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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in November 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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THE MOTION TO AMEND THE COMPLAINT TO IDENTIFY "JOHN DOE" "JANE DOE" DEFENDANTS AS POLICE OFFICERS IN THIS CIVIL RIGHTS CASE SHOULD NOT HAVE BEEN GRANTED; THE STATUTE OF LIMITATIONS HAD EXPIRED AND THE RELATION-BACK DOCTRINE DOES NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to amend the complaint to identify police officers as the "John Doe, Jane Doe" defendants in this 18 USC 1983 false arrest and unlawful search case should not have been granted. The statute of limitations had expired and the relation-back doctrine did not apply—police officers are not united in interest with the city:

CPLR 1024 provides that a "party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." "Yet, 'parties are not to resort to the "Jane Doe" procedure unless they exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, are unable to do so. Any failure to exercise due diligence to ascertain the "Jane Doe's" name subjects the complaint to dismissal as to that party'" … .

Here, the statute of limitations had expired by the time the defendants were identified in the second amended complaint. Contrary to the plaintiff's contention, the relation-back doctrine does not apply, because the defendants are not united in interest with the City … . The City "cannot be held vicariously liable for its employees' violations of 42 USC § 1983, and there is no unity of interest in the absence of a relationship giving rise to such vicarious liability" … . Additionally, the plaintiff failed to demonstrate that he made diligent efforts to ascertain the defendants' identities prior to the expiration of the statute of limitations or that the City hindered any such efforts … . Contrary to the plaintiff's contentions, the Supreme Court's prior orders allowing the plaintiff to amend the complaint to add

the then-unknown defendants by name within a certain time period are not binding on these issues. The doctrine of the law of the case does not bind an appellate court … . Agosto v Maria, 2024 NY Slip Op 05950, Second Dept 11-27-24

Practice Point: Here the motion to amend the complaint to identify "John Doe" and "Jane Doe" defendants as police officers should have been denied because the statute of limitations had expired and the relation-back doctrine did not apply because police officers are not united in interest with the city which employs them.

November 27, 2024

APPEALS, 30-DAY APPEALS CLOCK IN COURT OF APPEALS, ELECTRONIC FILING.

30-DAY COURT-OF-APPEALS "APPEAL CLOCK" EXPLAINED IN THE CONTEXT OF ELECTRONIC FILING (CT APP).

The Court of Appeals, in determining one of the party's appeal to the Court of Appeals was untimely, explained how the 30-day appeal clock works with electronic filing:

To be effective to start CPLR 5513 (b)'s 30-day clock, service must comply with CPLR 2103. CPLR 2103 (b) (7), in turn, empowers the Chief Administrative Judge to authorize electronic service. The Chief Administrative Judge has exercised this authority by promulgating Uniform Rules for Trial Courts (22 NYCRR) § 202.5-b (h) (2), which provides that in actions—such as this one—that are subject to electronic filing, parties may serve "notice of entry of an order" by filing "a copy of the order . . . and written notice of its entry" on its New York State Courts Electronic Filing System (NYSCEF) site, thus causing that site to transmit "notification of receipt of the documents, which shall constitute service thereof by the filer" (see also 22 NYCRR 202.5-bb [a] [1] [making section 202.5-b applicable to all electronic filing cases]). The relevant rules are not limited to service of trial court orders; and they neither prohibit nor render ineffective service of an intermediate appellate court order with notice of its entry by filing on the trial court's NYSCEF docket—as opposed to the NYSCEF docket of the intermediate appellate court (see generally CPLR 2103 [b] [7]; 5513 [b]; 22 NYCRR 202.5-b—202.5-bb). Thus, in an electronic filing case, service via filing on the NYSCEF docket for the trial court is effective to start CPLR 5513 (b)'s 30-day clock.

Here, plaintiffs moved for leave to appeal before this Court 31 days after defendant Structure Tone Inc. (Structure Tone) served plaintiffs by filing on the trial court's NYSCEF docket. Plaintiffs' motion to this Court was therefore untimely as to Structure Tone and, consequently, the portion of the motion to dismiss the appeal as against Structure Tone should be granted … . However, as to defendants 200 Park, LP (200 Park), Tishman Speyer Properties, L.P. (Tishman), and CBRE, Inc. (CBRE), the motion was timely. Ruisech v Structure Tone Inc., 2024 NY Slip Op 05866, CtApp 11-25-24

Practice Point: Here the 30-day period for taking an appeal to the Court of Appeals, in the context of electronic filing, is explained.

November 25, 2024

CERTIFICATE OF TRANSLATION, ATTORNEYS, EVIDENCE, NEGLIGENCE.

THE ATTORNEY'S "CERTIFICATE OF TRANSLATION" DID NOT INCLUDE SUFFICIENT DETAIL ABOUT THE ATTORNEY'S KNOWLEDGE OF THE SPANISH LANGUAGE; THEREFORE THE TRANSLATION OF PLAINTIFF'S AFFIDAVIT WAS NOT ADMISSIBLE AND SUMMARY JUDGMENT WAS NOT SUPPORTED (SECOND DEPT).

The Second Department, reversing summary judgment in favor of plaintiff in this traffic accident case, determined the attorney's "certificate of translation" was not sufficient to render plaintiff's affidavit, written in Spanish, admissible:

… [P]laintiff submitted an affidavit in which he averred, among other things, that the "affidavit was translated to me from English to Spanish prior to my signing by a person who speaks Spanish as it is my native language and the language I understand best." The plaintiff also submitted a certificate of translation by an associate attorney at his counsel's law office in which the associate attorney affirmed, without elaboration, that she is fluent in English and Spanish and competent to translate documents from one language to the other. Under these circumstances, the conclusory certificate of translation does not contain sufficient detail concerning the extent of the associate attorney's knowledge of the Spanish language. As such, the associate attorney's certificate of translation was insufficient

to state the associate attorney's qualifications, rendering the plaintiff's affidavit inadmissible (see CPLR 2101[b] …). Reyes v Underwood, 2024 NY Slip Op 05466, Second Dept 11-6-24

Practice Point: Here plaintiff's affidavit in support of summary judgment was in Spanish. An attorney provided a "certificate of translation" which did not include sufficient detail about the attorney's knowledge of the Spanish language. Therefore the affidavit was inadmissible.

November 6, 2024

CHILD MALTREATMENT REPORT, EXPUNGEMENT, FAMILY LAW.

PETITIONER NOT ENTITLED TO COUNSEL IN A STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT (SCR) PROCEEDING; THE STATUTE REQURING EXPUNGEMENT OF AN SCR CHILD MALTREATMENT REPORT IF THE RELATED FAMILY COURT CASE IS DISMISSED DOES NOT APPLY RETROACTIVELY; THE MALTREATMENT REPORT WAS SUPPORTED BY THE EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined (1) petitioner was not entitled to counsel at the Statewide Central Register of Child Abuse and Maltreatment (SCR) administrative hearing, (2) the amendment to the Social Services Law [Social Services Law § 422 [8] [a] [ii]] requiring expungement of a child maltreatment report after a related dismissal in Family Court did not apply retroactively, and (3) the report was supported by the evidence:

ACS [New York City Administration for Children's Services] commenced a Family Court article 10 neglect proceeding against petitioner and her husband, who had custody of T. and her younger sisters. Family Court authorized an adjournment in contemplation of dismissal (ACD), which allows the court to adjourn the proceedings for a period not exceeding one year "with a view to ultimate dismissal of the petition in furtherance of justice" (Family Court Act § 1039 [b]). In February of 2020, Family Court dismissed the article 10 proceeding upon the expiration of the adjournment period based on petitioner's satisfactory compliance with Family

Court's conditions, including completion of parenting and anger management classes.

Meanwhile, the police officer who interviewed T. made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR). One of the SCR's primary purposes is to inform child care providers and agencies that a person has a substantiated report of child abuse or maltreatment "for the purpose of regulating their future employment or licensure" … . In July of 2019, ACS determined that the report against petitioner was indicated … and petitioner challenged that determination … . After an internal administrative review, the New York State Office of Children and Family Services (OCFS) concluded that a fair preponderance of the evidence supported a determination that petitioner had maltreated T. and that the maltreatment was relevant and reasonably related to employment, licensure, or certification in the child care field … . Matter of Jeter v Poole, 2024 NY Slip Op 05868, CtApp 11-25-24

Practice Point: Petitioner was not entitled to counsel in a SCR child maltreatment proceeding.

Practice Point: The Social Services Law statute which requires expungement of a maltreatment report if the related Family Court proceeding is dismissed does not apply retroactively.

November 25, 2024

COLLATERAL ESTOPPEL, EVIDENCE, FAMILY LAW, 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

COVID-19 TOLLS, NEGLIGENCE.

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.

DEBTOR-CREDITOR, SUIT BY LIENHOLDER.

A LIENHOLDER NONPARTY TO AN ACTION THAT RESULTED IN A FEE AWARD TO A DEBTOR MAY SUE TO RECOVER THOSE FEES WHERE THE LIENHOLDER WAS NEITHER JOINED NOR REQUIRED TO INTERVENE IN THAT ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined: "[a] lienholder nonparty to an action that resulted in a fee award against a debtor may challenge the legal basis of the judgment in a separate proceeding to recover those fees. We conclude that because the nonparty was neither joined nor required to intervene in the action against the debtor, it had no prior opportunity to challenge the award and thus is not barred from doing so in this proceeding … ". Matter of Kasowitz, Benson, Torres & Friedman, LLP v JPMorgan Chase Bank, N.A., 2024 NY Slip Op 05876, CtApp 11-26-24

November 26, 2024

INSURANCE LAW, CONTRACT LAW, LIMITATION PERIOD.

IN THIS FIRE-DAMAGE CASE, THE INSURANCE POLICY IMPOSED A TWO-YEAR LIMITATION PERIOD; THE ACTION WAS NOT BROUGHT UNTIL SIX YEARS AFTER THE FIRE; PLAINTIFF'S FAILURE TO PROVIDE ANY DETAILS DEMONSTRATING WHY THE RESTORATION COULD NOT BE COMPLETED WITHIN THE TWO-YEAR LIMITATION PERIOD REQUIRED DISMISSAL OF THE COMPLAINT; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over an extensive three-judge dissent, determined plaintiff's complaint in this fire-damage case was properly dismissed because the contractual two-year limitation period was exceeded and plaintiff made only conclusory allegations that the repairs could not be made within that two-year period:

On this motion to dismiss, the Tower/AmTrust defendants met their burden of establishing, by reference to the contract's two-year suit limitation provision, that the action was time-barred because plaintiff did not commence it within two years of the fire, utterly refuting plaintiff's factual allegations … . Nothing in plaintiff's response raised any issue as to whether the provision should bar her claims. Plaintiff's allegation that "[g]iven the massive structural damage wrought by the fire, the restoration of [plaintiff's] property would have been [a] multi-year process under even the best of circumstances" is a conclusory statement that the suit limitation provision was unreasonable and is not logically inconsistent with the replacement of the property within the two-year limitation period. Here, plaintiff failed to allege actions that she took to complete the repairs within two years; she did not provide any details regarding the extent of the damage, other than that the damage was "massive" and the fire set off four alarms, or why complete restoration within two years was an impossibility. This bare-bones allegation stands in stark contrast to the plaintiff's factual assertions in [Executive Plaza, LLC v Peerless Ins. Co. (22 NY3d 511)]. There, the plaintiff pleaded the specific remedial actions taken to restore the property, including retaining an architect and construction company, submitting a variance application, and seeking and obtaining building permits, which were not issued until 20 months after the property damage … . Most importantly, that plaintiff provided that these remedial actions were taken within the limitation period. All of this information is notably absent from

plaintiff's pleadings and motion response here. Farage v Associated Ins. Mgt. Corp., 2024 NY Slip Op 05875, CtApp 11-26-24

Practice Point: Here the insurance contract imposed a two-year limitation on claims for the cost of fire-damage repair. Plaintiff did not bring the action until six years after the fire. The complaint was properly dismissed because it did not provide any details explaining why the repairs could not have been made during the two-year limitation period.

November 26, 2024

LAW OF THE CAW, FAMILY LAW, 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

LEGAL MALPRACTICE, MOTION TO DISMISS, EVIDENCE.

IN THIS LEGAL MALPRACTICE ACTION, THE PLAINTIFF NEED NOT SHOW SHE ACTUALLY SUSTAINED DAMAGES TO SURVIVE A MOTION TO DISMISS (SECOND DEPT).

The Second Department, reversing Supreme Court's dismissal of a legal malpractice complaint, noted that the plaintiff need not show she actually sustained damages to survive a dismissal motion:

The plaintiffs alleged … that they retained the defendants to represent them in an action to recover damages for personal injuries the plaintiff … allegedly sustained in a motor vehicle accident (hereinafter the underlying action) and that due to the defendants' failures to pursue a theory based on a violation of Vehicle and Traffic Law § 509(3), the plaintiffs were not able to obtain a verdict in their favor in the underlying action. * * *

To state a cause of action to recover damages for legal malpractice, "a plaintiff must allege that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" … . "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" … . "A plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages … . "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" … . Kowalski v Gold Benes, LLP, 2024 NY Slip Op 05967, Second Dept 11-27-24

Practice Point: In this legal malpractice case, the court noted the plaintiff need not show she actually sustained damages to survive a motion to dismiss.

November 27, 2024

MENTAL HYGIENE LAW, INCAPACIATED PERSONS, JUDGES, ATTORNEYS.

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

MINISTERIAL EXCEPTION, CONSTITUTIONAL LAW, HOSTILE WORK ENVIRONMENT, RELIGION, EMPLOYMENT LAW.

THE "MINISTERIAL EXCEPTION" IS GROUNDED IN THE FIRST AMEMDMENT AND MAY RESTRICT A STATE AGENCY'S REVIEW OF EMPLOYMENT DECISIONS MADE BY RELIGIOUS INSTITUTIONS; THE EXCEPTION IS AN AFFIRMATIVE DEFENSE, NOT A JURISDICTIONAL BAR, TO A HOSTILE WORK ENVIRONMENT ACTION UNDER THE NYS HUMAN RIGHTS LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the New York State Division of Human Rights (DHR) and the Appellate Division, determined the so-called "ministerial exception" was not a jurisdictional bar to the Nigerian priest's, Ibhawa's, hostile work environment claim under the NYS Human Rights Law. The "ministerial exception" is grounded in the First Amendment and may restrict state interference with employment decisions made by religious institutions.. The Court of Appeals clarified that the ministerial exception is an affirmative defense in an employment discrimination action against a religious institution, not a jurisdictional bar to bringing the case:

Ibhawa filed an employment complaint with the New York State Division of Human Rights (DHR) in November 2020, claiming that the Diocese had engaged in discriminatory employment practices in violation of the New York Human Rights Law (see Executive Law art 15). Ibhawa alleged that he had experienced racial discrimination at the Diocese, including from an employee who directed a racial slur at him and a parishioner who made xenophobic remarks to him. He further alleged that the Diocesan officials to whom he reported the incidents declined to investigate them, questioned his decision to terminate the employee who had used a racial slur, and made "highly insulting and offensive" remarks about "foreign priests." At a subsequent meeting, two Diocesan officials offered to buy Ibhawa a plane ticket to Nigeria and told him that the "Bishop could remove [his] faculties." Shortly afterwards, the Diocese informed Ibhawa that his employment had been terminated and his priestly faculties removed, which meant that that he could not apply for a position as a priest in the Diocese. The Diocese eventually hired a white priest to replace him. Based on these assertions, Ibhawa alleged claims of hostile work environment and unlawful termination on the basis

of race and national origin. He sought, among other remedies, compensatory and punitive damages. * * *

DHR's order dismissing Ibhawa's hostile work environment claim was affected by an error of law. After noting the parties' agreement that Ibhawa was "a priest serving as the pastor (Parish Administrator) of a church," DHR found that his complaint "comes under the ministerial exception (relative to the first amendment of the U.S. Constitution)." On that basis, DHR concluded that it lacked jurisdiction over Ibhawa's claims. This determination was contrary to the U.S. Supreme Court's express holding that the "exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar" … . Matter of Ibhawa v New York State Div. of Human Rights, 2024 NY Slip Op 05872, CtApp 11-26-24

Practice Point: The "ministerial exception" is grounded in the First Amendment and may restrict a state agency's review of employment decisions made by religious institutions. The exception is an affirmative defense, not a jurisdictional bar, to a hostile work environment action brought by a priest against his employer.

November 26, 2024

MOTION TO DISMISS, CREDIBILITY, EVIDENCE, JUDGES.

MOTHER MADE OUT A PRIMA FACIE CASE FOR RELOCATING WITH THE CHILD IN THIS CUSTODY PROCEEDING; CREDIBILITY ISSUES PLAY NO ROLE AT THE MOTION-TO-DISMISS STAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined mother had made out a prima facie case for relocating to a different county with the child. The petition for a modification of custody should not have been dismissed:

"In deciding a motion to dismiss a petition for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom" … . "The question of credibility is irrelevant, and should not be considered" … .

Here, accepting the petitioner's evidence as true and affording her the benefit of every favorable inference, the petitioner presented sufficient evidence to establish a prima facie case that relocating with the child to Bergen County might be in the

child's best interests … . At the hearing, the petitioner and her spouse testified that they wanted to relocate to Bergen County because they would have family support there and the child liked spending time with family members living in that area. The petitioner further testified that if she were permitted to relocate, she would continue the respondent's parental access schedule set forth in the stipulation of settlement and would agree to additional parental access for the respondent. We note that the Family Court did not ascertain from the attorney for the child the position of the then 11-year-old child or conduct an in camera interview with the child … . Matter of Fortune v Jasmin, 2024 NY Slip Op 05443, Second Dept 11-6-24

Practice Point: In considering a motion to dismiss a petition for a modification of custody credibility issues are irrelevant.

November 6, 2024

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE.

THE ERRORS MADE IN THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE WERE NOT MADE IN BAD FAITH AND DID NOT PREJUDICE THE MUNICIPAL DEFENDANT; THEREFORE AMENDMENT OF THE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the erroneous incident-date in the notice of claim did not justify dismissal of the action in this sidewalk slip and fall case. The error was not made in bad faith and did not prejudice the municipal defendant:

The Transit defendants … moved … pursuant to CPLR 3211(a) to dismiss the complaint … on the ground that the notice of claim did not comply with General Municipal Law § 50-e(2), as it incorrectly listed the date of the accident as March 5, 2016, instead of April 5, 2016, and identified the plaintiff as "Maria Hernandez," instead of "Maria Hernandez-Panell." …

General Municipal Law § 50-e(2) requires that a notice of claim set forth … "the time when, the place where and the manner in which the claim arose" … . "[I]n determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time

and understand the nature of the accident" … . Pursuant to General Municipal Law § 50-e(6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby … .

Here, there is no indication that the date originally listed in the notice of claim as the accident date was set forth in bad faith, and the Transit defendants did not demonstrate any prejudice as a result of the error … . Moreover, the plaintiff supplied the correct date of the accident at the hearing pursuant to General Municipal Law § 50-h and Public Authorities Law § 1212(5) … . Hernandez-Panell v City of New York, 2024 NY Slip Op 05962, Second Dept 11-27-24

Practice Point: Errors in a notice of claim against a municipality should not result in dismissal of the action if the errors were not made in bad faith and did not prejudice the municipal defendant.

November 27, 2024

REARGUE AND RENEW, COMBINED MOTION, JUDGES.

A COMBINED MOTION TO REARGUE AND MOTION TO RENEW IS PROPER; HERE SUPREME COURT CORRECTLY DENIED THE MOTION TO REARGUE BUT SHOULD HAVE CONSIDERED THE MOTION TO RENEW; MATTER REMANDED (FIRST DEPT).

The First Department, remanding the matter to Supreme Court, determined the combined motion to reargue and motion to renew was properly brought. The motion to reargue was properly denied, but the motion could should have considered the motion to renew:

A combined motion for leave to reargue and renew is permitted so long as each branch of the motion is separately identified and supported (CPLR 2221 [f]). Here, the motion court considered plaintiff's combined motion to be "couched" as one for reargument and improvidently failed to address or analyze plaintiff's application for renewal.

Plaintiff in this case submitted a medical expert's affidavit as new or additional facts not included on the motion to vacate, which this Court in the past has deemed to be sufficient to support a motion to renew … . As plaintiff properly submitted a

combined motion for reargument and renewal, CPLR 2221 (f) required the court to "decide each part of the motion as if it were separately made." Pellerano v New York City Health & Hosps. Corp., 2024 NY Slip Op 05899, First Department 11-26-24

Practice Point: It is proper to combine a motion to reargue and a motion to renew. The motions should be considered separately. Here the denial of the motion to reargue was proper but the motion to renew should also have been considered. The matter was remanded.

November 26, 2024

SANCTIONS, MERITLESS LAWSUITS, ATTORNEYS.

PLAINTIFF'S BRINGING MULTIPLE MERITLESS LAWSUITS AGAINST DEFENDANT AND HER ATTORNEYS OVER THE COURSE OF TEN YEARS WARRANTED SANCTIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's bringing several meritless lawsuits against defendant and her attorneys over the course of ten years warranted sanctions:

Supreme Court improvidently exercised its discretion in denying defendant an award of sanctions despite noting that plaintiff's "conduct was entirely frivolous," "abusive," and "fabricated." The record firmly established that plaintiff engaged in a persistent pattern of extended and largely meritless litigation against defendant … , rendering his conduct frivolous within the meaning of 22 NYCRR 130-1.1(c) and thereby warranting sanctions. Plaintiff's numerous lawsuits initiated against both defendant and her attorneys—six separate suits between 2010 and 2020, all dismissed at the pleading stage—strongly suggests that those lawsuits, along with the present action, were brought primarily to harass defendant … . Our prior decision holding that sanctions for frivolous conduct were not warranted does not affect our decision to grant the motion for sanctions here, as the result in our prior decision (Ray v Ray, 180 AD3d 472, 474 [1st Dept 2020]) was not based on these particular facts. Ray v Ray, 2024 NY Slip Op 05777, First Dept 11-19-24

Practice Point: Here plaintiff's multiple meritless lawsuits against defendant and her attorneys warranted sanctions for "frivolous conduct."

November 19, 2024

SERVICE OF PROCESS, FORECLOSURE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANT WAS PROPERLY SERVED OR EVEN NOTIFIED OF THE FORECLOSURE ACTION; THE COURT NEVER HAD JURISDICTION OVER DEFENDANT AND THE MOTION TO EXTEND THE TIME TO SERVE HER SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not demonstrate defendant was properly served with the summons and complaint. Therefore the court never had jurisdiction over the defendant:

… [T]he plaintiff was on notice in December 2018 that service upon the defendant allegedly was defective when the defendant moved to dismiss the complaint for lack of personal jurisdiction. The plaintiff nonetheless waited nearly 10 months thereafter to move for an extension of time to serve the defendant. Moreover, the plaintiff's motion was made more than two months after the hearing before the special referee concluded, even though the evidence at the hearing demonstrated that the defendant had been residing in Canada for decades … . Although the statute of limitations had already expired by the time the plaintiff moved for an extension of time, the plaintiff failed to demonstrate that it diligently prosecuted this action … . "Moreover, . . . the plaintiff submitted no evidence that [the defendant] had actual notice of the action against her within the 120-day service period" … . Further, the plaintiff failed to rebut the inference [*3]of substantial prejudice to the defendant that arose from the protracted delay in obtaining such notice … . Accordingly, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant.

Since the defendant was not properly served with the summons and complaint and the plaintiff failed to demonstrate entitlement to an extension of time to effectuate service, the Supreme Court should have granted the defendant's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her. "The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process. In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and

void" … . HSBC Bank USA, N.A. v Labin, 2024 NY Slip Op 05963, Second Dept 11-27-24

Practice Point: Consult this decision for the analytical criteria for determining whether a motion to extend the time to serve a defendant with the summons and complaint should be granted.

November 27, 2024

SERVICE, ORDER TO SHOW CAUSE, EVIDENCE.

THERE WAS NO PROOF THE ORDER TO SHOW CAUSE WAS ACTUALLY DELIVERED TO THE INCARCERATED DEFENDANT; DEFAULT JUDGMENT VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the order to show cause was not properly served on the incarcerated defendant, requiring vacation of the default judgment:

"The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with" … . "The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void" … .

The order granting plaintiff summary judgment on his claims without opposition submitted by defendant and the related Special Referee order awarding damages are vacated. Defendant affirmed that he did not know of, or have access to, the summary judgment motion hand-delivered and served by plaintiff's process server on a receptionist at the prison where defendant is incarcerated until after the order granting summary judgment was entered. Plaintiff's service on the prison employee who assured that the motion would be given to plaintiff did not satisfy the court's order to show cause approving alternative means of service that were applicable to the service of legal papers on the incarcerated defendant, and which required plaintiff to obtain at least some evidence from the prison that the served documents had, in fact, been delivered to the prisoner. The presumption of effective service arising from a valid affidavit of a process server does not apply here. The court approved an alternative means of service on the defendant incarcerated in a foreign prison, and plaintiff failed to comply. Therefore, defendant's unrebutted claim that he did not receive the motion is not conclusory

and requires vacatur of the default. Bacon v Nygard, 2024 NY Slip Op 05478, First Dept 11-7-24

Practice Point: Here service of an order to show cause upon the incarcerated defendant was not supported by any evidence the order to show cause was actually delivered to the defendant after it was given to a prison employee, Therefore the default judgment was vacated.

November 7, 2024

SOVEREIGN IMMUNITY, NEGLIGENCE.

NEW JERSEY TRANSIT CORPORATION CANNOT ASSERT THE SOVEREIGN IMMUNITY DEFENSE IN THIS TRAFFIC ACCIDENT CASE; THE ACCIDENT INVOLVED A NEW JERSEY TRANSIT CORPORATION BUS AND OCCURRED IN NEW YORK CITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over two concurrences and a dissent, determined the New Jersey Transit Corporation could not assert the sovereign immunity defense in this traffic-accident case:

In Franchise Tax Bd. of Cal. v Hyatt, the United States Supreme Court recognized that the text and structure of the Federal Constitution not only preserved States' pre-ratification sovereign immunity, but compelled absolute recognition of that immunity in other States' courts as a matter of "equal dignity and sovereignty" … . However, the Court did not address how to determine whether a state-created entity is entitled to this immunity. We glean from the Court's analysis that the relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign. We hold that, to answer this question, courts must analyze how the State defines the entity and its functions, its power to direct the entity's conduct, and the effect on the State of a judgment against the entity. Considering these factors, we conclude that maintaining this action against defendant New Jersey Transit Corporation (NJT) in our courts would not offend New Jersey's sovereign dignity and accordingly hold that defendants are not entitled to invoke a sovereign immunity defense. On February 9, 2017, a bus owned and operated by NJT allegedly struck and injured plaintiff Jeffrey Colt as he traversed a crosswalk on 40th Street in Manhattan. The bus was driven by defendant Ana Hernandez, an employee of NJT. Colt and his wife, plaintiff Betsy

Tsai, commenced this action on September 18, 2017, asserting causes of action for negligence, negligent hiring, and loss of consortium. Defendants answered the complaint and denied many of plaintiffs' factual allegations. Defendants asserted—as part of an exhaustive list including many boilerplate defenses—that plaintiffs' recovery was "barred by lack of jurisdiction over NJT" and "barred as this Court lacks jurisdiction," and that defendants were "immune from suit." Colt v New Jersey Tr. Corp., 2024 NY Slip Op 05867, CtApp 11-25-24

Practice Point: Here the New Jersey Transit Corporation could not invoke the sovereign immunity defense to a New York City traffic accident involving a New Jersey Transit Corporation bus.

November 25, 2024

STANDING, FORECLOSURE, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE STANDING TO FORECLOSE; THE NOTE WAS NOT PROPERLY ENDORSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not establish standing to foreclose. Although the plaintiff proved it had possession of the note at the time the proceeding was brought, it did not demonstrate the note was properly endorsed:

Although the plaintiff established, prima facie, that it had possession of the original "wet ink" note prior to commencing the instant action …, the plaintiff failed to demonstrate that the note was properly endorsed. "Where there is no allonge or note that is either endorsed in blank or specially endorsed to the plaintiff, mere physical possession of a note at the commencement of a[n] . . . action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" … . Here, the instant note bore no endorsements and had no allonges attached. Deutsche Bank Natl. Trust Co. v PJK Holdings, LLC, 2024 NY Slip Op 05787, Second Dept 11-20-24

Practice Point: If standing to foreclose is contested, a plaintiff must show (1) it was in possession of the note at the time the proceeding was brought and (2) the note was properly endorsed in blank or specifically to the plaintiff.

November 20, 2024

SUMMARY JUDGMENT MOTION, PRIMA FACIE CASE, NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

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

SUMMARY JUDGMENT, SEARCH THE RECORD, JUDGES.

A COURT'S POWER TO SEARCH THE RECORD AND AWARD SUMMARY JUDGMENT TO A NONMOVING POWER IS LIMITED TO THE CAUSES OF ACTION OR ISSUES IN THE MOTIONS BEFORE IT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that a court's power to search the record and award summary judgment to a nonmoving party is constrained by the causes of action or issues raised in the motions before it:

Although the court has the authority to search the record and grant summary judgment to a nonmoving party (see CPLR 3212[b] …), the "power to search the record and afford a nonmoving party summary relief is not . . . boundless" … . Thus, "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" … . Here, the court improperly considered an issue that was not the subject of the motion before it … . Mejia v 69 Mamaroneck Rd. Corp., 2024 NY Slip Op 05974, Second Dept 11-27-24

Practice Point: A court cannot search the record and award summary judgment to a nonmoving party on a cause of action or an issue not raised in the motions before it.

November 27, 2024

VENUE, CONTRACT LAW, EVIDENCE, FRAUD.

THE PARTY SEEKING TO ENFORCE A VENUE CONTRACT PROVISION HAS THE BURDEN OF DEMONSTRATING THE AUTHENTICITY OF THE SIGNATURE IN THE FACE OF AN ALLEGATION OF FORGERY; HERE DEFENDANT DEMONSTRATED THE SIGNATURE WAS AUTHENTIC AND PLAINTIFF FAILED TO RAISE A QUESTION OF FACT RE: THE FORGERY ALLEGATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the defendant demonstrated the contract which included a venue provision was signed by the decedent and the plaintiff failed to raise a triable question of fact about whether the signature was forged. The court noted that contractual choice of venue provisions are generally enforceable and provided some insight into how a forgery question-of-fact can be raised:

Forum selection clauses may designate a jurisdiction, such as the federal or state court system, or the clause may designate a venue within the State, as was done here by specifying Nassau County as the proper venue … .* * *

… [T]he party moving for a change of venue under CPLR 501 is in effect seeking to enforce a contractual provision. For that reason, … the proponent of the motion bears the initial burden to establish the authenticity of the writing for purposes of a motion to enforce a contractual venue provision … . This may be done through any of the recognized methods of authentication, including, but not limited to, the testimony of a witness who was present at the time of the signing, an admission of authenticity, proof of handwriting, and, as particularly relevant here, through circumstantial evidence … . * * *

Although an expert opinion is not required to raise an issue of fact as to forgery , the movant must nevertheless offer "[s]omething more than a bald assertion," and in this regard conclusory or self-serving affidavits are inadequate … . Plaintiff

offered only an affidavit in which he claimed to be "familiar" with decedent's handwriting. Based on a summary of certain perceived inconsistencies in the signatures and initials on the agreements, plaintiff asserted that "whoever the person or people who signed and initialed these pages may have been, it was not my mother." Attached to the affirmation is an undated "exemplar" of what is purportedly decedent's signature, but no effort is made to establish that the exemplar represents decedent's signature at the relevant time. Furthermore, the exemplar is purportedly decedent's handwritten signature, and … electronic signatures may naturally differ from handwritten one … . Knight v New York & Presbyt. Hosp, 2024 NY Slip Op 05870, CtApp

Practice Point: Contractual provisions designating venue are enforceable.

Practice Point: To enforce a contractual venue provision, in the face of a forgery allegation, the moving party must demonstrate the signature is authentic.

Practice Point: Bald assertions of forgery unsupported by any evidence will not raise a triable question of fact on the forgery issue.

November 25, 2024