affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed … . Further, Cook's affidavit failed to address the nature of Nationstar's relationship with Walz and whether Walz's records were incorporated into Nationstar's own records or routinely relied upon in its business … . Thus, Cook's affidavit failed to lay a foundation for the admission of a transaction report generated by Walz (see CPLR 4518 [a] …). Finally, the tracking numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima

facie, proper mailing under RPAPL 1304 … . Deutsche Bank Natl. Trust Co. v Palomaria, 2024 NY Slip Op 04374, Second Dept 9-11-24

Practice Point: In yet another reversal on this ground, plaintiff in this foreclosure action did not produce an affiant with first-hand knowledge of the mailing practices of the party responsible for mailing the RPAPL 1304 ninety-day notice of foreclosure to the defendant. Therefore the judgment of foreclosure was reversed.

SEPTEMBER 11, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

HERE PLAINTIFF DID NOT IDENTIFY AN EXPERT WITNESS AS REQUIRED BY CPLR 3101 AND THE MEDICAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; HOWEVER PLAINTIFF ALLEGED SCARRING AND BURNING DURING LASER HAIR REMOVAL AND MAY STILL BE ABLE TO PROVE ORDINARY NEGLIGENCE THROUGH THE TESTIMONY OF HIS TREATING PHYSICIAN AND OTHER EVIDENCE; THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although plaintiff was precluded from offering expert evidence and therefore could not prove medical malpractice, the negligence cause of action should not have been dismissed. Plaintiff alleged scarring and burns caused by laser hair removal:

The Supreme Court erred in dismissing the negligence cause of action on the ground that the plaintiff could not establish a prima facie case in the absence of the testimony of an expert witness. At trial, the plaintiff may, through the testimony of his treating physician, records, or "other evidence," be able to establish "the standard of care in performing laser hair removal and the known risks of the procedure" … . Therefore, contrary to the court's determination, although the plaintiff is precluded from offering the testimony of an expert witness whose identity must be disclosed pursuant to CPLR 3101(d)(1)(i), at this juncture, it cannot be determined that the plaintiff will be unable to establish a prima facie case

of negligence … . Mishli v Advanced Dermatology Laser & Cosmetic Surgery, P.C., 2024 NY Slip Op 04386, Second Dept 9-11-24

Practice Point: In this case alleging scarring and burning during laser hair removal, the dismissal of a medical malpractice cause of action because the identity of an expert witness has not been disclosed did not necessarily preclude a negligence cause of action proven by the testimony of plaintiff's treating physician.

SEPTEMBER 11, 2024

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THE MALPRACTICE ACTION WAS AGAINST EMERGENCY-ROOM PHYSICIANS WHO TREATED PLAINTIFF'S DECEDENT'S GUNSHOT WOUNDS; PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT DEMONSTRATE ANY FAMILIARITY WITH EMERGENCY MEDICINE AND THEREFORE DID NOT RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' summary judgment in this medical malpractice action should have been granted because the expert affidavit offered in opposition was deemed "conclusory" and insufficient to raise a question of fact. Plaintiff's decedent died from three gunshot wounds. Plaintiff's expert did not demonstrate any familiarity with the practice of emergency medicine:

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . "'Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered'" … .

Here, the plaintiff submitted an affirmation of a physician who engaged in the private practice of internal medicine and cardiology. However, the affirmation did not indicate that the physician had training in emergency medicine or what, if anything, the physician did to become familiar with the standard of care for this specialty … . Furthermore, the affirmation was conclusory, speculative, and

unsupported by the evidence … . Thus, the plaintiff failed to raise a triable issue of fact. Quinones v Winthrop Univ. Hosp., 2024 NY Slip Op 04406, Second Dept 9-11-24

Practice Point: Here plaintiff's expert did not demonstrate any familiarity with emergency medicine. Plaintiff's decedent died from gunshot wounds. Plaintiff's expert's affidavit was deemed "conclusory" and insufficient to raise a question of fact.

SEPTEMBER 11, 2024

NEGLIGENCE, EVIDENCE.

DEFENDANT IN THIS SLIP AND FALL CASE PROVED THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS INSPECTED (AT MOST) AN HOUR AND TEN MINUTES BEFORE THE FALL; THAT PROOF WAS SUFFICIENT TO AWARD DEFENDANT SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case proved it did not have actual or constructive notice of the food on the floor where plaintiff slipped and fell. Defendant's motion for summary judgment should have been granted:

… [T]he defendant established, prima facie, that it did not create or have actual or constructive notice of the condition alleged by the plaintiff to have caused the accident. In support of its motion, the defendant submitted, inter alia, the deposition testimony of its employee, as well as the "Daily Floor-walk / Safety Inspection" record for the day of the incident, which demonstrated that the area in question was last inspected between 2:47 p.m. and 3:40 p.m. on the date of the accident and that no hazardous condition was found in that location … . The employee testified that if he had observed any hazardous condition on the floor, he would have immediately cleaned it … . In opposition, the plaintiff failed to raise a triable issue of fact. Arbit v Costco Wholesale Corp., 2024 NY Slip Op 04366, Second Dept 9-11-24

Practice Point: This is a rare decision which gives some insight into how a defendant can prove a lack of constructive notice of a dangerous condition, here

food on the floor, which is alleged to have caused a slip and fall. Defendant produced a "Daily Floor-walk/Safety Inspection" record and employee testimony showing the area was inspected, at most, an hour and ten minutes before the alleged slip and fall.

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