NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
November 11 – 15, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts November 11 – 15, 2024, and Posted on the New York Appellate Digest Website on Monday, November 18, 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 Citations to Keep Your Place in the Reversal Report.

Contents

CONTRACT LAW.

THE COMPLAINT STATED CAUSES OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALINGS, AS WELL AS PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for breach of contract based on the implied covenant of good faith and fair dealing. In addition, the Second Department held that the promissory estoppel and unjust enrichment causes of action did not duplicate the breach of contract causes of action:

Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied covenant of good faith and fair dealing when it exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain … . "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" … . "Technically complying with the terms of a contract while depriving the plaintiff of the benefit of the bargain may constitute a breach of the covenant of good faith and fair dealing" … .

* * * "'[E]ven an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement'" … . The defendant failed to utterly refute the allegations in the complaint that the defendant terminated the consulting agreement without justification or good cause at a time when the completion of the subdivision of the

property was only weeks away, despite the plaintiff's alleged expenditure of hundreds of hours managing the process over the course of two years, and that the defendant acted in derogation of the consulting agreement, including by selling the property for less than its fair market value.

… Where "there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quantum meruit as well as contract, and will not be required to elect his or her remedies" … . JLO Dev. Corp. v Amalgamated Bank, 2024 NY Slip Op 05577, Second Dept 11-13-24

Practice Point: A complaint alleging breach of contract based on a violation of an implied covenant of good faith and fair dealing will survive a motion to dismiss, despite there being no specific provision of the contract which was alleged to have been breached.

Practice Point: Where there is an issue as to the existence of a contract or where the contract does not cover the issue in dispute, the plaintiff may plead promissory estoppel and unjust enrichment, in addition to breach of contract.

November 13, 2024

CRIMINAL LAW, APPEALS.

SUPREME COURT DISMISSED THE INDICTMENT ON SPEEDY-TRIAL GROUNDS, FINDING THAT THE PEOPLE HAD NOT COMPLIED WITH THEIR DISCOVERY OBLIGATIONS AT THE TIME THE PEOPLE INDICATED THEY WERE READY FOR TRIAL; THE DISMISSAL ORDER WAS NEVER SERVED ON THE PEOPLE SO THE 30-DAY APPEAL PERIOD NEVER STARTED RUNNING RENDERING THE PEOPLE'S APPEAL TIMELY; THE FAILURE TO TURN OVER "DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICES" DOCUMENTS DID NOT VIOLATE THE PEOPLE'S DISCOVERY OBLIGATIONS BECAUSE THE PEOPLE DID NOT POSSESS THOSE DOCUMENTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) the People's appeal was timely because defendant never served the order dismissing the

indictment on them so the 30-day appeal period never started running, and (2) the People were not obligated to turn over Department of Corrections and Community Supervision (DOCCS) documents to comply with their discovery obligations because the People did not possess those documents:

The Court of Appeals has "interpreted CPL 460.10 (1) (a) 'to require prevailing party service'—not just the handing out of an order by the court—'to commence the time for filing a notice of appeal' " … . Here, the record establishes that the People received a copy of the original order, but there is "no evidence that [defendant] ever served the order as required by CPL 460.10 (1) (a)" … . Inasmuch as the record fails to establish that defendant ever served the People with a copy of the original order, the People's 30-day period to appeal never began to run and the People's appeal is therefore timely … . * * *

… [A]ssuming … that the parole officer's disciplinary records from DOCCS met the relevancy prong as being related to the subject matter of the case, we conclude that the People established that those records did not meet the possessory prong required to prompt their initial discovery obligation with respect thereto (see CPL 245.20 [1] …). "[F]or the purposes of discovery, DOCCS is not a 'law enforcement' agency" and is " 'outside of the legal or practical control of local prosecutors' and, therefore, the People cannot be deemed to be in constructive possession of that which DOCCS possesses" … . People v Walker, 2024 NY Slip Op 05662, Fourth Dept 11-15-24

Practice Point: If the defendant wins a motion to dismiss the indictment, the defendant must serve the People with the dismissal order or the People's 30-day appeal period does not start running.

Practice Point: The People do not violate their discovery obligations by failing to turn over documents which are in the possession of another agency, here the Department of Corrections and Community Services (DOCCS).

November 15, 2024

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA).

THE NEW YORK STATUTE DESIGNATING DEFENDANT A SEXUALLY VIOLENT OFFENDER WOULD BE UNCONSTITUTIONAL AS APPLIED IF THE CALIFORNIA OFFENSE UPON WHICH THE DESIGNATION IS BASED WAS NON-VIOLENT; MATTER REMITTED FOR A RULING WHETHER THE CALIFORNIA OFFENSE WAS VIOLENT OR NON-VIOLENT (FOURTH DEPT).

The Fourth Department, remitting the matter to County Court, over a five-justice concurrence, determined County Court must rule on whether defendant's California conviction involved a violent or a non-violent sexual offense. If the facts of the case indicate the California offense was non-violent, the New York statute which requires designation of the defendant as a sexually violent offender would be unconstitutional as applied:

Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.). Due to the designation, which is based on a felony conviction in California requiring defendant to register as a sex offender in that state, defendant is subject to lifetime registration as a sex offender in New York even though County Court determined that he is only a level one risk. The designation was made pursuant to Correction Law § 168-a (3) (b) insofar as it defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Although defendant concedes that he qualifies as a sexually violent offender under the foreign registration clause of § 168-a (3) (b), he contends that the provision is unconstitutional on its face and as applied to him under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (US Const, 14th Amend, § 1), inasmuch as his out-of-state felony conviction was for a nonviolent offense. Defendant further contends that the foreign registration clause violates the Privileges and Immunities Clause of the Federal Constitution … . * * *

If the felony of conviction, by virtue of its statutory elements … , involved sexually violent conduct, then the foreign registration clause of Correction Law § 168-a (3) (b) is not unconstitutional as applied to defendant inasmuch as he committed a violent sex offense even if it does not include all of the essential

elements of one of the sexually violent offenses in New York enumerated in Correction Law § 168-a (3) (a). If, however, defendant was convicted of an out-of-state felony that is nonviolent in nature, we would conclude that the statute is unconstitutional as applied to defendant … . People v Grzegorzewski, 2024 NY Slip Op 05657, Fourth Dept 11-15-24

Practice Point: The statute which requires defendant be designated a sexually violent offender based upon an out-of-state conviction is unconstitutional as applied if the out-of-state offense was non-violent.

November 15, 2024

CRIMINAL LAW, CONSTITUTIONAL LAW, JUDGES.

DEFENDANT'S 2013 GUILTY PLEA WAS DEEMED DEFECTIVE BECAUSE THE JUDGE FAILED TO ENSURE THE DEFENDANT UNDERSTOOD THE CHARGE; BECAUSE THE 2013 CONVICTION WAS UNCONSTITUTIONALLY OBTAINED, IT CANNOT BE A BASIS, IN 2020, FOR SENTENCING THE DEFENDANT AS A PERSISTENT VIOLENT PREDICATE FELON; SENTENCE VACATED (FIRST DEPT).

The First Department, remanding the matter for resentencing, determined defendant should not have been sentenced as a persistent violent predicate felon based on a 2013 guilty plea because the plea to attempted burglary second was constitutionally invalid. In the plea allocution, defendant indicated he formulated the intent to steal after he entered the dwelling, prompting the need for further questioning by the judge. The intent to steal must be formulated before entry:

During the allocution on defendant's 2013 plea to attempted burglary in the second degree, he asserted that, although he stole property from the subject dwelling, his intent at the time he unlawfully entered the premises was to tell its occupant to close the door. Because "the intent to commit a crime in the dwelling must be contemporaneous with the entry" under the burglary statute … , defendant's statement that he formed the requisite intent "only after [he] had entered . . . the [premises] unlawfully" negated an element of the crime to which he pleaded guilty … . This statement triggered the court's duty to make further inquiry in order to ensure that defendant understood "the nature of the charge and that the plea [was]

intelligently entered" … . The court failed to do so. To the extent that the court conducted a further inquiry, its questions did no more than establish that defendant stole property once he was inside the dwelling, without refuting his statement that he had not intended to steal the property at the time of entry, nor did defendant confirm that he wished to waive a defense on that basis … . On this record, "we cannot conclude that defendant's guilty plea was knowingly, voluntarily and intelligently made" … . Accordingly, since the requirements for enhanced sentencing have not been met, defendant's sentence as a persistent violent felony offender must be vacated … . People v Stewart, 2024 NY Slip Op 05546, First Dept 11-12-24

Practice Point: Here it appears defense counsel demonstrated the 2013 guilty plea was unconstitutionally obtained because of an error by the sentencing judge during the allocution. Defense counsel then successfully argued the 2013 conviction could not be a basis for the 2020 sentencing of defendant as a persistent violent predicate felon. The current status of the 2013 conviction was not discussed.

November 12, 2024

CRIMINAL LAW, EVIDENCE.

THE POLICE HAD TO "MANIPULATE" THE CHECKS TO DETERMINE THEY WERE FORGED; THEREFORE THE "PLAIN VIEW" EXCEPTION TO THE SEARCH WARRANT REQUIREMENT WAS NOT APPLICABLE; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, suppressing evidence seized under the "plain view" exception to the warrant requirement, held the police had to "manipulate" the checks which were in plain view to determine they were forged. Because the nature of the checks was not apparent until they were "manipulated," the "plain view" exception was not applicable:

… [W]e conclude that the People did not meet their burden of establishing the third element of the plain view exception—i.e., that the incriminating nature of the seized items was immediately apparent. In making such a determination, we must consider whether "the facts available to the [police] officer would warrant a [person] of reasonable caution in the belief . . . that [the] items may be contraband or stolen property or useful as evidence of a crime" … . This is a probable cause

standard—i.e., there need not be "certainty or near certainty" about the incriminating nature of the seized items … . That element is not satisfied, however, "where the object [to be seized] must be moved or manipulated before its illegality can be determined" … . Indeed, "[s]uch a search or seizure may not be upheld without proof that the [police] officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or manipulated" … . Still, "[a] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a search" … . People v Howard, 2024 NY Slip Op 05733, Fourth Dept 11-15-24

Practice Point: Here the fact the checks were forged was not apparent until the police "manipulated" them. Therefore the "plain view" exception to the search-warrant requirement was not applicable and the checks should have been suppressed.

November 15, 2024

CRIMINAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S BIPOLAR DIAGNOSIS AND A STATEMENT INDICATING HIS FAILURE TO TAKE RESPONSIBILITY FOR THE OFFENSE DID NOT JUSTIFY AN UPWARD DEPARTURE FROM SORA RISK-LEVEL TWO TO THREE; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the People did not demonstrate that an upward departure from SORA risk-level two to three was warranted:

… [W]e conclude that the People failed to prove by clear and convincing evidence that defendant is more likely to reoffend based on his bipolar diagnosis. The only evidence offered by the People at the SORA hearing was the report prepared by defendant's expert, who opined that "impaired judgment is a common disability in Bipolar Disorder, as is impulsiveness." The expert further opined that defendant's "judgment was impaired by his disorder" when he committed the crimes, and that he "acted impulsively because of his then undiagnosed (and inadequately treated) illness." The fact that defendant's bipolar condition may have impaired his

judgment and decreased his ability to control impulsive sexual behavior when he committed the qualifying offenses does not mean, ipso facto, that he is at a greater risk of reoffending in the future as a result of his bipolar condition. Defendant's mental illness was undiagnosed and untreated when he committed the qualifying offenses, and there is no evidence in the record indicating a reluctance or inability on defendant's part to follow treatment recommendations and take prescribed medications now that he has been properly diagnosed.

We further conclude that an upward departure was not warranted based on defendant's post-offense statement to one of the victims. Although the statement in question may show, as the People asserted, that defendant failed to accept responsibility for his crimes, an offender's failure to accept responsibility is taken into account under risk factor 12 on the risk assessment instrument. Thus, an upward departure cannot be granted based on defendant's statement … . People v Cohen, 2024 NY Slip Op 05658, Fourth Dept 11-15-24

Practice Point: Here defendant's bipolar diagnosis and a statement to the victim indicating his failure to take responsibility for the offense did not justify an upward department from SORA risk-level two to three. The evidence did not demonstrate the bipolar disorder increased the risk of reoffending and the statement was already taken into account under risk factor 12.

November 15, 2024

CRIMINAL LAW, JUDGES.

COUNTY COURT SHOULD NOT HAVE ORDERED RESTITUTION, WHICH WAS NOT MENTIONED IN DEFENDANT'S COOPERATION AGREEMENT, WITHOUT FIRST GIVING DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA (THIRD DEPT).

The Third Department, reversing County Court, determined the judge should not have made restitution part of defendant's sentence without giving the defendant the opportunity to withdraw his guilty plea or accept the enhanced sentence:

"[A] sentencing court may not impose a more severe sentence than one bargained for without providing the defendant the opportunity to withdraw his or her plea" … . The People concede that the payment of restitution was not part of the

cooperation/plea agreement and that defendant should have been given the opportunity to either withdraw his plea or accept the enhanced sentence of restitution. Accordingly, we must remit the matter to County Court to either impose the agreed-upon sentence or give defendant the option of withdrawing his plea before imposing the restitution … . People v Nolasco-Gutierrez, 2024 NY Slip Op 05606, Third Dept 11-14-24

Practice Point: Here defendant pled guilty in accordance with a cooperation agreement which did not include restitution as part of the sentence. Imposing restitution without giving the defendant the opportunity to withdraw his plea required vacation of the restitution order.

November 14, 2024

CRIMINAL LAW.

PROSPECTIVE JUROR WHO SAID HE OR SHE WOULD HOLD THE REFUSAL TO TESTIFY AGAINST THE DEFENDANT SHOULD HAVE BEEN EXCUSED FOR CAUSE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined a prospective juror's indication he or she would hold defendant's refusal to testify against the defendant required excusal "for cause:"

Here, the prospective juror gave "some indication of bias" … by stating that he "[a]bsolutely" might hold it against defendant if defendant chose not to testify … .

Contrary to the court's determination, the prospective juror did not "give unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" … . Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [a prospective] juror[ ] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [the prospective juror] from reaching an impartial verdict" … . "If there is any doubt about a prospective juror's impartiality, [the] trial court[ ] should err on the side of excusing the juror, since at worst the court will have 'replaced one impartial juror with another' " … . We conclude that the prospective juror's act of nodding his head affirmatively after the court gave an instruction and posed a question to the entire jury panel was "insufficient to constitute such an

unequivocal declaration" … . People v Cheese, 2024 NY Slip Op 05712, Fourth Dept 11-15-24

Practice Point: Here the prospective juror indicated bias requiring excusal for cause by indicating he or she would hold the refusal to testify against the defendant.

November 15, 2024

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE, SOCIAL SERVICES LAW.

MOTHER SHOULD NOT HAVE BEEN DEEMED COLLATERALLY ESTOPPED FROM PRESENTING EVIDENCE OF HER MENTAL HEALTH IN THIS TERMINATION-OF-PARENTAL-RIGHTS ACTION; THE PRIOR MENTAL-HEALTH-BASED RULING WAS BASED ON THREE-TO-EIGHT-YEAR-OLD EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother should not have been prevented from presenting evidence of her mental health in this termination-of-parental-rights proceeding under the collateral estoppel doctrine. Although mother had previously been adjudicated unable to provide proper and adequate care of the children in 2018, there was no evidence of mother's current mental health:

Neither the relied-upon 2018 order of disposition nor its supporting decision … contains a finding of fact or conclusion of law that the mother's mental illness or intellectual disability permanently impaired the mother's ability to provide adequate care for a child … . Instead, the prior judicial determination that the mother was "presently and for the foreseeable future" unable to provide adequate care was premised upon evaluations of the mother conducted in 2012 and 2017. Further, that determination was issued a year prior to the birth of the subject child in the present proceeding and, although the subject child was ordered into petitioner's care almost immediately following her birth, the instant petition was nonetheless not filed for yet another two years. Thus, the 2018 judicial determination, premised on three- to eight-year-old evidence, is insufficient to establish by clear and convincing evidence, as a matter of law, that the mother was, at the time of this proceeding, "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate

care for [the subject] child" (Social Services Law § 384-b [4] [c] …). Matter of Juliet W. (Amy W.), 2024 NY Slip Op 05690, Fourth Dept 11-15-24

Practice Point: Here there was a prior ruling based on three-to-eight-year-old evidence that mother's mental health prevented her from adequately caring for her children. The collateral estoppel doctrine should not have been applied to prevent her from presenting evidence of her current mental health.

November 15, 2024

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

HERE THE CUSTODY CASE WAS TRANSFERRED TO A NEW JUDGE; THE PREVIOUS JUDGE'S ORDERS CONSTITUTED THE LAW OF THE CASE WHICH CANNOT BE VIOLATED BY SUBSEQUENT ORDERS BY THE NEW JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge to whom the case was transferred should not have issued orders which conflicted with those issued by the previous judge, which constituted the law of the case:

The March 21, 2023 order, which directed a hearing on the father's motion to vacate the 2017 custody order, constituted the law of the case and was thus binding on all judges of coordinate jurisdiction … . Thus, the order denying the motion to vacate the custody order, without holding a hearing, constitutes a violation of the law of the case doctrine, and the order should be reversed on that basis alone … . …

… [W]e further find that the [previous judge's] decision to so-order the subpoena … likewise constituted law of the case. Family Court therefore erred when it denied the motion to compel solely on the basis that the judicial subpoena was overbroad. Matter of Jahir I. v Sharon E.W., 2024 NY Slip Op 05635, Third Dept 11-14-24

Practice Point: When a case is transferred to a new judge, the orders issued by the previous judge are the law of the case and must be adhered to by the new judge.

November 14, 2024

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

FAILURE TO PROVE COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE PROVISIONS OF RPAPL 1304 REQUIRED REVERSAL OF SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's failure to prove compliance with the notice requirements in RPAPL 1304 required reversal in this foreclosure action:

… [T]he plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304. To that end, the plaintiff submitted an affidavit of Sarah L. Stonehocker, a vice president of loan documentation employed by the plaintiff's loan servicer, Wells Fargo Bank, N.A. (hereinafter Wells Fargo), with attachments, which were insufficient to establish compliance with RPAPL 1304. While Stonehocker averred that she had personal knowledge of Wells Fargo's business records and that, according to the business records she reviewed, 90-day notices were served via certified and first-class mail at the subject property, Stonehocker did not attest that she was familiar with the standard office mailing procedures of LenderLive, LLC (hereinafter LenderLive), the third-party vendor that apparently sent the RPAPL 1304 notices on behalf of the plaintiff. Thus, Stonehocker's "affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed" … .

Moreover, Stonehocker's affidavit failed to address the nature of Wells Fargo's relationship with LenderLive and whether LenderLive's records were incorporated into Wells Fargo's own records or routinely relied upon in its business… . Thus, Stonerhocker's affidavit failed to lay a foundation for the admission of a transaction report generated by LenderLive (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" … . U.S. Bank N.A. v Nahum, 2024 NY Slip Op 05581, Second Dept 11-13-24

Practice Point: Reversal of summary judgment because the bank failed to prove the RPAPL 1304 notice of foreclosure was properly mailed to defendant(s) is becoming less frequent, but there have been hundreds of reversals on this same ground over at least the last ten years.

November 13, 2024

MEDICAL MALPRACTICE, CIVIL PROCEDURE, EVIDENCE, JUDGES.

THE FAILURE TO GRANT PLAINTIFF'S REQUEST THAT THE JURY BE GIVEN AN INTERROGATORY ON THE THEORY THE SURGEON IMPROPERLY PERFORMED A PROCEDURE WAS REVERSIBLE ERROR (SECOND DEPT).

The Second Department, ordering a new trial on one of the theories of negligence, determined plaintiff's request that the jury be given an interrogatory should have been granted:

… [T]he Supreme Court erred in denying the plaintiff's request that the jury be given an interrogatory asking whether [defendant] Lazzaro departed from good and accepted standards of medical practice by "the improper performance of a surgical procedure," and therefore a new trial is required on this theory of negligence. "'Jury interrogatories must be based on claims supported by the evidence'" … . "'The trial court has broad discretion in deciding whether to submit interrogatories to the jury'" … . "However, where there is sufficient evidence to support a plaintiff's cause of action pursuant to a particular theory of negligence, it is error to deny a request by the plaintiff to submit an interrogatory to the jury regarding that theory" … .

Here, the plaintiff introduced sufficient evidence at trial to support her theory that Lazzaro departed from good and accepted standards of medical practice by the manner in which he performed the surgery … . Lawrence v New York Methodist Hosp., 2024 NY Slip Op 05571, Second Dept 11-13-24

Practice Point: In this medical malpractice case, there was sufficient proof a defendant improperly performed a surgical procedure to warrant granting plaintiff's request to give the jury an interrogatory on the issue. The denial of the request was deemed reversible error.

November 13, 2024

MENTAL HYGIENE LAW, ATTORNEYS, CIVIL PROCEDURE, JUDGES.

THE JUDGE IN THIS MENTAL HYGIENE LAW PROCEEDING SHOULD NOT HAVE HELD THE HEARING ON WHETHER APPELLANT WAS AN INCAPACITATED PERSON IN HER ABSENCE WITHOUT FIRST FINDING SHE COULD NOT MEANINGFULLY PARTICIPATE; IN ADDITION, COUNSEL SHOULD HAVE BEEN APPOINTED FOR APPELLANT BECAUSE SHE WAS CONTESTING THE GUARDIANSHIP PETITION (THIRD DEPT).

The First Department, vacating the judgment that appellant is an incapacitated person and remanding for a hearing, determined Supreme Court should not have held the Mental Hygiene Law section 81.11 hearing in appellant's absence without first making the finding she was unable to meaningfully participate in it. In addition, Supreme Court should have appointed counsel for the appellant because she was contesting the guardianship petition:

Under the unique facts of this case [not described in the decision], we are exercising our inherent power to vacate the order and judgment in the interest of substantial justice … . Vacatur is warranted in the interest of justice because the court held a hearing pursuant to Mental Hygiene Law § 81.11 in respondent's absence and without having made a finding regarding her inability to meaningfully participate in the hearing … . In addition, the court failed to appoint counsel to represent respondent even though she was contesting the guardianship petition … . Matter of Jenkins v Gina B., 2024 NY Slip Op 05637, Third Dept 11-14-24

Practice Point: A hearing under the Mental Hygiene Law to determine whether a person is incapacitated should not be held in the person's absence without a finding he or she could not meaningfully participate in the hearing.

Practice Point: Where a person is contesting a guardianship petition under the Mental Hygiene Law, he or she is entitled to appointed counsel.

November 14, 2024

NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT SCHOOL DISTRICT DID NOT MAKE OUT A PRIMA FACIE CASE DEMONSTRATING IT LACKED CONSTRUCTIVE NOTICE OF THE TEACHER'S ALLEGED PROPENSITY TO SEXUALLY ABUSE CHILDREN; THEREFORE ITS MOTION FOR SUMMARY JUDGMENT IN THIS CHILD VICTIMS ACT CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district was not entitled to summary judgment in this case alleging sexual abuse by a teacher in 2013 – 2014. A question of fact had been raised about whether the school district knew or should have known of the teacher's alleged propensity to abuse children:

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee" … . "'[A] necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … .

"A school 'has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'" … . "'The standard for determining whether the school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information'" … . "'The adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff's injury'" … . "Where the complaint alleges negligent supervision due to injuries related to an individual's intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable" … . "'Actual or constructive notice to the school of prior similar conduct generally is required'" … .

Here, the defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . In particular, the defendants submitted a transcript of the plaintiff's deposition testimony, in which the plaintiff testified that the principal and other teachers were aware of the teacher's inappropriate behavior, which occurred multiple times throughout the school year in a classroom on the defendants' premises during school hours … . J.J. v Mineola Sch. Dist., 2024 NY Slip Op 05580, Second Dept 11-13-24

Practice Point: Here the plaintiff's testimony that the principal and other teachers were aware of the teacher's inappropriate behavior which occurred multiple times in a classroom was enough to prevent the school from making out a prima facie case that it did not have constructive notice of the teacher's alleged propensity.

November 13, 2024

NEGLIGENCE, EVIDENCE.

PLAINTIFF SLIPPED AND FELL ON TRACKED-IN-RAIN DURING AN ONGOING STORM; DEFENDANT HAD PLACED MATS NEAR THE DOOR AND ELSEWHERE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the defendant (Open Kitchen) in this tracked-in-rain slip and fall case was entitled to summary judgment. Open Kitchen demonstrated plaintiff slipped and fell during an ongoing rain storm and it had placed mats near the door and elsewhere:

… [T]here is no evidence that Open Kitchen either created the wet condition in the entryway or had notice of a hazard that could have been prevented by the exercise of reasonable care … . Open Kitchen satisfied its duty by employing reasonable remedial measures to address the ongoing rainstorm by laying mats in front of the entrance doors and elsewhere throughout the premises … . There was no active notice in the form of prior complaints received … . Nor did the undisputed fact that it was raining at the time of plaintiff's accident, causing water to be tracked into the premises, constitute constructive notice of a dangerous situation requiring Open Kitchen to cover the entire floor with mats or continuously mop the floor … . Moreover, plaintiff testified that that he only noticed water on the floor after his fall, and thus it cannot be inferred that Open Kitchen had constructive notice of "a

hazard sufficiently visible as to permit discovery and remedy" … . Betancourt v ARC NYC123 William, LLC, 2024 NY Slip Op 05628, Third Dept 11-14-24

Practice Point: Here a slip and fall on tracked-in-rain during an ongoing storm was not actionable. Defendant had placed mats near the door and elsewhere and was deemed not have had constructive notice of a dangerous condition.

November 14, 2024

NEGLIGENCE, EVIDENCE.

PROOF THAT PLAINTIFF WIFE ASSUMED FULL RESPONSIBILITY FOR HOUSEHOLD CHORES, COOKING, TRANSPORTIING THE CHILDREN, AND CARED FOR THE INJURED PLAINTIFF, WARRANTED A $40,000 AWARD FOR LOSS OF SERVICES; THE JURY HAD AWARDED $0 DAMAGES (FIRST DEPT).

The First Department, remanding for a new trial unless the parties stipulate to a damages award of $40,000 for loss of services, determined the jury's award of $0 damages constituted a material deviation from reasonable compensation:

Plaintiff wife testified that after the injured plaintiff's accident, she assumed full responsibility for household chores, cooking, and transportation for plaintiffs' children, and also had to care for the injured plaintiff. This testimony is sufficient to support an award for past loss of services … . Lind v Tishman Constr. Corp. of N.Y., 2024 NY Slip Op 05540, First Dept 11-12-24

Practice Point: Consult this decision for some insight into the value of "loss of services" in a personal injury case.

November 12, 2024

NEGLIGENCE. CIVIL PROCEDURE.

THE COVID-19 TOLLS SUSPENDED THE RUNNING OF THE STATUTE OF LIMITATIONS IN THIS PERSONAL INJURY CASE RENDERING THE ACTION TIMELY COMMENCED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the COVID-19 tolls suspended the running of the statute of limitations in this personal injury case, rendering the action timely commenced:

Pursuant to CPLR 214 (5), a three-year statute of limitations applies to an action to recover damages for personal injury. Plaintiff's cause of action accrued on June 27, 2019, the date of the accident … , and plaintiff did not commence this action until June 29, 2022. However … plaintiff established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" … . Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 … . "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" … . "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" … . Paul v Lyons, 2024 NY Slip Op 05661, Fourth Dept 11-15-24

Practice Point: Consult this decision for a concise explanation of how the COVID-19 tolls affect the running of a statute of limitations.

November 15, 2024