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Weekly Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 20 – 24, 2025, and Posted on the New York Appellate Digest Website on Monday, January 27, 2025. The Entries iin 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 Second Department, reversing Supreme Court, determined dismissing the complaint was not the appropriate remedy for petitioners' failure to include necessary parties, the property owners,, in this Article 78 proceeding challenging zoning variances. Supreme Court should have directed the necessary parties be summoned. The courts power to summon necessary parties is not affected by the running of the statute of limitations. Only the necessary parties themselves have standing to raise the statute of limitations defense:

When a necessary party has not been made a party and is "subject to the jurisdiction" of the court, the proper remedy is not dismissal of the complaint or the petition, but rather for the court to direct that the necessary party be summoned ([CPLR]. § 1001[b] …). Contrary to the respondents' contention, the Supreme Court's ability to direct joinder of the property owners at this juncture is not affected by the purported running of the statute of limitations … . Moreover, the respondents lack standing to assert a statute of limitations defense on behalf of the property owners, who have not yet appeared in this proceeding … . Thus, the respondents failed to demonstrate that the petitioners' failure to join the property owners as respondents warranted dismissal of the petition. Matter of Supinsky v Town of Huntington, 2025 NY Slip Op 00323, Second Dept 1-22-25

Practice Point: Here the dismissal of the petition for failure to include necessary parties was not appropriate. The court should have directed that the necessary parties be summoned.

Practice Point: A court's power to direct that necessary parties be summoned is not affected by the running of the statute of limitations.

Practice Point: Here only the necessary parties themselves have standing to raise the stature of limitations defense.

January 22, 2025

CONTRACT LAW, FRAUD.

IT WAS SUFFICIENTLY ALLEGED THE RELEASE WAS INDUCED BY FRAUD; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint should not have been dismissed on the basis of the release because it was sufficiently alleged the release was induced by fraud:

Plaintiff's complaint sufficiently alleges that the general release that was the basis for dismissal of the complaint was fraudulently induced based on defendant's misrepresentations upon which plaintiff justifiably relied … . For example, the complaint alleges, among other things, that defendant induced plaintiff's signature on the release by stating that if plaintiff did not sign, defendant would withdraw a New York Gaming Commission complaint that plaintiff had urged defendant to file, when, in fact, there was no complaint to withdraw because defendant had falsely represented he had filed the complaint.

Upon a "detailed analysis of whether plaintiff had sufficiently alleged the existence of overreaching or unfair circumstances such that enforcement of the general release[] would be inequitable" … , we concluded that dismissal of the complaint based on the release was not warranted. Jones v Jacobs, 2025 NY Slip Op 00377, First Dept 1-23-25

Practice Point: Here the complaint sufficiently alleged the release was induced by fraud. The complaint should not have been dismissed based on the release.

January 23, 2025

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT MADE A DISCOVERY DEMAND FOR "LINE OF DUTY" DOCUMENTS RELEVANT TO THE DEFENSE; THE PEOPLE DID NOT ADDRESS THE DEMAND; ON APPEAL THE PEOPLE ARGUED FOR THE FIRST TIME THAT THERE WERE NO SUCH DOCUMENTS; BY FAILING TO ADDRESS THE DEMAND IN THE MOTION COURT, THE PEOPLE WERE DEEMED TO HAVE CONCEDED THE EXISTENCE OF THE DOCUMENTS; THE CERTIFICATE OF COMPLIANCE WAS THEREFORE ILLUSORY; INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing the conviction and dismissing the indictment, determined the certificate of compliance (COC) with the People's discovery obligations was illusory and defendant's motion to dismiss on speedy trial grounds should have been granted:

Officer Soto testified before the grand jury that the defendant was sitting in a parked car when the plainclothes officers approached him, that Officer Soto did not identify himself as a police officer, that he could not recall whether Officer Cruz identified himself as a police officer, that a struggle ensued over some suspected marijuana in the defendant's hand, and that the defendant drove away, causing injury to each officer. The indicted charges included aggravated assault upon a police officer and assault in the second degree, alleging, among other things, that the defendant caused serious physical injury to Officer Soto and physical injury to Officer Cruz. * * *

The defendant … identified the failure to disclose any "line of duty" paperwork, despite the defendant's request for the same, and the facts that both officers were out "line of duty" for a period of time due to their injuries and Officer Soto ultimately retired due to his injuries. The defendant asserted that the "line of duty" paperwork would include documents relating to the independent medical examinations by the New York City Police Department District Surgeon used to certify that the officers were, in fact, injured and unable to return to full duty, as well as written statements by the officers regarding the manner in which their injuries occurred. * * *

On appeal, the People assert that there is no indication that any "line of duty" paperwork exists. In opposition to the defendant's motion, however, the People did

not refute the defendant's assertion that the paperwork existed. "Normally what is not disputed is deemed to be conceded" … . Moreover, as the People bear the burden of establishing that they did, in fact, exercise due diligence and make reasonable inquiries to ascertain the existence of material and information subject to discovery prior to filing the COC, it was incumbent on the People to address the defendant's assertion regarding the "line of duty" paperwork in opposing his motion. People v Serrano, 2025 NY Slip Op 00338, Second Dept 1-22-25

Practice Point: If the People ignore a defendant's discovery demand for relevant documents, they will be deemed to have acknowledged that the documents exist rendering the COC illusory.

January 22, 2025

CRIMINAL LAW, JUDGES, APPEALS, ATTORNEYS, CONSTITUTIONAL LAW.

THE TRIAL JUDGE COMPLETELY BYPASSED THE BATSON PROCEDURE WHEN DEFENSE COUNSEL OBJECTED TO THE PEOPLE'S PEREMPTORY CHALLENGES TO FOUR JURORS; ALTHOUGH THE JURORS HAD BEEN EXCUSED, THE BATSON OBJECTION WAS TIMELY; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; CONVICTION HELD IN ABEYANCE AND MATTER REMITTED; TWO JUSTICE DISSENT (FIRST DEPT).

The First Department, holding the judgment of conviction in abeyance and remitting the matter, in a full-fledged opinion by Justice Pitt-Burke, over a two-justice dissent, determined (1) the appeal raising an unpreserved objection to the trial judge's handling of a Batson challenge could be considered "in the interest of justice," and (2) the trial judge erroneously bypassed the Batson procedure for addressing whether racial discrimination was the basis for four of the prosecution's peremptory challenges. Defense raised the Batson challenge after the four jurors had been excused. The trial judge argued the challenge was untimely and the only remedy was a mistrial. Defense counsel argued, and the prosecution conceded, the challenge was timely, but defense counsel declined to request a mistrial. The First

Department noted that remedies other than a mistrial were available—recalling the excused jurors, limiting the prosecution's peremptory challenges, or granting the defense additional peremptory challenges, for example:

Even if we were to agree that defendant's claim is unpreserved, we find that the trial court's errors here were critical, and not merely a case of putting the proverbial cart before the horse … . The trial court's actions, whether intentional or not, sidestepped the entire Batson protocol.

This Court's recent precedent has been to exercise its interest of justice jurisdiction to correct unpreserved Batson errors where a trial court has substantially deviated from the Batson protocol. * * *

Crucially, here we are not faced with a circumstance in which the trial court erroneously concluded that defendant did not meet his prima facie burden at step one … . In fact, as noted above, the trial court took notice of the preemptory challenges implemented by the prosecution.

This is also not a circumstance in which the court deviated from the Batson protocol by improperly combining steps two and three … . Rather, we are faced with a circumstance where the trial court failed to provide any inquiry into the question of discrimination by circumventing all three steps of the Batson protocol. People v Luke, 2025 NY Slip Op 00297, First Dept 1-21-25

Practice Point: The failure to adhere to the Batson three-step procedure for addressing discrimination in jury selection can be considered by an appellate court "in the interest of justice" despite the failure to preserve the error.

Practice Point: A Batson challenge raised after the jurors had been excused, but before jury selection is complete, is timely.

Practice Point: Remedies for a Batson challenge first raised after the jurors have been excused include recalling the excused jurors, limiting the prosecution's peremptory challenges, and granting the defense additional peremptory challenges.

January 21, 2025

CRIMINAL LAW, APPEALS, JUDGES.

THE WARRANTLESS SEARCH PROBATION CONDITION WAS NOT REASONABLY RELATED TO THE UNDERLYING OFFENSES; THE APPEAL WAIVER WAS INVALID; EVEN IF THE WAIVER WERE VALID THE IMPROPER PROBATION CONDITION COULD BE CONSIDERED ON APPEAL (FIRST DEPT).

The First Department determined defendant's waiver of appeal was invalid and the probation condition allowing warrantless searches of defendant's home, person and vehicle was not reasonable related to the underlying offenses. The court noted that defendant could appeal the probation condition even if the appeal waiver were valid:

We find defendant's appeal waiver invalid and unenforceable because the court did not adequately explain the nature of the appellate rights defendant was waiving, that the right to appeal was separate and distinct from the rights automatically forfeited upon a guilty plea or the limited claims that survive an appeal waiver … . The written waiver of appeal defendant signed "[was] not a complete substitute for an on-the-record explanation of the nature of the right to appeal, and some acknowledgment that the defendant is voluntarily giving up that right" … .

Although defendant's waiver of the right to appeal was invalid, defendant's sentence was not excessive. However, the special probation condition permitting warrantless searches of defendant's home, person and vehicle was not reasonably related to defendant's rehabilitation since the crime of which defendant was convicted did not involve weapons or drugs … . Contrary to the People's contention, a defendant's challenge to the condition of probation requiring consent to searches of their person, vehicle and place of abode by a probation officer for drugs, drug paraphernalia, weapons and contraband would have survived the appeal waiver had it not been invalid … . People v Amparo, 2025 NY Slip Op 00389, First Dept 1-23-25

Practice Point: A written appeal waiver does not cure deficiencies in the judge's explanation of the forfeited rights.

Practice Point: A condition of probation which does not reasonably relate to the underlying offenses will be struck on appeal.

Practice Point: An improper probation condition can be appealed even if the error has not been preserved by objection.

January 23, 2025

CRIMINAL LAW, JUDGES.

DEFENDANT SHOULD NOT HAVE BEEN ADJUDICATED A SECOND FELONY OFFENDER BASED ON A LOUISIANA CONVICTION FOR AN OFFENSE WHICH IS NOT A FELONY IN NEW YORK (SECOND DEPT).

The Second Department, remitting the matter for resentencing, determined the Louisiana conviction for an offense which is not a felony in New York should not have been the basis for adjudicating defendant as a second felony offender:

The defendant … contends that his adjudication as a second felony offender was illegal because the predicate Louisiana offense was not a felony under New York law. "Penal Law § 70.06 requires the imposition of enhanced sentences for those found to be predicate felons" … . An out-of-state felony conviction qualifies as a predicate felony under Penal Law § 70.06 only if it is for a crime whose elements are equivalent to those of a felony in New York … . Here, as conceded by the People, the defendant's Louisiana conviction of simple robbery did not constitute a felony in New York for the purpose of enhanced sentencing and thus, the defendant should not have been adjudicated a second felony offender on the basis of that conviction … . People v Harris, 2025 NY Slip Op 00331, Second Dept 1-22-25

Practice Point: If an out-of-state conviction is for an offense which is not a felony in New York, an enhanced sentence as a second felony offender is not available.

January 22, 2025

FREEDOM OF INFORMATION LAW (FOIL), CIVIL PROCEDURE, JUDGES, ZONING.

A FOIL REQUEST FOR A ZONING BOARD OF APPEALS (ZBA) MEMO SHOULD NOT HAVE BEEN DENIED BECAUSE PETITIONER HAD UNSUCCESSFULLY SOUGHT TO ANNUL A ZBA RULING; MATTER REMITTED FOR REVIEW OF THE MEMO TO DETERMINE WHETHER IT IS EXEMPT FROM DISCLOSURE AS INTER-AGENCY OR INTRA-AGENCY MATERIAL (SECOND DEPT).

The Second Department, reversing the denial of the petition, determined the FOIL request for a memo prepared by the Chair of the Zoning Board of Appeals (ZBA) should not have been dismissed on the ground the petitioner had unsuccessfully sought to annul a determination by the ZBA. The matter was remitted for a review of the memo by the judge to determine whether it was exempt from disclosure as inter-agency or intra-agency material:

Supreme Court erred in dismissing this proceeding on the basis that it was rendered academic by the dismissal of a separate CPLR article 78 proceeding in which the petitioner was one of the parties seeking to annul a determination by the ZBA. "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose. The underlying premise [is] that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" … . "[T]he standing of one who seeks access to records under [FOIL] is as a member of the public, and is neither enhanced nor restricted because he [or she] is also a litigant or potential litigant" … .

… [E]xemptions are construed "narrowly, and an agency has the burden of demonstrating that an exemption applies 'by articulating a particularized and specific justification for denying access'" … . When relying upon an exemption, "it is the agency's burden to demonstrate that the requested material falls squarely within a FOIL exemption" … . "To meet its burden, the party seeking exemption must present specific, persuasive evidence that the material falls within the exemption. Conclusory assertions that are not supported by any facts are insufficient" … . Here, the exemption at issue provides that each agency shall make its records available for inspection, "except that such agency may deny access to records or portions thereof that . . . are . . . intra-agency materials which are not . . . statistical or factual tabulations or data" … . … Factual data "simply

means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" … . Matter of Supinsky v Town of Huntington, 2025 NY Slip Op 00324, Second Dept 1-22-25

Practice Point: A FOIL request should not be denied on the ground the person making the request is, was or could be a litigant in a matter related to the request.

Practice Point: Intra-agency and inter-agency material, meaning opinions, ideas or advice exchanged as part of a deliberative process, is exempt from FOIL disclosure.

January 22, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS CROUCHING DOWN MARKING THE FLOOR WITH DUCT TAPE WHEN A LADDER FELL OVER AND STRUCK HIM; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defense motion for judgment for summary judgment in this Labor Law 240(1) action should not have been granted and plaintiff's cross-motion for summary judgment should have been granted. Plaintiff was crouching down marking off areas of the floor with duct tape when an ladder fell over and struck him, causing him to lose consciousness:

The elevation differential involved here cannot be described as de minimis … . The evidence also established that the ladder was not adequately secured for the purposes of the undertaking … .

… [P]laintiff established prima facie entitlement to summary judgment through his deposition testimony that he was struck by a ladder that was not properly secured. … [I]t was foreseeable for a ladder resting against a wall to topple over and strike a nearby worker. Nor could a worker knocking over the ladder be considered an intervening superseding cause in this case … . Silva v 770 Broadway Owner LLC, 2025 NY Slip Op 00299, First Dept 1-21-25

Practice Point: Here plaintiff was marking the floor with duct tape when a ladder which had been leaning against a wall fell over and struck him. It was foreseeable that an unsecured ladder could fall over. If a worker knocked it over, that would be foreseeable as well and would not be a superseding cause.

January 21, 2025

LEGAL MALPRACTICE, ATTORNEYS.

A CAUSE OF ACTION ALLEGING LEGAL MALPRACTICE SHOULD NOT HAVE BEEN DISMISSED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined a cause of action alleging legal malpractice should not have been dismissed:

… [T]he complaint sufficiently stated a cause of action alleging legal malpractice. The complaint alleged that the defendants failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession by filing a second amended complaint which deleted the majority of the factual allegations and legal malpractice causes of action the plaintiff had interposed against the defendant in the underlying action without the plaintiff's knowledge or consent. The complaint further alleged that the defendants' negligence in amending that pleading proximately caused the plaintiff to lose his claims of legal malpractice against the defendant in the underlying action, and to incur additional legal fees to appeal the denial of his motion for leave to amend the second amended complaint. Contrary to the defendants' contention, the plaintiff alleged actual, ascertainable damages that resulted from the defendants' negligence … . Ofman v Richland, 2025 NY Slip Op 00327, Second Dept 1-22-25

Practice Point: Consult this decision for a concise description of the elements of a cause of action for legal malpractice.

January 22, 2025

NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW, IMMUNITY.

PLAINTIFF POLICE OFFICER WAS PARTICIPATING IN A TRAINING SESSION WHEN HE WAS BITTEN BY A POLICE DOG; THE TRAINING WAS A GOVERNMENTAL FUNCTION; THEREFORE THE MUNICIPALITY MUST HAVE OWED PLAINTIFF A SPECIAL DUTY TO BE LIABLE, NOT THE CASE HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipality (City of Middletown) did not owe a special duty to plaintiff police officer, who was bitten by a police dog during training: The dog handler, Officer McDonald (a City of Middletown police officer), and plaintiff were participants in training sessions conducted by the NYS Homeland Security and Emergency Services when the unleased dog bit plaintiff:

As part of the training, the police dogs were off-leash. The plaintiff, who was participating in a different training event in a different building, entered the building where the explosives detection training exercise was being held and was still in progress when he was bitten by Officer McDonald's police dog.

When a negligence cause of action is asserted against a municipality, and the municipality was exercising a governmental function, a municipality may not be held liable unless it owed a special duty to the injured party … . Such a special duty can arise, as relevant here, where "the municipality took positive control of a known and dangerous safety condition" … . Here, the defendants established, prima facie, that they did not owe a special duty to the plaintiff. There was no evidence that Officer McDonald [the dog handler] took positive control of a known and dangerous safety condition which gave rise to the plaintiff's injuries … . The defendants established that Officer McDonald was an attendee at a training program conducted by the New York State Homeland Security and Emergency Services at a New York State facility, that he merely participated in the training exercise, and that he took direction from the NYPD canine instructor. Mahar v McDonald, 2025 NY Slip Op 00315, Second Dept 1-22-25

Practice Point: Here the police dog handler did not have control of the unleashed dog when it bit plaintiff. The dog and the handler were participating in an explosive-detection training session conducted by a third party. Because the dog handler had not taken control of a known and dangerous safety condition (the dog)

at the time plaintiff was injured, the dog handler did not owe plaintiff a special duty, a prerequisite to municipal liability.

January 22, 2025

NEGLIGENCE, WORKERS' COMPENSATION, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

HERE THE ADMINISTRATOR OF PLAINTIFF'S DECEDENT'S ESTATE BROUGHT A WRONGFUL DEATH ACTION IN SUPREME COURT AND DEFENDANTS MOVED FOR SUMMARY JUDGMENT ARGUING PLANTIFF'S EXCLUSIVE REMEDY WAS WORKERS' COMPENSATION; RATHER THAN DECIDE THE MOTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD WHICH HAS PRIMARY JURISDICTION RE: THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department reversed Supreme Court's denial of defendants' summary judgment motion in this wrongful death action and referred the matter to the Workers' Compensation Board. Whether, as defendants argued in their motion, plaintiff's decedent's exclusive remedy is Workers' Compensation must be determined by the Workers' Compensation Board before a court can consider the issue:

"The Workers' Compensation Law 'is designed to insure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope of his [or her] employment caused the injury'" … . "[P]rimary jurisdiction" for determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board (hereinafter the Board) … , and it is therefore inappropriate for the courts to express views with respect thereto in the absence of a determination by the Board … . "Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Board, a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because the Board's disposition of the plaintiff's compensation

claim is a jurisdictional predicate to the civil action … . Guang Qi Lin v Xiaoping Lu, 2025 NY Slip Op 00309, Second Dept 1-22-25

Practice Point: Here in this wrongful death action defendants argued plaintiff's exclusive remedy was Workers' Compensation. Because that issue had not been determined by the Workers' Compensation Board, Supreme Court could not rule on it and should have referred the matter to the Board which has primary jurisdiction on the applicability of the Workers' Compensation Law.

January 22, 2025

NEGLIGENCE. MUNICIPAL LAW.

THE COMPLAINT ALLEGED THE FAILURE TO CLEAR ICE AND SNOW AND CERTAIN BUILDING CODE VIOLATIONS CAUSED HER SLIP AND FALL; THE "STORM IN PROGRESS" RULE ONLY NEGATED THE CAUSE OF ACTION BASED UPON THE FAILURE TO CLEAR THE ICE AND SNOW; THE DEFENDANTS DID NOT DEMONSTRATE THE BUILDING CODE VIOLATIONS WERE INAPPLICABLE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that, although the "storm in progress" applied to this slip and fall because it was snowing at the time, summary judgment should not have been awarded to defendants. In addition to alleging the negligent failure to clear ice and snow, the complaint alleged the ramp where plaintiff fell violated certain provision of the NYC Building Code. The defendants did not demonstrate the code did not apply. Because there can be more than one proximate cause the defendants were not entitled to summary judgment:

… "[T]here can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause" … . Although there is no disagreement that the snow and ice from the storm was a proximate cause of the plaintiff's fall, Avenue L and the Sesame defendants each failed to establish, prima facie, that the provisions of the 1968, 2008, and 2014 New York City Building Codes relied upon by the plaintiff were inapplicable and that an

alleged violation of those provisions did not proximately cause the plaintiff to fall … . Wechsler v Ave. L., LLC, 2025 NY Slip Op 00347, Second Dept 1-22-25

Practice Point: Here plaintiff conceded it was snowing when she slipped and fell, triggering the "storm in progress" rule which let defendants off the hook for any failure to clear ice and snow. But the plaintiff also alleged certain building code violations caused her fall. The defendants did not demonstrate the code was inapplicable so they were not entitled to summary judgment. There can be more than one proximate cause of a slip and fall.

January 22, 2025