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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October 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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Practice Point: In this case, the proverb cited in the opinion—"be careful what you wish for"—-means the contract provisions compelling arbitration controlled and the court litigation which had been commenced was precluded.

October 8, 2024

CHILD VICTIMS ACT, EMPLOYMENT LAW, SUFFICIENCY OF COMPLAINT.

IN A CHILD VICTIMS ACT CASE AGAINST A TEACHER ALLEGED TO HAVE SEXUALLY ABUSED A STUDENT IN THE 60'S, THE BARE ALLEGATION IN THE COMPLAINT THAT THE EMPLOYER KNEW OR SHOULD HAVE KNOWN OF THE TEACHER'S PROPENSITY WAS NOT SUFFICIENT TO STATE A CAUSE OF ACTION; COMPLAINT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the complaint did not state a cause of action for negligent retention or negligent supervision of a teacher alleged to have sexually abused plaintiff in the 60's. An allegation which merely states a bare legal conclusion is not entitled to consideration on a motion to dismiss. Here the complaint alleged defendant employer, YCQ, "knew or should have known of the employee's propensity for the conduct which caused the injury:"

… [T]o sustain the cause of action sounding in negligent supervision of a child, the plaintiff was required to allege that YCQ "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . Similarly, "[a]n employer can be held liable under theories of negligent hiring, retention, and supervision where it is shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … .

Here, the complaint failed to state a cause of action alleging negligent retention of the religious studies teacher by YCQ and a cause of action alleging negligent supervision based upon YCQ's failure to adequately supervise the plaintiff and/or the religious studies teacher, as the complaint did not sufficiently plead that YCQ knew or should have known of the religious studies teacher's propensity for the type of conduct at issue … . While it is true that such causes of action need not be pleaded with specificity … , the complaint merely asserted the bare legal conclusion that YCQ "knew or should have known of [the religious studies teacher's] propensity to sexually abuse minor students," without providing any factual allegations that the religious studies teacher's sexual abuse of the plaintiff was foreseeable … . Kessler v Yeshiva of Cent. Queens, 2024 NY Slip Op 05337, Second Dept 10-30-24

Practice Point: In a Child Victims Act case alleging negligent retention and negligent retention of a teacher who allegedly sexually abused a student, the bare allegation that the teacher's employer knew or should have known of the teacher's propensity was not enough to survive a motion to dismiss for failure to state a cause of action. Allegations which amount to bare legal conclusions will not be considered on a motion to dismiss.

October 30, 2024

CORPORATION LAW, SERVICE OF PROCESS.

THE PROCESS SERVER'S AFFIDAVIT DID NOT DEMONSTRATE THE PERSON SERVED WAS AN AGENT OF DEFENDANT CORPORATION; CLERK'S JUDGMENT VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court and vacating the clerk's (default) judgment for over $420,000, determined the process server's affidavit did not demonstrate the person served with the summons and complaint was an agent of defendant corporation:

The plaintiff failed to establish that personal jurisdiction had been acquired over the defendant through proper service of process. Although a process server's affidavit of service ordinarily constitutes prima facie evidence of proper service … , here, the affidavit of service contained no indication that Lewis was an agent of the defendant authorized to accept service on the defendant's behalf (see CPLR 311[1][a] …). Accordingly, the Supreme Court should have granted, pursuant to CPLR 5015(a)(4), that branch of the defendant's motion which was to vacate the clerk's judgment. Bold Broadcasting, LLC v Wawaloam Reservation, Inc., 2024 NY Slip Op 05196, Second Dept 10-23-24

Practice Point: Here the process server's affidavit did not demonstrate the person served with the summons and complaint had the authority to accept service for defendant corporation. The default judgment was vacated.

October 23, 2024

COURT OF CLAIMS, NOTICE OF INTENTION TREATED AS CLAIM, NEGLIGENCE.

THE APPLICATION TO TREAT THE NOTICE OF INTENTION TO FILE A CLAIM (NOI) AS A TIMELY FILED CLAIM IN THIS PRISON STABBING CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the notice of intention to file a claim (NOI) in this negligent supervision case met the requirements of a claim. Therefore the application to treat the NOI as a timely filed claim should have been granted. Claimant, a prison inmate, was stabbed in the eye:

Court of Claims Act § 10(8)(a) provides that a court may grant an application to treat an NOI as a claim if, among other things, the NOI "was timely served, and contains facts sufficient to constitute a claim; and the granting of the application would not prejudice the defendant." Court of Claims Act § 11(b) requires a claim to specify: (1) the nature of the claim; (2) the time when it arose; (3) the place where the claim arose; (4) the items of damage or injuries claimed; and (5) the total sum claimed … . While section 11(b) does not require "absolute exactness," the "guiding principle informing" section 11(b) pleading requirements is whether the State is "able to investigate the claim promptly and to ascertain its liability under the circumstances" … . "In describing the general nature of the claim, . . . or a notice of intention to file a claim, . . . [it] 'should provide an indication of the manner in which the claimant was injured and how the State was negligent, or enough information so that how the State was negligent can be reasonably inferred'" … .

Here … the claimant provided sufficient details to meet the requirements outlined in Court of Claims Act § 11(b), including the nature of the claim and the alleged act of negligence by the State … . Johnson v State of New York, 2024 NY Slip Op 04949, Second Dept 10-9-24

Practice Point: Where a notice of intention to file a claim (NOI) includes sufficient information about the nature of the claim and the alleged negligence by the state, an application to treat the NOI as a timely filed claim should be granted.

October 9, 2024

DISCOVERY SANCTIONS, NEGLIGENCE, EVIDENCE, JUDGES.

STRIKING THE COMPLAINT WAS TOO SEVERE A SANCTION FOR PLAINTIFF'S FAILURE TO RESPOND TO DISCOVERY DEMANDS; $2500 PENALTY IMPOSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined sanctions were in order for plaintiff's failure to respond to discovery demands, but striking the complaint was too severe. A monetary penalty was imposed:

… [T]he plaintiff's failure to comply with discovery demands and orders directing discovery or respond to the letters from the defendants' counsel concerning discovery, without providing a reasonable excuse, supports an inference of willful or contumacious conduct … . However, under the circumstances, the sanction imposed was too drastic a remedy and the defendants' motion pursuant to CPLR 3126 to strike the complaint should have been granted only to the extent of directing the plaintiff's counsel to personally pay the sum of $2,500 as a sanction to the defendants … . Mirabile v Kuwayama, 2024 NY Slip Op 04958, Second Dept 10-9-24

Practice Point: This case presents another instance of an appellate court's determination the striking of a pleading as a sanction is too severe a penalty. Here plaintiff failed to respond to discovery demands and a $2500 penalty was deemed an appropriate sanction by the Second Department.

October 9, 2024

DISCOVERY, NEGLIGENCE, PRODUCTS LIABILITY, TOXIC TORTS, EVIDENCE.

THE IDENTITIES OF THE SUBJECTS OF TWO SCHOLARLY ARTICLES LINKING TALCUM-POWDER PRODUCTS WITH MESOTHELIOMA SHOULD BE RELEASED; THE INFORMATION IS NOT PROTECTED BY HIPAA OR THE FEDERAL COMMON RULE; PRODUCTION OF THE INFORMATION WOULD NOT BE UNDULY BURDENSOME AND WOULD NOT DETER FUTURE RESEARCH (FIRST DEPT).

The First Department, reversing Supreme Court's denial of a petition to enforce an out-of-state subpoena, determined the identities of the subjects of two scholarly articles linking cosmetic talcum powder products with mesothelioma were not protected by HIPAA's privacy rule or the federal Common Rule:

The information sought by the subpoenas … is clearly relevant to the underlying New Jersey personal injury action. It goes directly to the credibility of these articles, which speak to the central issues in dispute and are relied on by three testifying experts, and whose author was to testify as an expert until she voluntarily withdrew … .

The information sought by the subpoenas is not protected from disclosure by HIPAA's privacy rule, which does not apply where, as here, the health care providers did not provide physician services in connection with the articles and the subjects were never their patients … .

The information sought by the subpoenas is also not protected from disclosure by the federal Common Rule because the articles to which they relate fall within the exemption for secondary research based on publicly available identifiable private information or biospecimens … .The burden was on the party opposing the subpoenas to prove that this information was produced in the underlying litigations subject to a protective order … . Neither party opposing disclosure of the information has offered any such proof.

Production of the information sought by the subpoenas would not be unduly burdensome, nor is it likely to have a chilling effect on future medical research. The subject information consists of just a few pages, is easily located, does not concern ongoing research, and does not reveal the unpublished thought processes of the researchers. Moreover, the subjects never actually agreed to participate in

any research, having released their information in connection with public litigation, and so it is unclear how allowing disclosure of their identities might deter future research participation … . Matter of Johnson & Johnson v Northwell Health Inc., 2024 NY Slip Op 04909, First Dept 10-8-24

Practice Point: The decision outlines the issues involved in seeking the identities of the subjects of two scholarly articles linking talcum-powder products with mesothelioma.

October 8, 2024

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, TEACHERS' FAILURE TO COMPLY WITH EMPLOYMENT CONDITIONS.

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

FAMILY LAW, MOST CONVENIENT FORUM, 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, DISMISSAL OF COMPLAINT, JUDGES.

DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION WAS NOT IN COMPLIANCE WITH CPLR 3216 OR 22 NYCRR 202.7, AND THERE WAS INSUFFICIENT JUSTIFICATION FOR A "SUA SPONTE" DISMISSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prerequisites for the dismissal of the complaint in this foreclosure action were not met:

… [T]he Supreme Court failed to serve a written demand upon the plaintiff to resume prosecution of the action and to serve and file a note of issue within 90 days of receipt of the demand (see CPLR 3216[b][3]). Since at least one precondition set forth in CPLR 3216 was not met here, the court was without power to direct dismissal of the complaint pursuant to that statute … .

Pursuant to 22 NYCRR 202.27, a court has discretion to dismiss an action where a plaintiff fails to appear "[a]t any scheduled call of a calendar or at any conference" … . In this case, however, the court attorney referee did not recommend dismissal of the complaint based upon a failure to appear at a conference, but rather for failure to move for an order of reference by a date certain without good cause shown. Thus, the dismissal order, which confirmed the report of the court attorney referee, did not direct dismissal of the complaint based upon a default in appearing at a scheduled conference or calendar call, and 22 NYCRR 202.27 could not have provided the basis for dismissal of the complaint … .

Moreover, "'[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . Here, the plaintiff's failure to comply with a court conference order directing the plaintiff to move for an order of reference was not a sufficient ground upon which to direct dismissal of the complaint … . Bank of Am., N.A. v Banu, 2024 NY Slip Op 04940, Second Dept 10-9-24

Practice Point: The appellate courts will not affirm dismissals of complaints when the statutory and regulatory requirements for dismissal have not been met.

October 9, 2024

FORECLOSURE, FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY.

THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY TO THE 2005 DISONTINUANCE OF THE FORECLOSURE ACTION RENDERING THE ACTION COMMENCED IN 2015 TIME-BARRED (SECOND DEPT).

The Second Department, in a complex decision addressing issues not summarized here, determined the Foreclosure Abuse Prevention Act (FAPA) (CPLR 3217) applied retroactively to the 2005 voluntary discontinuance. Therefore the instant action, which was commenced in 2015, was time-barred:

The Foreclosure Abuse Prevention Act … ; hereinafter FAPA) amended CPLR 3217, which governs the voluntary discontinuance of an action, to provide that "[i]n any action on an instrument described under [CPLR 213(4)], the voluntary

discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" … . Thus, applying FAPA, the voluntary discontinuance of the 2005 action did not serve to reset the statute of limitations … .

Wells Fargo's contention that CPLR 3217(e), added under FAPA, was not intended to have retroactive effect is without merit. FAPA took effect "immediately," applying "to all actions commenced on an instrument described under [CPLR 213(4)] in which a final judgment of foreclosure and sale has not been enforced" … . Thus, "[a]lthough the Legislature did not explicitly state that FAPA should apply retroactively, it clearly indicated that it should" … . Wells Fargo Bank, N.A. v Edwards, 2024 NY Slip Op 05368, Second Dept 10-30-24

Practice Point: The Foreclosure Abuse Prevention Act (FAPA) was applied retroactively here to a 2005 voluntary discontinuance of the foreclosure action, rendering the action started in 2015 time-barred.

October 30, 2024

FORECLOSURE, FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY.

RETROACTIVE APPLICATION OF THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) WHERE FINAL JUDGMENT HAS NOT BEEN RENDERED DOES NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS; HERE THE DEBT WAS ACCELERATED IN 2008 AND THE CURRENT FORECLOSURE PROCEEDING IS THEREFORE UNTIMELY PURSUANT TO THE FAPA (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the Foreclosure Abuse Prevention Act (FAPA) applied retroactively to render the foreclosure action untimely because the debt had been accelerated by a prior foreclosure proceeding in 2008. The Third Department determined the retroactive application of the FAPA to foreclosure actions where final judgment has not been rendered did not violate plaintiff's due process rights:

In drafting FAPA, the Senate and Assembly sponsors both expressed an urgent need to correct judicial interpretation with unintended consequences which allowed noteholders to unilaterally "manipulate statutes of limitations to their advantage" and to the detriment of homeowners … . … [W]e find that FAPA should be applied retroactively to effect its beneficial purpose … . * * *

… [W]e find that retroactive application of FAPA to foreclosure actions where a final judgment has not been enforced does not violate plaintiff's due process rights … . U.S. Bank N.A. v Lynch, 2024 NY Slip Op 05261, Third Dept 10-24-24

Practice Point: Where there has been no final judgment, retroactive application of the Foreclosure Abuse Prevention Act (FAPA) to render a foreclosure action untimely does not violate a plaintiff's due process rights.

October 24, 2024

FORECLOSURE, STANDING.

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

FORECLOSURE, STATUTE OF LIMITATIONS.

THE FACT THAT A MORTGAGE IS MERELY INSURED BY HUD OR THE FHA DOES NOT MAKE THE BANK WHICH HOLDS THE MORTGAGE AN ASSIGNEE OF A FEDERAL AGENCY SUCH THAT NEW YORK'S STATUTE OF LIMITATIONS DOES NOT APPLY; A BANK IS NOT AN ASSIGNEE OF HUD OR THE FHA IF IT WAS NOT ASSIGNED THE AUTHORITY TO FORECLOSE THE INSURED MORTGAGE (SECOND DEPT).

The Second Department, affirming Supreme Court, in a full-fledged opinion by Justice Maltese, determined New York's six-year statute of limitations applied to the foreclosure of a mortgage insured by the US Department of Housing and Urban

Development (HUD). The bank argued that, as an assignee of a federal agency, it is immune from New York's statute of limitations:

"'There is no federal statute of limitations applicable to mortgage foreclosure actions brought by the United States or its federal agencies'" … . "That rule applies equally to an assignee of a federal agency, including a commercial lender, and includes the benefit of immunity from a state limitations period" … . * * *

The relevant distinction in this case is that between a loan that was merely insured by a federal agency and a loan that was held by a federal agency, such that the federal agency had a right to foreclose the mortgage, and then assigned to the plaintiff. A plaintiff seeking to foreclose a mortgage that was merely insured by a federal agency is not entitled to immunity. Allowing immunity in such instances would inappropriately expand its application and would be inconsistent with the purpose of "allow[ing] the government to maintain belated actions to enforce public rights," where the government never had the ability to maintain such an action … . * * *

Although [the] evidence demonstrated that the loan at issue was insured by HUD and/or the FHA, the plaintiff failed to establish that either of those agencies ever had the right to foreclose the mortgage "unfettered by [the] statute of limitations" or that such a right was ever assigned to the plaintiff … . … [T]he plaintiff was not an assignee of a federal agency merely because the loan was insured by federal agencies. Bank of Am., N.A. v Reid, 2024 NY Slip Op 04942, Second Dept 10-9-24

Practice Point: An assignee of a federal agency is immune from New York's statute of limitations. Here the bank which held the mortgage which was insured by HUD was not an assignee of the federal agency (HUD) because it was not assigned the authority to foreclose the insured mortgage.

October 9, 2024

FRAUD, DEFENSE TO ACTION BASED ON AN INSTRUMENT FOR THE PAYMENT OF MONEY ONLY.

DEFENDANTS RAISED QUESTIONS OF FACT SUPPORTING A "FRAUD IN THE INDUCEMENT" DEFENSE TO THE ACTION BASED UPON AN EXECUTED PROMISSORY NOTE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants raised a valid "fraud in the inducement" defense to the action seeking payment on an executed promissory note. Defendants executed the note to purchase protein powder from plaintiffs. Plaintiffs described the powder as having 23 to 25 grams of protein per 33/5 grams of powder. After the purchase defendants had the powder tested which revealed the powder contained a significantly lower percentage of protein:

"When an action is based upon an instrument for the payment of money only . . . , the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (CPLR 3213). Therefore, "[t]o prevail on [their] motion for summary judgment in lieu of complaint based on a promissory note, plaintiff[s] w[ere] required to present evidence that defendant[s] executed the note and defaulted thereon" … . Plaintiffs demonstrated their prima facie burden by supplying the note at issue, signed by [defendant], and evidence of defendant's failure to pay; therefore, the burden shifted to defendants to establish the existence of a triable issue of fact as to a bona fide defense to liability … . …

Fraud in the inducement is a defense to the enforcement of a promissory note … , and, as such, defendants were required to "allege that (1) the plaintiff made a representation or a material omission of fact which was false and the plaintiff knew to be false, (2) the misrepresentation was made for the purpose of inducing the defendant to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury" … . * * *

Generally, "what constitutes reasonable reliance is always [a] nettlesome" inquiry best left to the trier of fact … . Furthermore, "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact" … . Panessa v Lederfeind, 2024 NY Slip Op 05252, Third Dept 10-24-24

Practice Point: Fraud in the inducement is a valid defense to an action for summary judgment based upon an instrument for the payment of money only (CPLR 3213), here a promissory note.

October 24, 2024

LABOR LAW-CONSTRUCTION LAW, PHOTOS AS NOTICE TO ADMIT.

PHOTOS SUBMITTED AS A NOTICE TO ADMIT DID NOT SHOW THE METAL OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED AND FELL; ALTHOUGH THE PHOTOS ARE DEEMED TO SHOW THE PROJECT SITE ON THE DAY OF THE FALL, THERE WAS NO EVIDENCE THE PHOTOS DEPICTED THE CONDITION OF THE SITE AT THE TIME OF THE FALL OR IMMEDIATELY PRIOR TO THE FALL (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 alleged he tripped on metal debris and fell. Defendants submitted three photographs alleged to depict the project site on the day of the plaintiff's fall as a notice to admit. The photos did not show any metal debris. Although plaintiff did not respond to the notice to admit, thereby deeming the allegations admitted, the photos did not establish the condition of the depicted area at the time of plaintiff's trip and fall, or immediately prior to the fall:

According to plaintiff, his accident occurred as he was retrieving wooden planks for his coworker to install on the floor. Doing so required plaintiff to traverse over an uncovered beam pocket measuring three feet wide and three feet deep. His accident occurred when he tripped over metal debris on the floor and fell into the beam pocket. Plaintiff was wearing a harness with a yo-yo/at the time of his accident, but there was no place for him to tie off. * * *

… Defendants rely on a notice to admit that they served on plaintiff seeking his admissions that three photos annexed thereto … depicted the project site on the day of plaintiff's accident. Plaintiff did not respond to the notice to admit, deeming the allegations admitted (CPLR 3123 [a]). However, these admissions do not establish that those photos fairly and accurately depict the location of plaintiff's accident either at the time thereof or immediately prior thereto. Thus, the absence from

those photos of the metal on which plaintiff claims to have tripped does not raise an issue of fact as to the manner in which plaintiff's accident occurred. Guzman-Saquisili v Harlem Urban Dev. Corp., 2024 NY Slip Op 05420, First Dept 10-31-24

Practice Point: Photos which depict the condition of the area of plaintiff's fall on the day of the fall, without more specificity about when the photos were taken, may not be deemed to depict the area at the time of the fall or immediately prior to the fall.

October 31, 2024

MEDICAID, PLENARY ACTION FOR BREACH OF CONTRACT, 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

MEDICAL MALPRACTICE, STATUTE OF LIMITATIONS, CONTINUOUS TREATMENT DOCTRINE.

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.

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VERDICT, MOTION TO SET ASIDE, ATTORNEYS, 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."

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