NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
October 14 – 18, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts October 14 – 18, 2024, and Posted on the New York Appellate Digest Website on Monday, October 21, 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, MEDICAID.

THE NYS DEPARTMENT OF HEALTH'S (DOH'S) UPDATED GUIDELINES WHICH PROHIBIT PHYSCIANS WHO TREAT CANCER PATIENTS FROM DISPENSING MEDICATIONS WHICH ADDRESS THE SIDE EFFECTS OF CANCER TREATMENTS ARE "IRRATIONAL" (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, determined the NYS Department of Health's (DOH's) definition of "oncological protocol" was irrational. The petitioner provides physician-care to cancer patients, including Medicaid recipients. Physicians who provide care to cancer patients can dispense medications (72-hour supplies) pursuant to the DOH's "oncological protocol." In the past, petitioner was dispensing medications which addressed the side effects of cancer treatments, including nausea, pain, vitamins, antibiotics and antipsychotics. Under the 2021 update to the DOH's guidelines, the oncological protocol no longer covered medications which address the side effects of cancer treatments. That update was deemed "irrational" by the Third Department:

The record before us is replete with evidence of industry guidelines and authoritative medical literature strongly suggesting that respondents' definition may inhibit the provision of adequate healthcare to oncology patients. This includes evidence of the need for ancillary or concomitant administration of medications presumably excluded from the definition in order to enhance the effects of cancer treatments and/or prevent fatal complications arising therefrom. That evidence also clearly contemplates supportive care medications being administered as part of cancer treatment regimens in order to address the often debilitating side effects of such treatment. Given the complete absence of any medical basis for the line drawn here, and guided by the Legislature's intent to ensure that its general prohibition against prescriber-dispensing did not unreasonably impede the provision of adequate healthcare services in the context of oncology, we cannot find that the definition of oncological protocol before us is rational. Matter of North Shore Hematology-Oncology Assoc., P.C. v New York State Dept. of Health, 2024 NY Slip Op 05165, Third Dept 10-17-24

Practice Point: Here the Third Department deemed the Department of Health's guideline which prohibited physicians who treat cancer patients from dispensing

medications which address the side effects of cancer treatments "irrational" and therefore unenforceable.

October 17, 2024

ATTORNEYS, CIVIL PROCEDURE, JUDGES, NEGLIGENCE.

DEFENDANTS FAILED TO MOVE FOR A MISTRIAL BASED ON PLAINTIFF'S COUNSEL'S ALLEGED BEHAVIOR PRIOR TO THE VERDICT; THE ALLEGED BEHAVIOR WAS NOT SO WRONGFUL OR PERVASIVE AS TO JUSTIFY SETTING ASIDE THE VERDICT IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the motion to set aside the verdict based on the conduct of plaintiff's counsel should have been denied because (1) no motion for a mistrial was made before the verdict, and (2) counsel's behavior was not so wrongful and pervasive as to justify setting aside the verdict in the interest of justice. Allegedly, plaintiff's daughter was raped by defendants' son, in defendants' house, during a sleep over. It was alleged defendants were aware of the danger posed by their son:

Although some of counsel's comments may have been objectionable, because defendants did not move for a mistrial their "argument respecting these remarks [was] not preserved" … . Nor, in our opinion, have defendants shown this to be "the rare case in which the misconduct of counsel for the prevailing party was so wrongful and pervasive as to constitute a fundamental error and a gross injustice warranting the exercise of the trial court's discretionary power under CPLR 4404 (a) to set aside a verdict in the interest of justice" … . Accordingly, Supreme Court erred in granting defendants' posttrial motion to set aside the verdict in the interest of justice. Lisa I. v Manikas, 2024 NY Slip Op 05164, Third Dept 10-17-24

Practice Point: To address objectionable courtroom behavior of opposing counsel, a motion for a mistrial should be made before the verdict.

Practice Point: A post-verdict motion to set aside the verdict based upon opposing counsel's courtroom behavior should not be granted absent "misconduct so wrongful and pervasive as to constitute a fundamental error and a gross injustice."

October 17, 2024

CIVIL PROCEDURE, CONTRACT LAW, MEDICAID, ADMINISTRATIVE LAW.

A NURSING HOME CAN BRING A PLENARY ACTION SOUNDING IN BREACH OF CONTRACT AGAINST THE AGENCY WHICH DENIED MEDICAID COVERAGE FOR A RESIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff nursing home (Kings Harbor) properly brought a plenary action against the agency which denied Medicaid coverage for a resident. Plaintiff's remedy was not limited to bringing an Article 78 proceeding on behalf of the resident. The action against the agency properly sounded in breach of contract:

"It is well established that a nursing home may, as here, bring a plenary action in its own right against the agency designated to determine Medicaid eligibility" … . The plaintiff's "private financial interest in recovering expenditures rendered creates a relationship of purchaser and seller, thereby permitting it to bring a plenary action in its own right against the governmental agency designated to declare eligibility" … .

Furthermore, the plaintiff is not bound by the resident's failure to exercise his separate right to an administrative appeal of the denial of Medicaid benefits … . Thus, the authorizations executed by the resident allowing the plaintiff to represent him "in all matters pertaining to [his] Medicaid Assistance application and follow up activities" did not impair the plaintiff's right to commence its own plenary action independent from the pursuit of administrative review … .

"[I]nasmuch as [the] plaintiff was not bound by the administrative determination denying the [resident's] application for medical assistance, and has commenced a plenary action in its own right, [the] plaintiff is not bound by the four-month Statute of Limitations contained in CPLR 217" … . * * *

… [T]he purchaser/seller relationship between a nursing home provider and the governmental agency designated to declare Medicaid eligibility is construed as a contractual relationship, the alleged breach of which gives rise to a breach of contract cause of action … . Kings Harbor Multicare Ctr. v Townes, 2024 NY Slip Op 05093, Second Dept 10-16-24

Practice Point: An action by a nursing home against the agency which denied Medicaid coverage for a resident sounds in breach of contract and is properly brought as a plenary action, not as an Article 78 proceeding.

October 16, 2024

CONTRACT LAW, EMPLOYMENT LAW.

THE WARRANT ENTITLING PLAINTIFF TO MORE THAN 1100 SHARES OF DEFENDANT CORPORATION'S STOCK WAS APPENDED TO PLAINTIFF'S EMPLOYMENT CONTRACT WITH DEFENDANT; THE TWO CONTRACTS DID NOT MERGE AND ANY ALLEGED BREACH OF THE EMPLOYMENT CONTRACT BY PLAINTIFF DID NOT PRECLUDE THE ENFORCEMENT OF THE WARRANT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, affirming Supreme Court, determined that the Warrant was a separate contract entitling plaintiff to 1,148 shares of defendant corporation, SPI. SPI argued the Employment Contract and the Warrant merged forming a single contract and plaintiff's breach of the Employment Contract precluded recovery on the Warrant. The First Department held that the fact that the Employment Contract was appended to the Warrant was not enough to demonstrate the two contracts merged:

SPI argues that appending the Employment Agreement to the Warrant demonstrates integration of the two agreements, or at a minimum raises a factual issue, relying on Starr Indem. & Lia. Co. v Brightstar Corp. (388 F Supp 3d 304 [SD NY 2019]). The argument is unavailing because it is based on a misreading of Starr Indemnity. That decision held that, to incorporate a document into another agreement, "[n]o particular mode of reference is necessary for that purpose; any language which indicates the intent that the two shall make one instrument, or a physical annexing of the one to the other, in a manner or under circumstances [*6]showing clearly such intent, is sufficient" … . SPI overlooks the element of intent in its argument, basing its position solely on the fact that the Employment Agreement is attached to the Warrant. The mere fact that the Employment Agreement is appended to the Warrant is insufficient, standing alone, to demonstrate incorporation. Absent from the Warrant is any contractual language indicating a clear and unequivocal intent to incorporate and integrate the

Employment Agreement. Instead, the Warrant simply states without qualification that plaintiff and SPI had entered into the annexed Employment Agreement, and fails to set forth any language providing for integration of the two agreements … . O'Connor v Society Pass Inc., 2024 NY Slip Op 05141, First Dept 10-17-24

Practice Point: The fact that one contract is appended to another, standing alone, is not enough to demonstrate the two contracts merged or were integrated.

October 17, 2024

CRIMINAL LAW, ATTORNEYS.

THE DELAY IN PRODUCING THE DEFENDANT FOR ARRAIGNMENT AFTER THE PEOPLE BECAME AWARE HE WAS IN CUSTODY WAS ATTRIBUTABLE TO THE PEOPLE (A "CONTRADICTORY HOLDING" BY THE FOURTH DEPARTMENT WAS NOTED); DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO DISMISS ON SPEEDY TRIAL GROUNDS; INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the indictment, determined the People were not timely ready for trial and defense counsel was ineffective for failing to move for dismissal on "speedy trial" grounds:

… [T]he People became aware that defendant was in the custody of DOCCS at the May 13, 2019 appearance, and they requested to have the arraignment adjourned to "May 28th, as soon as we can get [defendant] from downstate." Yet, the record reflects that the People engaged in no efforts to have defendant produced until May 29, when they filed their application pursuant to CPL 560.10, and we reject their generic assertion that this constituted diligent and reasonable efforts … . The People could not proceed to trial without having first arraigned defendant and because the delay was caused by the People's own inaction, the 16 days from May 13 through May 29 are chargeable to the People, thus exceeding the seven days remaining on the speedy trial clock. As such, we conclude that the People were not ready for trial within the applicable six-month statutory period … .

Having concluded that defense counsel failed to make a meritorious speedy trial motion, we must determine whether this failure, alone, was so egregious and prejudicial as to amount to ineffective assistance … . We reject the People's

contention that this speedy trial motion involved the resolution of various novel and complex issues … , as it has long been settled in this Department that CPL 560.10 (1) (a) imposes upon the People a "responsibility to petition the trial court for an order producing defendant for 'arraignment or prosecution' " … — a principle which is not diminished by the Fourth Department's contradictory holding in People v Taylor (57 AD3d at 1518-1519 …). As such, and noting that the timeline underlying the speedy trial analysis is uncontroverted, we find that defendant was denied meaningful representation due to defense counsel's failure to pursue a meritorious speedy trial motion and, thus, his motion to vacate should have been granted … .. Lastly, as the time to prosecute defendant under this indictment has expired, the indictment must be dismissed. People v Shuler, 2024 NY Slip Op 05154, Third Dept 10-17-24

Practice Point: In the Third Department [but apparently not in the Fourth Department (People v Taylor (57 AD3d at 1518-1519)?] any delay in producing a defendant for arraignment after the People become aware the defendant is in custody is attributable to the People.

Practice Point: Defense counsel's failure to move to dismiss on speedy-trial grounds is ineffective assistance.

October 17, 2024

CRIMINAL LAW, ATTOTRNEYS, EVIDENCE.

AFTER TWO MENTIONS OF THE POSSIBLE NEED FOR AN ATTORNEY WHICH DID NOT AMOUNT TO AN UNEQUIVOCAL REQUEST, THE DEFENDANT STATED "THAT'S WHAT I WANT A LAWYER FOR," HE WAS "SCARED TO TALK," AND HE "COULD STILL COOPERATE LATER;" THOSE STATEMENTS SHOULD HAVE BEEN UNDERSTOOD BY THE POLICE AS A REQUEST FOR COUNSEL (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined statements made by defendant after he invoked his right to counsel should have been suppressed:

In the course of the investigators' questioning of defendant, they transitioned away from asking defendant about his flight from the police and turned to the underlying

domestic violence incident. When they began focusing on how he had first encountered the victim earlier that morning, defendant expressed that he did not wish to discuss that subject. After the investigators continued with a couple of follow-up questions on this topic, defendant stated, "that's what I want a lawyer for." He then went on to say that he was scared to talk and noted that he could still cooperate with the District Attorney at a later time.

… [We conclude that defendant clearly invoked his right to counsel. Although the first two alleged invocations … did not constitute requests for an attorney, they nevertheless serve to indicate that the subject of obtaining a lawyer was on defendant's mind while he was being questioned. … [O]nce the interrogation moved to the underlying incident, defendant "articulated his desire to have counsel present such that a reasonable police officer should have understood that he was requesting an attorney" … . Accordingly, any statements made by defendant thereafter should have been suppressed … . People v Lipka, 2024 NY Slip Op 05153, Third Dept 10-17-24

Practice Point: Defendant's statements "that's what I want a lawyer for," he was "scared to talk," and he "could still cooperate later" constituted an unequivocal request for counsel. Statements made thereafter should have been suppressed.

October 17, 2024

CRIMINAL LAW, EVIDENCE, APPEALS.

IN THIS "ATTEMPTED CRIMINAL POSSESSION OF A WEAPON" AND "FALSIYFING BUSINESS RECORDS" PROSECUTION, THE PEOPLE DID NOT PROVE DEFENDANT WAS SUBJECT TO A RESTRAINING ORDER ISSUED AFTER A HEARING OF WHICH HE HAD NOTICE AND IN WHICH HE COULD HAVE PARTICIPATED; THEREFORE THE PEOPLE DID NOT PROVE HIS ANSWERING "NO" TO THE QUESTION WHETHER HE WAS SUBJECT TO A RESTRAINING ORDER WAS FALSE; CONVICTIONS REVERSED (THIRD DEPT).

The Third Department reversed defendant's "attempted criminal possession of a weapon" and "falsifying business records" convictions as against the weight of the evidence. Defendant, when attempting to purchase a shotgun, answered "no" to the

question whether he was subject to a court order. Although restraining orders were produced by the People, there was no proof any restraining order "was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate" as required by 18 USC 922 (g) (8) (an element of the charged offenses):

… [T]he People failed to prove beyond a reasonable doubt that defendant attempted to buy a shotgun knowing his possession of same was "prohibited by law" (Penal Law § 265.17 [1]). People v Rock, 2024 NY Slip Op 05162, Third Dept 10-17-24

October 17, 2024

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE SHOULD NOT HAVE SUMMARILY DENIED DEFENDANT'S REQUEST TO REPRESENT HIMSELF WITHOUT CONDUCTING A COLLOQUY TO DETERMINE THE WAIVER WAS VOLUNTARY AND INTELLIGENT; THE INFORMATION IN THE WARRANT DID NOT PROVIDE PROBABLE CAUSE TO SEARCH DEFENDANT'S CELL PHONE, CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing the conviction and ordering a new trial, determined the judge should not have summarily denied defendant's request to represent himself and the motion to suppress evidence retrieved from the defendant's cell phone should have been granted:

A court may not summarily deny a defendant's request to represent himself or herself, even if the court believes it to be in the defendant's best interest to be represented by counsel … . Once defendant made his request, which was unequivocal and timely, County Court was required to conduct a colloquy to determine whether he was making a voluntary and intelligent waiver of his right to counsel … . * * *

… [T]he warrant was supported by [the investigator's] affidavit, which stated that he believed the phones "may" contain digital data, including call histories, that would evidence the commission of criminal possession of a controlled substance in the third degree. However, the statute requires that a statement of reasonable cause

based upon information and belief must also state "the sources of such information and the grounds of such belief" (CPL 690.35 [3] [c]), which was lacking here. Stated differently, even where there is probable cause to suspect the defendant of a crime, law enforcement may not search his or her cell phone unless they have information demonstrating that evidence is likely to be found there; some link sufficient to connect the two must be provided. Our review of the affidavit of probable cause in this case reveals no such link. People v Poulos, 2024 NY Slip Op 05152, Third Dept 10-17-24

Practice Point: A defendant's request to represent himself should not be summarily denied. The judge must conduct a colloquy to ensure the waiver of the right to counsel is voluntary and intelligent.

Practice Point: Here the search warrant did not demonstrate probable cause to believe the search of defendant's cell phone would reveal evidence of criminal possession of a controlled substance.

October 17, 2024

CRIMINAL LAW, JUDGES, EVIDENCE.

DEFENDANT HAD A RIGHT TO BE PRESENT DURING THE SANDOVAL/MOLINEUX DISCUSSIONS OF THE ADMISSIBILITY OF HIS PRIOR CONVICTIONS; THE FACT THAT THE JUDGE ANNOUNCED HIS SANDOVAL/MOLINEUX RULINGS IN THE DEFENDANT'S PRESENCE WAS NOT ENOUGH; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, reversing defendant's conviction, in a full-fledged opinion by Judge Rivera, determined defendant had a right to be present during the Sandoval/Molineux discussions concerning the admissibility of defendant's prior convictions. The fact that the judge announced his rulings in defendant's presence was not enough:

We reverse defendant's conviction and grant him a new trial. The trial court held a conference in defendant's absence on the prosecution's motion to cross examine him on his prior criminal conduct, in violation of his right to be present (see CPL 260.20 …). The court held a subsequent hearing on the motion in defendant's presence. However, the court did not hear arguments on the merits, did not confirm

defendant's understanding of the underlying facts or the merits of the application, and merely announced its decision. Thus, the subsequent proceeding did not provide for defendant's meaningful participation in the determination of the merits of the motion and did not cure the earlier violation. People v Sharp, 2024 NY Slip Op 05132, CtApp 10-17-24

Practice Point: Defendant's right to be present at trial includes the right to be present during the arguments about the admissibility of defendant's prior convictions under Sandoval/Molineux. Defendant's presence when the judge announced the Sandoval/Molineux rulings is not sufficient.

October 17, 2024

CRIMINAL LAW, JUDGES, EVIDENCE.

THE DENIAL OF DEFENDANT'S REQUEST FOR AN INTOXICATION JURY INSTRUCTION WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the denial of defendant's request for the intoxication jury instruction was reversible error:

… County Court improperly refused to instruct the jury as to the defense of intoxication. "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" … . The charge should be given when there is "evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent" … . It is true that more is required than "a bare assertion by a defendant that he was intoxicated," but the threshold to demonstrate entitlement to the charge is nevertheless "relatively low" … . We find that the evidence presented at trial regarding defendant's consumption of alcohol during the afternoon and evening on the date in question easily surpassed this low bar. People v Smith, 2024 NY Slip Op 05158, Third Dept 10-17-24

Practice Point: The evidence of defendant's consumption of alcohol was more than sufficient to warrant instructing the jury on the intoxication defense.

October 17, 2024

CRIMINAL LAW, JUDGES, EVIDENCE.

THE DENIAL OF DEFENDANT'S REQUEST FOR A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, reversing the conviction and ordering a new trial, determined the denial of defendant's request for a cross-racial identification jury instruction was reversible error:

As held by the Court of Appeals in People v Boone (30 NY3d 521 [2017]), "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification" … . Here, at the close of proof, defendant requested that the jury be given a cross-racial identification instruction pursuant to Boone. County Court denied his request noting, among other things, that in the present case, the identifying witness … knew defendant. County Court, however, misinterpreted the Boone standard and erred in denying defendant's request for a cross-racial identification jury instruction upon defendant's request for same … . People v Alexander, 2024 NY Slip Op 05160, Third Dept 10-17-24

Practice Point: Where the witness who identifies the defendant as the perpetrator and the defendant appear to be of different races, defendant's request for a cross-racial identification jury instruction must be granted.

October 17, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, ATTORNEYS.

DEFENSE COUNSEL'S REQUEST FOR AN ADJOURNMENT OF THE SORA RISK-LEVEL PROCEEDING TO ALLOW REVIEW OF DOCUMENTS WHICH MAY BE RELEVANT TO A DOWNWARD DEPARTURE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing County Court and ordering a new SORA risk-level assessment, determined defendant's attorney's request for an adjournment to

allow review of documents relevant to a downward departure should have been granted:

… County Court improvidently exercised its discretion when it denied the defendant's request for an adjournment. The defendant's open release date two days after the hearing was not a sufficient reason to deny the defendant's request for an adjournment (see Correction Law § 168-l[8]). Further, the documents discussed by the defendant, including documents relating to his participation in treatment programs, may be relevant to support an application for a downward departure from his presumptive risk level. "A defendant seeking a downward departure from the presumptive risk level has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the . . . Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence'" … . "In making the determinations the court shall review . . . any relevant materials and evidence submitted by the sex offender" … . "An offender's response to treatment, if exceptional, can be the basis for a downward departure" … . As the documents cited by the defendant were potentially material, the adjournment request was not made for the purposes of delay, and the necessity of the request was not due to a failure of due diligence, the court should have granted the request to adjourn the SORA hearing so that the defendant's counsel could review the documents and determine whether they should be offered to the court as evidence at the hearing. People v Eldridge, 2024 NY Slip Op 05117, Second Dept 10-16-24

Practice Point: Here defense counsel's request for an adjournment of the SORA risk-level proceeding to allow review of documents which may be relevant to a downward departure should have been granted. Defense counsel was not able to meet with the defendant until 15 minutes before the hearing, the request was not made to delay, and the fact that defendant had an upcoming open release date was not a sufficient reason to deny an adjournment.

October 16, 2024

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

TENURED TEACHERS WERE NOT ENTITLED TO A HEARING BEFORE BEING PLACED ON LEAVE BECAUSE THEY DID NOT SUBMIT PROOF OF VACCINATION AGAINST COVID; HEARINGS ARE REQUIRED IN DISCIPLINARY PROCEEDINGS, BUT NOT WHERE, AS HERE, TEACHERS FAIL TO COMPLY WITH A CONDITION OF EMPLOYMENT (CT APP).

The Court of Appeals, affirming the dismissals of the tenured New York City teachers' petitions, determined the teachers were properly placed on leave without pay for failing to submit proof of vaccination against COVID. The petitioners' argument that they were entitled to a hearing pursuant to the Education Law prior to being placed on leave was rejected because the teachers were not being disciplined. Rather, they failed to comply with a condition of employment:

Petitioners were not entitled to the hearing procedures outlined in Education Law §§ 3020 and 3020-a before being placed on leave without pay. These statutory provisions establish a detailed and comprehensive system for conducting disciplinary hearings for tenured teachers. While tenured teachers have a right to these statutory hearings when faced with disciplinary proceedings, these provisions are not applicable to petitioners, who were placed on leave without pay for failure to comply with the vaccine mandate, a condition of employment.

This Court has long distinguished between disciplinary proceedings and employment conditions for employees entitled to statutory civil service protections, and has held that statutory hearings are not warranted when employment eligibility conditions are enforced … . Matter of O'Reilly v Board of Educ. of the City Sch. Dist. of the City of N.Y., 2024 NY Slip Op 05130, CtApp 10-17-24

Practice Point: The Education Law requires hearings before tenured teachers can be disciplined. But no hearing is required before placing teachers on leave for failure to comply with a condition of employment (here the submission of proof of vaccination against COVID).

October 17, 2024

EMPLOYMENT LAW, HUMAN RIGHTS LAW, LABOR LAW, MUNICIPAL LAW.

PLAINTIFF'S SUIT AGAINST HIS EMPLOYER UNDER THE WHISTLEBLOWER LAW (LABOR LAW 740) SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE AMENDMENTS TO THE STATUTE APPLY RETROACTIVELY TO PLAINTIFF'S ALLEGATIONS; PLAINTIFF'S AGE-DISCRIMINATION CAUSES OF ACTION UNDER THE STATE AND NYC HUMAN RIGHTS LAW SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined amendments to the Whistleblower Law (Labor Law 740) applied retroactively. Therefore plaintiff could sue based upon events which preceded the amendments. In addition, the First Department held plaintiff's age-discrimination claims pursuant to the state and NYC Human Right Law should not have been dismissed:

Plaintiff states that he made numerous complaints to management at the hotel where he was employed. He complained that the windows lacked safety bars and were left wide open, that a fire exit was blocked by flammable materials, and that the hotel lacked permits for construction work. Plaintiff was later terminated. Because plaintiff failed to prove that an actual violation had occurred, his claim for retaliation would not have withstood summary judgment under the Whistleblower Law in effect at the time … . The Whistleblower Law has since been amended in this respect. It now covers activity "that the employee reasonably believes" violates law or poses a danger to the public (Labor Law § 740 [2] [a] …). …

We now find that the Whistleblower Law has retroactive application because the amendment at issue was remedial in nature … . * * *

… [P]laintiff submitted evidence that the hotel's general manager, who participated in the decision to terminate plaintiff, told front desk managers about a plan to fill front desk positions "with young and attractive individuals," naming as examples two front desk agents in their twenties. The hotel's list of front desk employees hired between 2006 and 2012 shows that plaintiff was the oldest and that the two most recent hires were decades younger.

Plaintiff's evidence that the hotel had twice attempted to terminate him for reasons found by arbitrators to be unsubstantiated, failed to interview him about the incident giving rise to his third termination, and prohibited testimony favorable to him from being offered at his third arbitration, as well as evidence that the arbitrator found plaintiff's grievance to be a close case, could lead a reasonable jury to conclude that defendants' proffered reason for the termination was "false, misleading, or incomplete" … . Therefore, the evidence supports an inference of age discrimination sufficient to reach a jury … . Spiegel v 226 Realty LLC, 2024 NY Slip Op 05076, First Dept 10-15-24

Practice Point: The amendments to the Whistleblower Law (Labor Law 740) were found by the First Department to apply retroactively to plaintiff's allegations.

Practice Point: Plaintiff made out a prima facie case of age-discrimination under the state and city Human Rights Law.

October 15, 2024

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE, APPEALS.

FAMILY COURT'S RULING THAT A MASSACHUSETTS COURT WAS THE MORE CONVENIENT FORUM FOR THIS CUSTODY MATTER WAS NOT SUPPORTED BY EXPLICIT REFERENCE TO THE STATUTORY FACTORS OR ANY TESTIMONY OR SUBMISSIONS BY THE PARTIES; THE RECORD WAS THEREFORE INSUFFICIENT FOR APPELLATE REVIEW AND THE MATTER WAS REMITTED (THIRD DEPT).

The Third Department, reversing Family Court's ruling that a Massachusetts court was the most convenient forum for this custody matter, determined Family Court's failure to place on the record the factors it considered in making its ruling, combined with absence of any testimony, rendered the record inadequate for review, requiring remittal:

"Where, as here, a New York court has continuing jurisdiction over a custody matter, it may decline to exercise such jurisdiction if it determines that New York is an inconvenient forum and that another state is a more appropriate forum" … . A court is obliged to consider eight statutory factors in rendering that determination, and "[t]hose statutory factors include (1) 'whether domestic violence or

mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child,' (2) the length of time the children have resided in another state, (3) the distance between the two states in question, (4) the relative financial circumstances of the parties, (5) any agreement among the parties regarding jurisdiction, (6) the nature and location of relevant evidence, including testimony from the children, (7) the ability of each state to decide the issue expeditiously and the procedures necessary to present the relevant evidence, and (8) the familiarity of each court with the relevant facts and issues" (… Domestic Relations Law § 76-f [2] [a]). Notably, the "determination depends on the specific issues to be decided in the pending litigation, and must involve consideration of all relevant factors, including those set forth in the statute" … .

… Family Court did not explicitly refer to the statutory factors during its conference with the Massachusetts court, which was essentially a back-and-forth between the judges on issues that included the language of the prior custody orders, the nature of the cases presently before them and the differences between New York and Massachusetts laws governing custody proceedings. The parties were not invited to, and did not, offer any testimony regarding the relative convenience of the two forums. Matter of Mark AA. v Susan BB., 2024 NY Slip Op 05173, Third Dept 10-17-24

Practice Point: Here Family Court did not make an adequate record to support its ruling that a Massachusetts court was the more convenient forum for this custody matter. There were no submissions by the parties and there was no testimony. The statutory factors were not explicitly referenced. The matter was remitted.

October 17, 2024

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE BANK FAILED TO PROVE STANDING TO FORECLOSE BECAUSE THE NECESSARY BUSINESS RECORDS WERE NOT ATTACHED TO THE FOUNDATIONAL AFFIDAVITS; HOWEVER, THE DEFENDANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THEY FAILED TO AFFIRMATIVELY PROVE THE BANK DID NOT HAVE STANDING (SECOND DEPT)

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action failed to prove it had standing to foreclose because the necessary business records were not attached to the foundational affidavits. The court noted that Supreme Court properly denied defendants' motion for summary judgment because the defendants did not prove the bank did not have standing:

"Although [t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business, it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . Without the introduction of the records themselves, "a witness's testimony as to the contents of the records is inadmissible hearsay" … .

Here, the plaintiff relied on the affidavits from Jackson and Smith to demonstrate that it had possession of the note prior to commencing this action. The defendants correctly contend that neither Jackson nor Smith attached any business records to their affidavits. Thus, the assertions of Jackson and Smith that the plaintiff had possession of the note prior to commencing this action were inadmissible hearsay and insufficient to establish, prima facie, the plaintiff's standing … . Bank of N.Y. v Levy, 2024 NY Slip Op 05085, Second Dept 10-16-24

Similar failure of proof in the context of the confirmation of the referee's report in a foreclosure proceeding, i.e., the failure to produce the business records relied upon by the affiant. Deutsche Bank Natl. Trust Co. v Quaranta, 2024 NY Slip Op 05090, Second Dept 10-16-24

Practice Point: In a foreclosure proceeding, the failure to attach or produce the business records relied upon by an affiant renders the affidavit inadmissible hearsay.

Practice Point: The bank's failure to prove it has standing to foreclose (due to the failure to attach the relevant business records to a foundational affidavit) does not entitle defendants to summary judgment on the standing issue. Defendants must affirmatively prove the bank does not have standing to warrant summary judgment in their favor.

October 16, 2024

INSURANCE LAW.

NEW YORK STATE'S SELF-FUNDED GOVERNMENT HEALTH PLAN FOR NEW YORK STATE'S PUBLIC EMPLOYEES, THE "EMPIRE PLAN," IS SUBJECT TO THE INDEPENDENT DISPUTE RESOLUTION (IDR) PROCEDURES IN THE FEDERAL "NO SURPRISES ACT" (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined the state's self-funded government health plan for New York State's public employees (the Empire Plan) is subject to the independent dispute resolution (IDR) procedures in the federal "No Surprises Act:"

In 2014, the Legislature passed the "Surprise Bill Law" … which protects insureds from being billed directly for healthcare services they did not know were being performed by an out-of-network provider … . Under the law, the "health care plan" of an insured who receives a surprise bill is liable for the costs of the out-of-network services and may attempt to negotiate a reimbursement amount that is less than the amount billed … . "If the health care plan's attempts to negotiate . . . do[ ] not result in a resolution of the payment dispute . . . , the health care plan shall pay the non-participating provider an amount the health care plan determines is reasonable for the health care services rendered, except for the insured's co-payment, coinsurance or deductible" … . The law also contains an independent dispute resolution (… IDR) process to address payment disputes, which may be invoked by "[e]ither the health care plan or the non-participating provider" if certain conditions are met … . When invoked, the IDR process assigns the dispute to an independent arbitrator to determine the reasonable fees for services rendered by an out-of-network provider utilizing the factors outlined in Financial Services Law § 604 and the FAIR Health benchmarking database * * *

… [A]fter the US Congress passed the federal No Surprises Act in 2020 … — a statute substantively similar to the state's Surprise Bill Law — the Empire Plan began using the IDR process set forth in the federal law, which uses different benchmarks to determine the reasonable fees to be paid to an out-of-network provider by an insured's health care plan … . Joseph v Corso, 2024 NY Slip Op 05170, Third Dept 10-17-24

October 17, 2024

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM AN UNSECURED LADDER WHEN STRUCK BY FALLING OBJECTS; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff fell from an unsecured ladder when hit by small beams falling from the ceiling:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. Plaintiff met his prima facia burden by establishing that he was injured when he was hit by 20-to-30-pound small beams falling from the ceiling, causing him to lose balance while standing on an unsecured ladder … , and [defendant's] evidence in opposition to this claim did not raise a triable issue of fact. Urquia v Deegan 135 Realty LLC, 2024 NY Slip Op 05080, First Dept 10-15-24

Practice Point: Losing one's balance on an unsecured ladder when struck by a falling object makes out a prima facie case under Labor Law 240(1).

October 15, 2024

MEDICAL MALPRACTICE, CIVIL PROCEDURE.

THE NEARLY THREE-YEAR GAP BETWEEN PLAINTIFF'S KNEE SURGERY AND HIS SEEING THE SURGEON TO COMPLAIN OF KNEE PAIN DID NOT PRECLUDE THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE TO TOLL THE STATUTE OF LIMITATIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact about whether the continuous treatment doctrine applies to render the action timely. Plaintiff had knee surgery and did not see the surgeon again for nearly three years when he experienced pain. He had not seen any other orthopedic surgeons in the interim:

Defendants fail to establish that plaintiff's claims involving treatment of her right knee before May 21, 2016 are time-barred. Given the evidence of "an ongoing relationship of trust and confidence between the patient and physician," the record presents disputed issues of fact regarding whether the continuous treatment doctrine applies, thus precluding dismissal at this stage of the litigation … . The 34-month gap between the one-year postoperative follow-up visit after plaintiff's right total knee replacement and her next complaint to defendant Dr. Steven B. Haas, M.D. about pain in his right knee does not prevent application of the doctrine as a matter of law, as plaintiff visited no orthopedic surgeon other than defendant Dr. Haas during that period, and she returned to Dr. Haas to address increased pain in her right knee, which even he determined would require revision surgery. Karanevich-Dono v Haas, 2024 NY Slip Op 05137, First Dept 10-17-24

Practice Point: Plaintiff had knee surgery and did not see the surgeon again for nearly three years to complain of knee pain. Plaintiff did not see any other orthopedic surgeon in the interim. There was a question of fact whether the continuous treatment doctrine applied to render the medial malpractice action timely.

October 17, 2024

MENTAL HYGIENE LAW, ADMINISTRATIVE LAW.

THE HEARING OFFICER RECOMMENDED THAT JUSTICE DD, A SEVERELY DISABLED MAN, REMAIN AT HIS CURRENT PLACEMENT IN MASSACHUSETTS AND NOT BE MOVED TO A NEW PLACEMENT IN NEW YORK; THE COMMISSIONER OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (OPWDD), NEARLY A YEAR LATER, REJECTED THE HEARING OFFICER'S RECOMMENDATION AND ORDERED THE NEW PLACEMENT; BECAUSE JUSTICE DD'S CONDITION HAD WORSENED DURING THAT TIME, THE COMMISSIONER'S DETERMINATION WAS ANNULLED (THIRD DEPT).

The Third Department annulled the determination of the Office for People with Developmental Disabilities (OPWDD). The Commissioner of the OPWDD rejected the hearing officer's findings and ordered that Justice DD, the disabled man, be removed from his current placement in Massachusetts and placed in New York. The Third Department held that the nearly one-year delay between the hearing officer's recommendation that Justice DD remain placed in Massachusetts and the Commissioner's rejection of the recommendation, during which Justice DD's condition had deteriorated, required annulment of the Commissioner's ruling:

… [D]espite the Legislature's use of the word "shall" in specifying that respondent [the Commissioner] is to issue a determination within 30 days of adjournment of the hearing, this language was merely directory based upon the absence of any "specific consequence to flow from the administrative agency's failure to act in violation of the time limit" … .

"When an administrative body fails to comply with procedural provisions that are merely directory, relief will be granted only if petitioners show that substantial prejudice resulted from the noncompliance" … . We find that petitioners have made such a showing here and, as a result, respondent "must face the consequences of [her] delays" … . Matter of Hannah DD. v Neifeld, 2024 NY Slip Op 05167, Third Dept 10-17-24

Practice Point: The regulation that requires the Commissioner of the OPWDD to make a ruling on the placement of a disabled person within 30 days of the adjournment of the hearing is merely "directory," not "mandatory." However, if, as here, the failure to issue the ruling within 30 days results in prejudice to the

disabled person, the delay is a valid ground for annulment of the Commissioner's ruling.

October 17, 2024

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

HERE THE SUPERINTENDENT OF HIGHWAYS WAS NOT "ENGAGED IN HIGHWAY WORK" WHEN HE COLLIDED WITH PLAINTIFF; THEREFORE THE ORDINARY NEGLIGENCE STANDARD, NOT THE HIGHER "RECKLESS" STANDARD FOR HIGHWAY WORKERS IN THE VEHICLE AND TRAFFIC LAW, APPLIED TO THIS TRAFFIC ACCIDENT (CT APP).

The Court of Appeals, reversing the Appellate Division and awarding summary judgment to plaintiff, in a full-fledged opinion by Judge Cannataro, determined the defendant, Simone, the Superintendent of Highways for the Town of Carmel, was not engaged in highway work when he failed to look to his right before pulling out of an intersection and collided with plaintiff's car. Simone had driven to a vantage point to see how much snow had fallen on the town's roads and had ordered the highway department employees to salt the roads. He was on his way back to his office when the accident happened:

… [T]itle VII of the Vehicle and Traffic Law sets out a uniform set of traffic regulations, or "rules of the road," which generally "apply to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state" … . Vehicle and Traffic Law § 1103 (b), however, provides that those rules "shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" … . Although such parties remain liable for "the consequences of their reckless disregard for the safety of others," they bear no liability for ordinary negligence … . * * *

… [A]ccording to Simone's own deposition testimony, the accident occurred after he had fully completed his assessment of roadway conditions at his bellwether location and mobilized his entire team to salt the town's roads. At the time of the accident, Simone was merely using the road to return to work. Although he testified that he saw a slushy accumulation of snow to his left shortly before the collision occurred, he took no action in response to observing that condition.

Indeed, he testified that as he pulled into the intersection where the collision occurred, there was nothing keeping his attention drawn to his left and he was no longer looking at the condition.

Because the uncontested evidence demonstrates that Simone was not actually engaged in work on a highway at the time the accident occurred, defendants are not entitled to the protections of [Vehicle and Traffic Law] section 1103 (b). Orellana v Town of Carmel, 2024 NY Slip Op 05131, CtApp 10-17-24

Practice Point: Here ordinary negligence rules applied to the Superintendent of Highways when he had an accident returning to his office after assessing how much snow had fallen. At the time of the accident he had already ordered his employees to salt the roads. He therefore was not "engaged in highway work" when he collided with plaintiff.

October 17, 2024