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CIVIL PROCEDURE, FORECLOSURE.

ALTHOUGH THE PLAINTIFF BANK DID NOT INITIATE PROCEEDINGS TO TAKE A JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION, THE DEFENDANTS HAD FILED AN UNTIMELY ANSWER WHICH WAIVED THE DEFENDANTS' RIGHT TO SEEK DISMISSAL OF THE COMPLAINT PURSUANT TO CPLR 3215 (C) (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the defendants waived the right to seek dismissal of the complaint pursuant to CPLR3215 (c) (based on the bank's failure to take proceedings for the entry of a default judgment within one year) by submitting an untimely answer:

In May 2016, the plaintiff commenced this action to foreclose the mortgage against … [defendants].. The defendants filed an untimely answer on December 9, 2016. * * *

Pursuant to CPLR 3215(c), "[a]n action is deemed abandoned where a default has occurred and a plaintiff has failed to take proceedings for the entry of a judgment within one year]thereafter" … . It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) … . Nor is a plaintiff required to specifically seek the entry of a judgment within one year … . As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) ,,, .

A defendant may waive the right to seek dismissal pursuant to CPLR 3215(c) by serving an answer or taking "'any other steps which may be viewed as a formal or informal appearance"' … . Here, the defendants waived their right to seek dismissal of the complaint insofar as asserted against them by serving an untimely answer in the action … .Deutsche Bank Natl. Trust Co. v Garriques, 2025 NY Slip Op 00648, Second Dept 2-5-25

Practice Point: Here the plaintiff bank did not initiate proceedings to take a default judgment within one year of defendants' default. Defendants however where not entitled to dismissal of the complaint on that ground (CPLR 3215 (c)) because they had submitted a late answer.

February 5, 2025

CRIMINAL LAW, EVIDENCE.

THE BULLET CASINGS IN EVIDENCE COULD HAVE COME FROM A PISTOL OR A RIFLE; DEFENDANT WAS CHARGED WITH ILLEGAL POSSESSION OF A PISTOL AND THE JURY WAS SO INSTRUCTED; BECAUSE THERE WAS NO BASIS FOR THE JURY TO CONCLUDE DEFENDANT POSSESSED A PISTOL, AS OPPOSED TO A RIFLE, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction as against the weight of the evidence, determined the People did not prove defendant possessed a "pistol" as opposed to a "rifle" at the time of the shooting. There was video evidence showing a muzzle flash from the area in the car where defendant was sitting, but the weapon could not be seen. Because the indictment and the jury instructions charged defendant with possession of a "pistol," the conviction could not stand:

… [T]he indictment and the jury charge specifically narrowed the theory of the case to require the People to establish that defendant possessed a loaded pistol at the time in question. Here, the evidence permitted, at best, mere speculation that the firearm defendant allegedly possessed was a pistol, and not a rifle. Video footage of the shooting shows multiple muzzle flashes indicative of gunfire from the vehicle—it does not directly depict the firearm that is firing the shots. Moreover, the angle of the video does not permit an observer to make any reasonable inferences about what type of firearm is being fired at the relevant time. Nothing in the video establishes that the firearm being fired was a pistol rather than another type of firearm. People v Brumfield, 2025 NY Slip Op 00764, Fourth Dept 2-7-25

Practice Point: The People are held to the theory presented in the indictment and charged to the jury. Since the indictment charged defendant with illegal possession of a pistol and the jury was so charged, the People's failure to prove the type of firearm defendant possessed required reversal of the conviction.

February 7, 2025

CRIMINAL LAW, FAMILY LAW.

COUNTY COURT PROPERLY GRANTED THE PEOPLE'S REQUEST TO PREVENT REMOVAL OF DEFENDANT'S CASE TO FAMILY COURT UNDER THE "RAISE THE AGE ACT;" THERE WAS A COMPREHENSIVE DISSENT (FOURTH DEPT).

The Fourth Department, over a comprehensive dissent, determined County Court properly granted the People's motion to prevent removal of defendant's case to Family Court pursuant to the Raise the Age Law:

In 2017, the New York State Legislature enacted the Raise the Age Law, which defines a person who was charged with a felony committed on or after October 1, 2018 when the person was 16 years old, or committed on or after October 1, 2019 when the person was 17 years old, as an " '[a]dolescent offender' " … . The Raise the Age Law created in each county a youth part of the superior court to make appropriate determinations with respect to the cases of, inter alia, adolescent offenders … . Where, as here, an adolescent offender is charged with a violent felony as defined in Penal Law § 70.02, within six calendar days of the adolescent offender's arraignment, the youth part of superior court is required to review the accusatory instrument and determine whether the prosecutor has proven by a preponderance of the evidence that the adolescent offender caused "significant physical injury" to someone other than a participant in the crime, displayed a "firearm, shotgun, rifle or deadly weapon as defined in the penal law" in furtherance of the crime, or unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the Penal Law … . If none of those factors exist, the matter must be transferred to Family Court unless the prosecutor moves to prevent the transfer of the action to Family Court and establishes that extraordinary circumstances exist … . … [I]n making an extraordinary circumstances determination, courts should "look at all the circumstances of the case, as well as . . . all of the circumstances of the young person," … . …

… [T]he court did not abuse its discretion in granting the prosecutor's motion to prevent removal inasmuch as the prosecutor established that there are extraordinary circumstances. … [D]efendant's prior adjudications as a juvenile delinquent or any evidence obtained as a result of those proceedings cannot be

used in determining whether to grant the People's motion (Family Ct Act § 381.2 [2] …).. Nevertheless, although it is impermissible to raise any issue related to the adjudication or evidence obtained therefrom, it is still permissible to raise " 'the illegal or immoral acts underlying such adjudications' " … .

Here … defendant was charged with participating in a violent crime, i.e., a home invasion robbery involving weapons and resulting in injuries to the victim. Moreover, despite the various services and programs provided to defendant over the last five years while defendant had been involved in the criminal justice system, defendant has made no appreciable positive response and continues to engage in escalating criminal behavior. People v Guerrero, 2025 NY Slip Op 00766, Fourth Dept 2-7-25

Practice Point: Under the "Raise the Age Act" the People can move to prevent the transfer of felony cases to Family Court where the defendant was 16 or 17 at the time of the alleged offense.

February 7, 2025

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

DESIGNATING DEFENDANT A SEXUALLY VIOLENT OFFENDER BASED SOLELY UPON THE FACT HE WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN PENNSYLVANIA VIOLATED DUE PROCESS; HOWEVER THE MATTER WAS REMITTED TO DETERMINE WHETHER ANY OF THE PENNSYLVANIA FELONIES WOULD HAVE CONSTITUTED A SEXUALLY VIOLENT OFFENSE IN NEW YORK, A QUESTION NOT RAISED BEFORE COUNTY COURT (FOURTH DEPT).

The Fourth Department reversed defendant's SORA designation as a sexually violent offender based upon Pennsylvania convictions as a violation of due process, but remitted the matter to Count Court for consideration of the issue under another provision of the Correction Law:

… [W]e conclude, based on the reasoning set forth by the plurality in People v Malloy (228 AD3d 1284, 1287-1291 [4th Dept 2024]), that there is no rational

basis for designating defendant a sexually violent offender solely on the ground of his conviction of the Pennsylvania felony sex offenses requiring him to register as a sex offender in that jurisdiction … . Defendant has therefore met his burden of showing that the imposition of the sexually violent offender designation under the second disjunctive clause of Correction Law § 168-a (3) (b), as applied to him, violates his constitutional right to substantive due process. Consequently, we reverse the order insofar as appealed from and vacate that designation.

However, we note that the issue whether the essential elements of any of the Pennsylvania felonies were the statutory equivalent of a sexually violent offense in New York under the essential elements test set out in the first disjunctive clause of Correction Law § 168-a (3) (b) was never raised before County Court. We decline to consider that alternative basis for affirmance, sua sponte, for the first time on appeal … . We therefore remit to County Court to consider whether any of the Pennsylvania felonies includes all of the essential elements of a sexually violent offense set forth in Correction Law § 168-a (3) (a) … . People v Boldorff, 2025 NY Slip Op 00765, Fourth Dept 2-7-25

Practice Point: A sexually-violent-offender designation based solely upon the fact defendant was required to register as a sex offender in Pennsylvania was deemed unconstitutional here. But the matter was remitted for a determination whether any of the Pennsylvania felonies would have constituted a sexually violent offense in New York.

February 7, 2025

FAMILY LAW, JUDGES, APPEALS, CIVIL PROCEDURE, EVIDENCE.

ALTHOUGH FATHER FAILED TO APPEAR IN THE CUSTODY PROCEEDING, FAMILY COURT SHOULD HAVE HELD A HEARING AND MADE FINDINGS OF FACT; CUSTODY ORDER VACATED AND MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Family Court, determined father’s motion to vacate the custody order should have been granted. Despite father’s failure to appear in this custody proceeding, Family Court should have held a hearing and made findings of fact in support of awarding custody to mother:

"Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court, the law favors resolution on the merits in child custody proceedings" … . In addition, the court's authority to proceed by default "in no way diminishes the court's primary responsibility to ensure that an award of custody is predicated on the child's best interests, upon consideration of the totality of the circumstances, after a full and comprehensive hearing and a careful analysis of all relevant factors" … . "A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … .

Here, the Family Court made a custody determination without a hearing and without making any specific findings of fact regarding the best interests of the child. Matter of Riera v Ayabaca, 2025 NY Slip Op 00661, Second Dept 2-5-25

Practice Point: Although Family Court can proceed by default in a custody matter, a hearing and findings of fact are necessary.

February 5, 2025

FAMILY LAW, JUDGES.

HERE THE NEGLECT PROCEEDINGS WERE BROUGHT AGAINST FATHER WHO DID NOT LIVE WITH MOTHER AND THE CHILD; MOTHER WAS NOT A PARTY IN THE NEGLECT PROCEEDINGS; FAMILY COURT DID NOT HAVE THE AUTHORITY TO PLACE MOTHER UNDER THE SUPERVISION OF THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) (SECOND DEPT).

The Second Department, reversing Family Court, in a full-fledged opinion by Justice Ventura, determined Family Court did not have statutory authority to place mother, who was not a respondent in the neglect proceeding, under the supervision of the Administration for Children's Services (ACS) and direct that she cooperate with ACS. The neglect proceedings were brought against father (respondent), who did not live with the mother and child. Mother, a "nonrespondent," was not a party in the neglect proceedings and the child had not been removed from her home:

This appeal presents this Court with the opportunity to decide an issue of first impression in New York involving the rights of nonrespondent parents in child

neglect proceedings, to wit: whether the Family Court may place a nonrespondent custodial parent under the supervision of … [ACS] and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the nonrespondent parent's home. Considering, inter alia, the well-established "interest of a parent in the companionship, care, custody, and management of his or her children" … and the lack of any statutory authority permitting the challenged directives, we answer this question in the negative. Therefore, we conclude that, in this case, the Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects. * * *

… [T]he relevant provisions of Family Court Act § 1017 apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and "noncustodial parent" … . By the plain language of the statutory text, the provisions requiring the nonrespondent parent … to "submit[ ] to the jurisdiction of the court with respect to the child" and "to cooperate" with "the child protective agency" in various ways … are only triggered "[a]fter [the] child is removed from the home" … . Here, since the court never "determin[ed] that [the] child must be removed from . . . her home" … , it did not have authority pursuant to Family Court Act § 1017 to impose the challenged directives upon the mother, no matter how "well-intended" the court's "goals" may have been … . Matter of Sapphire W. (Kenneth L.), 2025 NY Slip Op 00662, Second Dept 2-5-25

Practice Point: Here Family Court did did not have the authority to place mother, who was not a party to the neglect proceedings against father, under the supervision of ACS.

February 5, 2025

FORECLOSURE, CIVIL PROCEDURE.

EVEN THOUGH THE BANK'S MOTION FOR AN ORDER OF REFERENCE WAS REJECTED AS DEFICIENT, THE MOTION CONSTITUTED INITIATING PROCEEDINGS FOR A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT; THE BANK'S MOTION TO VACATE THE DISMISSAL OF THE COMPLAINT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion to vacate the dismissal of the foreclosure action should have been granted. The bank's motion for an order of reference made within one year of defendant's default was a sufficient step toward taking a default judgment within the meaning of CPLR 3215 (c), even though the motion was rejected as deficient:

… [T]he plaintiff initiated proceedings for the entry of a judgment by moving for an order of reference within one year of the defendant's default in the action … . "'The fact that the Supreme Court rejected the motion as defective is beside the point, as the mere presentment of it established the plaintiff's intent to proceed toward the entry of judgment and not to abandon the action'" … . Since the plaintiff did not fail to take timely proceedings for a judgment against the defendant within the meaning of CPLR 3215(c), the plaintiff was not required to demonstrate an excuse for its purported delay in moving to vacate the dismissal order … . Moreover, the plaintiff's motion, inter alia, in effect, pursuant to CPLR 2221(a) to vacate the dismissal order was not subject to any specific time limitation … . … Supreme Court should have granted the plaintiff's motion … pursuant to CPLR 2221(a) to vacate the dismissal order and to restore the action to the active calendar … . Wells Fargo Bank, N.A. v Wint, 2025 NY Slip Op 00698, Second Dept 2-5-25

Practice Point: Here the bank's unsuccessful motion for an order of reference met the criteria for initiating proceedings to take a default judgment within one year of defendants' default.

February 5, 2025

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

THE FORECLOSURE ACTION BROUGHT IN 2011 WAS DISMISSED BECAUSE THE BANK FAILED TO COMPLY WITH THE NOTICE OF DEFAULT PROVISIONS IN THE MORTGAGE AGREEMENT; THEREFORE THE 2011 ACTION DID NOT ACCELERATE THE DEBT AND THE STATUTE OF LIMITATIONS FOR FORECLOSURE NEVER STARTED RUNNING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage was never validly accelerated when the foreclosure proceeding was brought in 2011. The 2011 action was dismissed because the notice of default was not served in accordance with the mortgage agreement (a condition precedent to foreclosure). Because the debt was never accelerated in 2011, the statute of limitations never started running and plaintiffs' action to cancel and discharge the mortgage (RPAPL 1501 (4)) should not have been granted:

… [T]he defendants established … that the acceleration of the debt alleged in the complaint was a nullity due to the Supreme Court's determination … that GMAC failed to establish … proper mailing of the notice of default, a contractual condition precedent to acceleration of the debt. Accordingly, the statute of limitations to foreclose the mortgage never accrued … . …

Contrary to the plaintiffs' contention, CPLR 213(4)(b), as amended by the Foreclosure Abuse Prevention Act …, … does not preclude the defendants from asserting that the statute of limitations for an action to foreclose the mortgage has not expired. … [T]he defendants demonstrated that the statute of limitations had not previously accrued because the 2011 action was dismissed upon an expressed judicial determination made upon a timely interposed defense that the notice of default was not mailed in accordance with the terms of the mortgage agreement … . Nichols v U.S. Bank, 2025 NY Slip Op 00665, Second Dept 2-5-25

Practice Point: If a foreclosure action is dismissed because the bank did not comply with the notice of default provisions in the mortgage agreement, a condition precedent to foreclosure, the debt was never accelerated and the foreclosure statute of limitations never started running.

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FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

NYPD PROPERLY REQUIRED TO RELEASE DOCUMENTS RELATING TO ITS USE OF SURVEILLANCE TECHNOLOGIES INCLUDING FACIAL RECOGNITION, IRIS RECOGNITION AND MOBILE X-RAY TECHNOLOGIES (FIRST DEPT).

The Frist Department, in a full-fledged opinion by Justice Moulton, rejected the New York City Police Department's (NYPD's) argument that the FOIL request for documents relating to the NYPD's use of surveillance technologies (such as facial recognition, iris recognition and mobile x-ray technology) was unduly burdensome:

An overarching problem with the NYPD's evidence of burdensomeness, which consisted entirely of [NYPD attorney] Murtagh's testimony, is that it is nonspecific. To begin, Murtagh did not set forth the number of SPEX [special expense purchase] Contracts that are encompassed by the request. He also did not set out an approximate number of pages that contain potentially exempt information. * * *

The NYPD's assertion of the burdensomeness exemption also rests on the necessity of reviewing approximately 165,000 pages of hard-copy documents. While this is a considerable task, it is eased by Supreme Court's determination that the production could go forward quarterly, on a rolling basis. Additionally, the review is facilitated by the fact that the relevant documents are all in one place, and there is no need to search the NYPD's precincts and departments. While Murtagh stated that only he and one colleague were qualified to review this universe of documents, he failed to explain why other NYPD employees could not be trained to do so. Finally, Public Officers Law § 89(3)(a) provides that an agency may use an "outside professional service to provide copying, programming or other services required to provide the copy." Murtagh stated that the documents are too sensitive to be shown to an outside contractor. Again, he did not grapple with the POST Act's [Public Oversight of Surveillance Technology (POST) Act's] effect on the documents' sensitivity. Assuming that some portions of the contract documents fall within FOIL's exemptions, Murtagh did not explain why a nondisclosure agreement would be insufficient to protect the exempt portions of the

documents. Matter of Legal Aid Socy. v Records Access Officer, 2025 NY Slip Op 00723, First Dept 2-6-25

Practice Point: Here the NYPD's argument that the FOIL request for documents relating to the use of surveillance technologies was unduly burdensome was rejected.

February 6, 2025

LEGAL MALPRACTICE, ATTORNEYS, INSURANCE LAW.

PLAINTIFF DID NOT SUFFER A "SERIOUS INJURY" WITHIN THE MEANING OF THE INSURANCE LAW IN THE UNDERLYING PEDESTRIAN-VEHICLE ACCIDENT CASE; THEREFORE PLAINTIFF COULD NOT HAVE SUCCEEDED ON THE MERITS OF THAT ACTION; DEFENDANT ATTORNEY WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE INSTANT LEGAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant attorney was entitled to dismissal of the legal malpractice action because plaintiff could not have succeeded in the underlying traffic accident case. Plaintiff, a pedestrian, was struck by a vehicle. The traffic-accident case was dismissed because plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law:

"A plaintiff seeking to recover damages for legal malpractice must establish that (1) the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and (2) the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages" … . "Even if a plaintiff establishes the first prong of a legal malpractice cause of action, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action but for the attorney's negligence" … . "To succeed on a motion for summary judgment dismissing a legal malpractice action, a defendant must present evidence in admissible form establishing that at least one of the essential elements of legal malpractice cannot be satisfied" … .

Here, in support of its motion, the defendant submitted evidence demonstrating that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. The defendant thus established … that the plaintiffs would not have succeeded on the merits of the underlying personal injury action … . Dodenc v Dell & Dean, PLLC, 2025 NY Slip Op 00650, Second Dept 2-5-25

Practice Point: An essential element of a legal malpractice action is that the plaintiff would have succeeded on the merits in the underlying action. Here the attorney demonstrated plaintiff did not sustain a serous injury within the meaning of the Insurance Law and, therefore, plaintiff would not have succeeded in the underlying traffic accident case.

February 5, 2025

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

IT WAS ALLEGED A TEACHER SEXUALLY ABUSED PLAINTIFF STUDENT ONCE OR TWICE A WEEK FOR THREE YEARS ON SCHOOL GROUNDS, SOMETIMES FOLLOWED BY ABUSE OFF SCHOOL GROUNDS; THE NEGLIGENT SUPERVISION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school's motion for summary judgment in this Child Victims Act case should not have been granted. It was alleged plaintiff-student was sexually abused by a teacher once or twice a week for three years. Based on the frequency of the alleged abuse, the school did not demonstrate it did not have constructive notice of the abuse and properly supervised the teacher. Because abuse which allegedly occurred off the school premises was preceded by abuse on school grounds, the off-premises-abuse causes of action should not have been dismissed:

… [T]he defendants failed to establish, prima facie, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct … . In particular, given the frequency of the alleged abuse, which occurred once or twice per week over the course of three school years in the same closet while the teacher left the

other students in his class unattended, the defendants failed to eliminate triable issues of fact as to whether they should have known of the abuse … . Additionally, the defendants failed to eliminate triable issues of fact as to whether their supervision of the teacher was negligent … .

Further, although the plaintiff alleged acts of sexual abuse that occurred outside of school premises and school hours, the defendants' submissions showed that those alleged acts were preceded by instances when the plaintiff allegedly was sexually abused by the teacher during school hours on a regular basis. Sallustio v Southern Westchester Bd. of Coop. Educ. Servs., 2025 NY Slip Op 00690, Second Dept 2-5-25

Practice Point: Consult this decision for a concise summary of the elements of the causes of action where a teacher is accused of frequently sexually abusing a student both on and off school grounds.

February 5, 2025

NEGLIGENCE, REAL PROPERTY LAW, CIVIL PROCEDURE, JUDGES.

THE JUDGE SHOULD NOT HAVE CONSIDERED A NEW ARGUMENT RAISED FIRST IN REPLY; THE HOLDER OF AN EASEMENT OVER THE PARKING LOT, NOT THE OWNER OF THE PARKING LOT, IS PRIMARILY RESPONSIBLE FOR KEEPING THE LOT FREE OF ICE AND SNOW, NOTWITHSTANDING AN AGREEMENT BETWEEN THE EASEMENT HOLDER AND THE OWNER IN WHICH THE OWNER AGREED TO REMOVE ICE AND SNOW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this slip and fall case, determined (1) Supreme Court should not have considered a new argument raised for the first time in reply, and (2) defendant, as the holder of an easement over the parking lot, was primarily responsible for keeping the lot free of ice and snow, notwithstanding the terms of a "parking agreement" between defendant and the owner of the lot in which the owner agreed to remove ice and snow from the lot:

… [T]he court improperly granted the motion based on an argument advanced for the first time in reply [i.e., the existence of the "parking agreement"]. The function of reply papers is "to address arguments made in opposition to the position taken

by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" … . * * *

We agree with the Second Circuit Court of Appeals that the duty of an easement holder "is the same as that owed by a landowner" and is nondelegable (Sutera v Go Jokir, Inc., 86 F3d 298, 308 [2d Cir 1996] …). We therefore conclude that defendant's "duty to exercise reasonable care toward third parties making use of the parking lot subject to the easement, once established, is not abrogated by a covenant on the part of the servient owner[, i.e., the nonparty owner of 875 East Main Street,] to clear ice and snow from the lot. The general rule that a servient owner may assume duties of maintenance, while undoubtedly relevant as between dominant and servient owners, does not apply when the rights of injured third parties are implicated," as in the case here … . The fact that the nonparty owner of 875 East Main Street may also have had a duty to maintain the parking lot does not serve to insulate defendant from liability to plaintiff. Otero v Rochester Broadway Theatre League, Inc., 2025 NY Slip Op 00769, Fourth Dept 2-7-25

Practice Point: An argument based on new evidence first presented in reply should not have been considered by the court.

Practice Point: Here the holder of the easement over the parking lot, as opposed to the owner of the parking lot, was primarily responsible for the removal of ice and snow.

February 7, 2025

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