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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 February 24 – 28, 2025, and Posted on the New York Appellate Digest Website on Monday, March 3, 3035. 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 Second Department, reversing Supreme Court, determined defendant in this foreclosure proceeding was not in default. The defendant answered the first complaint but did not answer two subsequent complaints which were designated "amended complaints," Amended complaints require an answer, but "supplemental complaints" do not require an answer. Here the "amended complaints" merely repeated the allegations in the original complaint, making them "supplemental," not "amended," complaints:

"Generally, an amended complaint supersedes the original pleading, the defendant's original answer has no effect, and a new responsive pleading is substituted for the original answer. In contrast, a supplemental complaint does not supersede the original pleading and the answer which had already been served at the time the supplemental pleading was interposed remains in effect" … . Here, insofar as asserted against the defendant, the purported amended complaints merely repeated the same allegations against the defendant that were made in the original complaint and, thus, are properly characterized as supplemental complaints … . As the defendant had already answered the allegations asserted, no further answer was required within the meaning of CPLR 3025(d). Thus, the defendant was not in default. U.S. Bank N.A. v Deblinger, 2025 NY Slip Op 01126, Second Dept 2-26-25

Practice Point: "Amended" complaints require a new answer, "supplemental" complaints do not. Here, although the subsequent complaints were designated "amended," they in fact were "supplemental" because they merely repeated the allegations in the first complaint.

February 26, 2025

CIVIL PROCEDURE, FRAUD, LANDLORD-TENANT.

HERE THE MOTION TO RENEW, BASED UPON A CHANGE IN OR CLARIFICATION OF THE LAW, SHOULD HAVE BEEN GRANTED DESPITE THE APPELLATE RULING ON THE PRIOR ORDER (FIRST DEPT).

he First Department, reversing Supreme Court, determined defendant landlord's motion to renew based upon a change in the law should have been granted}

On appeal, this Court agreed with defendant that the law as it existed prior to enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) applies in this case. However, we found that plaintiffs had raised a triable issue of fact as to whether the landlord engaged in a fraudulent scheme [to deregulate apartments]. Accordingly, we affirmed denial of defendant's summary judgment motion.

In April 2023, defendant moved in Supreme Court for renewal of its summary judgment motion. Defendant argued that Casey v Whitehouse Estates, Inc. (39 NY3d 1104 [2023]) supported its position on the summary judgment motion. The motion court denied the motion to renew and did not reach the substantive issue raised by defendant.

Contrary to plaintiffs' contention, a court of original jurisdiction may entertain a motion for leave to renew based on an alleged change in or clarification of the law, "even after an appellate court has rendered a decision" on the prior order … . Accordingly, defendant's motion to renew its summary judgment motion should be granted. 435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC, 2025 NY Slip Op 01157, First Dept 2-27-25

Practice Point: Even where the denial of summary judgment has been affirmed on appeal, a motion to renew based upon a change in or clarification of the law should be granted.

February 27, 2025

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

ALTHOUGH A COURT HAS THE DISCRETIONARY "INTERESTS OF JUSTICE" POWER TO VACATE ITS OWN ORDER, THAT POWER SHOULD ONLY BE EXERCISED IN UNIQUE OR UNUSUAL CIRCUMSTANCES NOT PRESENT HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court should not have vacated its own dismissal of the action in 2013 because paintiff (Wilmington) demonstrated none of criteria for vacation of a judgment or order described in CPLR 5015 (a);

"Under CPLR 5015(a), the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, upon the ground of excusable default; newly discovered evidence; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction to render the judgment or order; or reversal, modification, or vacatur of a prior judgment or order upon which it is based" … . "In addition to the specific grounds set forth in CPLR 5015(a), a court may, in its discretion, vacate its own judgment 'for sufficient reason and in the interests of substantial justice'" … . "However, a court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect" … . In other words, "[a] court should only exercise its discretionary authority to vacate a judgment in the interests of substantial justice where unique or unusual circumstances . . . warrant such action" … .

Here, the Supreme Court improvidently exercised its discretion in granting that branch of the Wilmington's motion which was to vacate the 2013 dismissal order. Importantly, Wilmington did not adequately explain why it delayed nearly eight years before filing its motion … . Wells Fargo Bank, N.A. v Sulton, 2025 NY Slip Op 01128, Second Dept 2-26-25

Practice Point: CPLR 5015 (a) gives a court the discretionary power to vacate its own order "in the interests of substantial justice." That power should only be exercised in unique or unusual circumstances, not present here.

February 26, 2025

CIVIL PROCEDURE.

THE PROCESS SERVER DID NOT MAKE SUFFICIENT EFFORTS TO PERSONALLY DELIVER THE SUMMONS AND COMPLAINT BEFORE RESORTING TO NAIL AND MAIL SERVICE; COMPLAINT DISMISSED FOR LACK OF PERSONAL JURISDICTION OVER DEFENDANT (SECOND DEPT).

The Second Department determined the complaint should have been dismissed for lack of personal jurisdiction. The process server did not make sufficient efforts to personally deliver the summons and complaint before resorting to nail and mail service:

… [T]he plaintiff failed to demonstrate that the process server acted with due diligence before relying on affix and mail service pursuant to CPLR 308(4) … . The process server resorted to service pursuant to CPLR 308(4) after twice attempting personal service at the defendant's residence and once attempting service where the process server stated the defendant's residence could not be accessed due to an "impassable road." Also, there was no evidence that the process server made any genuine inquiries about the defendant's whereabouts and place of business … . Additionally, the process server's attempts at personal delivery occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit from work … . Sams Distribs., LLC v Friedman, 2025 NY Slip Op 01124, Second Dept 2-26-25

Practice Point: Consult this decision for some insight into when a court will find a process server's efforts to personally deliver the summons and complaint insufficient, thereby rendering the nail and mail service invalid.

February 26, 2025

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

IN AN EFFORT TO CONVINCE THE COURT TO GRANT THEIR REQUEST FOR A COMPETENCY HEARING BASED UPON DEFENDANT'S REJECTION OF A FAVORABLE PLEA OFFER, THE DEFENSE ATTORNEYS REVEALED CONFIDENTIAL COMMUNICATIONS WITH DEFENDANT ABOUT THE STRENGTH OF THE EVIDENCE; ALTHOUGH THE DEFENSE ATTORNEYS WERE ATTEMPTING TO HELP THE DEFENDANT, THE DEFENSE ATTORNEYS BECAME WITNESSES AGAINST THE DEFENDANT, DEPRIVING HIM OF HIS RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant received ineffective assistance of counsel. Defendant was offered a plea deal which avoided incarceration for robbery and assault. When defendant rejected the offer, the defense attorneys requested a competency examination. In arguing for the competency examination, the defense attorneys described their efforts to convince defendant to accept the plea bargain, including a mock trial in the defense attorneys' office finding defendant guilty. The Second Department determined the defense attorneys, by describing their confidential communications with defendant, which included the strength of the evidence, had become witnesses against the defendant:

… [T]he defendant's right to counsel was adversely affected, and he received ineffective assistance of counsel when his attorneys revealed confidential communications on the record and, in effect, took a position adverse to him … . Contrary to the People's contention, defense counsels did more than merely express concern that the defendant misunderstood the nature of the relevant issues … . Instead, defense counsels emphasized the strength of the evidence against their client, including revealing that a mock trial conducted in their office resulted in the defendant being found guilty … . These detailed statements, in effect, made defense counsels witnesses against their client, regardless of whether defense counsels allegedly made these statements in order to aid the application for an examination pursuant to CPL article 730 or in an attempt to persuade the defendant to accept what they viewed as a highly favorable plea offer. Although defense counsels had an obligation to advise the defendant regarding the plea offer … , the defendant retains the authority to accept or reject a plea offer, even having accepted

the assistance of counsel … , and defense counsels must provide meaningful representation consistent with the defendant's desire to proceed to trial … . People v Montgomery, 2025 NY Slip Op 01111, Second Dept 2-26-25

Practice Point: Here the defense was trying to help the defendant by requesting a competency hearing after he rejected a favorable plea offer. In arguing for the competency hearing, the defense revealed confidential discussions with the defendant about the strength of the evidence, thereby becoming witnesses against the defendant and depriving him of his right to counsel.

February 26, 2025

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT'S COMPLAINTS ABOUT THE ACTIONS OF DEFENSE COUNSEL WERE NOT SPECIFIC OR SERIOUS ENOUGH TO WARRANT AN INQUIRY BY THE JUDGE; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined defendant had not made specific and serious allegations about the behavior of his attorney which were sufficient to warrant an inquiry by the judge:

… [D]efendant argues that the complaints contained in his letter were factually specific and serious enough to require a minimal inquiry. He points to his accusations that defense counsel was not working in his best interest; disregarded his request to visit, "even via [v]ideo"; hung up on him; disrespected him and his wife; was prolonging the proceedings; and told him to accept a plea even though he was "in fact innocent." Contrary to defendant's contention, these statements did not constitute "specific factual allegations of 'serious complaints about counsel' " … . Defendant's assertions that counsel was not working in his best interest, was prolonging the proceedings, and was advising him to take a plea were too general and conclusory to require a minimal inquiry. There are simply no facts elucidating these allegations that would have signaled to the trial court that a serious conflict emerged between defendant and his counsel.

… The seriousness of defendant's allegation that counsel failed to visit him was undermined by other statements in the letter, which clearly indicated that counsel and his private investigator were communicating with defendant. Moreover,

defendant failed to explain how defense counsel allegedly disrespected him and his wife. Nor did he provide any context regarding defense counsel allegedly hanging up on him. For instance, it is entirely unclear whether defense counsel intentionally or inadvertently hung up on defendant or whether defense counsel simply hung up because the conversation had ended. … [D]efendant's complaints … lacked sufficient elaboration to signal to the trial court that the complaints were serious enough to warrant minimal inquiry … . People v Fredericks, 2025 NY Slip Op 01011, CtApp 2-20-25

Practice Point: The nature of defendant's complaints about the behavior of defense counsel were not specific or serious enough to trigger the need for an inquiry by the judge. There was a three-judge dissent.

February 20, 2025

CRIMINAL LAW, ATTORNEYS, VEHICLE AND TRAFFIC LAW.

DEFENSE COUNSEL'S FAILURE TO REQUEST THAT THE JURY BE INSTRUCTED ON THE HEIGHTENED DEFINITION OF IMPAIRMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE; AT THE TIME OF THE TRIAL THERE WAS NO APPELLATE AUTHORITY FOR THE APPLICATION OF THE HEIGHTENED DEFINITION OF IMPAIRMENT IN ANY CONTEXT OTHER THAN VEHICULAR MANSLAUGHTER (THIRD DEPT).

The Third Department, affirming defendant's conviction, over a dissent, determined that the heightened definition of "impaired" which has been applied to a vehicular manslaughter charge need not be applied to driving while ability impaired by drugs or a combination thereof, the charges against defendant here. Therefore the failure to request that the jury be instructed to apply the heightened definition of impaired did not constitute ineffective assistance of counsel:

At the time of defendant's trial, there was no appellate authority which warranted a jury instruction concerning the heightened intoxication standard relative to the crimes that were pending against defendant. In Caden N. [189 AD3d 84], this Court, by its own express language, limited its holding to the crime of vehicular manslaughter, which of course is not present here. That is, this Court was careful to state that it was defining impairment "in the context of assessing whether a person

has committed the crime of vehicular manslaughter in the second degree" (People v Caden N., 189 AD3d at 90). In the event that this Court had also wished to apply the new definition of impairment to the underlying crimes of driving while ability impaired by drugs or by a combination thereof, it surely would have explicitly stated as much. * * *

In the absence of any such authority, defense counsel properly acquiesced to the jury being charged in accordance with the definition of impairment that was provided in the Criminal Jury Instructions as of that time. Thus, under these circumstances, it cannot be said that any reasonable defense counsel would have requested the intoxication instruction in place of the impairment instruction, and counsel was not ineffective for failing to do so. People v Ambrosio, 2025 NY Slip Op 01133, Third Dept 2-27-25

Practice Point: The Third Department has applied a heightened definition of impairment for vehicular manslaughter cases. The Fourth Department refused to follow suit. The law in this area is in flux.

February 27, 2025

CRIMINAL LAW, EVIDENCE, JUDGES, APPEALS.

THE APPEAL WAIVER WAS INVALID, CRITERIA EXPLAINED; THERE ARE UNRESOLVED QUESTIONS (RAISED BY A DEFENSE INVESTIGATION SUBMITTED WITH THE MOTION TO SUPPRESS) ABOUT WHETHER THE DESCRIPTON OF THE SEARCHED PREMISES IN THE WARRANT WAS ACCURATE, REQUIRING A HEARING; MATTER REMANDED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, remanding the matter for a suppression hearing, and finding the appeal waiver invalid, determined there were questions about whether the search warrant described the premises to be searched with sufficient particularity. The warrant indicated there was only one apartment, with an unmarked tan door. The defendant's investigator submitted evidence demonstrating there were two apartments, neither with a tan door, and the door to the searched apartment was marked with a number one, while the other apartment door was unmarked:

The plea colloquy contained several defects. It did not make clear, expressly or tacitly, that the right to appeal was separate and distinct from the Boykin rights defendant was automatically forfeiting with the plea; the colloquy suggested that the appeal waiver was absolute, offering no clue that some core appellate claims would survive; and, relatedly, the colloquy wrongly indicated that no appeal was permissible on the fundamental issues of whether the plea was entered into knowingly and voluntarily, and whether the sentence was legal.

The written waiver cannot save the oral appeal waiver. The plea court did not confirm that defendant had read the written waiver; the court did not confirm that defendant had discussed the written waiver with counsel; and the court did not confirm that defendant understood the written waiver … . * * *

… [D]efendant's submissions in support of his omnibus motion call into question whether the search warrant contains a misdescription of the premises to be searched, and, if there is a misdescription, whether it renders the warrant invalid. Specifically, defendant's omnibus motion submissions raise a question of fact as to whether, based on what the police officer knew or should have known about the premises when the search warrant was sought, the warrant's description of the target premises was accurate … . [D]efendant here submitted evidence (in particular, the affirmation of the investigator who visited the premises and the photographs of 955 Bruckner Boulevard taken by the investigator) about the "actual conditions of the premises" in support of his omnibus motion … . Additionally, assuming there was a misdescription of the premises to be searched, a question of fact exists as to whether there was no reasonable possibility that the wrong premises would have been searched … .

We cannot resolve the issues raised by defendant's omnibus motion submissions without a hearing (see CPL 710.60[4]; see also CPL 710.60[2] …). This is not a situation where it is plain from the existing record that there was no reasonable possibility that the wrong premises would be searched regardless of any misdescription … . People v Trulove, 2025 NY Slip Op 01178, First Dept 2-27-25

Practice Point: Consult this opinion for a detailed explanation of the criteria for a valid waiver of appeal.

Practice Point: Here the defense investigator submitted evidence which raised a question whether the search warrant accurately described the premises to be searched. The matter was remanded for a hearing.

February 27, 2025

CRIMINAL LAW, EVIDENCE.

AT THE SUPPRESSION HEARING THE OFFICER TESTIFIED THE SEARCH OF DEFENDANT'S PERSON AFTER A TRAFFIC STOP WAS BASED UPON THE ODOR OF MARIJUANA; THE OFFICER DID NOT TESTIFY HE WAS QUALIFIED BY TRAINING AND EXPERIENCE TO RECOGNIZE THE ODOR OF MARIJUANA; THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the traffic stop was proper (inoperable brake light) but the search of defendant's person, based on the odor of marijuana, was not:

… [T]he officer's testimony was insufficient to establish that there was probable cause for the search of the defendant's person. As the law existed in 2020, "the odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, [was alone] sufficient to constitute probable cause to search the vehicle and its occupants" … . Here, however, the officer did not testify that he had any training or experience in detecting the odor of marihuana … .

Accordingly, the Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress physical evidence. People v McLeod, 2025 NY Slip Op 01108, Second Dept 2-26-25

Practice Point: Under the law as it was in 2020, the search of a person could be justified by the odor of marijuana, but only if the officer was qualified by training and experience to recognize the odor of marijuana. Here the officer did not testify he was qualified to recognize the odor of marihuana. Therefore, defendant's motion to suppress should have been granted.

February 26, 2025

CRIMINAL LAW.

WHETHER DEFENDANT WAS PROPERLY SENTENCED AS A SECOND FELONY OFFENDER DEPENDS ON THE UNDERLYING FACTS FOR THE PREDICATE FEDERAL OFFENSE WHICH ARE NOT ON THE RECORD; MATTER REMITTED FOR THAT DETERMINATION (THIRD DEPT).

The Third Department, reversing Supreme Court and remitting the matter, determined that whether the federal offense used as a predicate for defendant's second felony offender designation is the equivalent of a New York felony depends on the underlying facts of the federal offense:

… [T]he federal statute under which defendant was previously convicted provides, in relevant part, that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" (21 USC § 841 [a] [1]). As defendant points out, the federal statute contains elements not found in certain New York statutes, e.g., manufacturing, and encompasses a mix of felony and misdemeanor offenses … . Hence, resort to the facts underlying defendant's federal conviction is warranted in order to ascertain whether defendant's convictions are equivalent to a felony in this state … . However, because defendant did not controvert his status as a second felony offender, the People have not sought to admit an "accusatory instrument that describe[s] the particular act or acts underlying the charge [for purposes of] isolat[ing] and identify[ing] the statutory crime[s] of which . . . defendant was accused" for purposes of "determining whether Penal Law § 70.06 [1] [b] [i] has been satisfied" … . Accordingly, we remit this matter for a hearing on defendant's CPL 440.20 motion to give the People the opportunity to establish, and defendant the opportunity to protest, the issue of equivalency, which is a determination we cannot make on the current record. People v Darby, 2025 NY Slip Op 01134, Third Dept 2-27-25

Practice Point: When a federal conviction is used as a predicate offense for a second felony offender designation, the federal offense must be equivalent to a New York felony. Here the federal offense included elements not included in the relevant New York felony. In that situation, it is necessary to look at the underlying facts for the federal conviction to determine equivalency.

February 27, 2025

DEBTOR-CREDITOR, CIVIL PROCEDURE, INSURANCE LAW, JUDGES.

WHETHER THE JUDGMENT DEBTOR IS ENTITLED TO RESTITUTION AFTER REVERSAL OF A RESTRAINING NOTICE AND WHETHER PLAINTIFF IS ENTITLED TO AN INSTALLMENT PAYMENT ORDER ARE DISCRETIONARY ISSUES TO BE DECIDED UPON REMAND; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, reversing Supreme Court and remanding the matter, determined that whether the judgment debtor was entitled to restitution based on the reversal of a restraining notice and whether the plaintiff is entitled to an installment payment order were not decided by the reversal, but rather were discretionary issues to be resolved on remand. The facts are too complex to fairly summarize here:

… CPLR 5015(d) provides that, "[w]here a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal." … Thus, "CPLR 5015[d] empowers a court that has set aside a judgment or order to restore the parties to the position they were in prior to its rendition, consistent with the court's general equitable powers" … . The essential inquiry for a court addressing a request for the equitable remedy of restitution is whether it is against equity and good conscious to permit a party to retain the money that is sought to be recovered … . The determination whether to award restitution is committed to the trial court's discretion … . * * *

Contrary to defendant's contention that an installment payment order cannot be directed at funds exempt from execution under CPLR 5231 (i.e., 90% of his monthly disability insurance payments), such an order is the expedient for accessing exempt income … . As Professor Siegel stated long ago, "[o]ne of [CPLR 5226's] prime uses is in that situation . . . where it appears that the judgment debtor can afford more than the 10% to which the income execution is limited" … . Thus, "[t]he court on the [CPLR 5226] motion can direct the debtor to make regular payments to the judgment creditor in any sum it finds the debtor able to afford, not limited by the 10% that restricts the income execution of CPLR 5231" … . Hamway v Sutton, 2025 NY Slip Op 01062, First Dept 2-25-25

Practice Point: Although this opinion is fact-specific, it includes the criteria for some fundamental debtor-creditor issues, i.e., the amount of monthly disability insurance payments which is available to a judgment debtor, the income-sources which are available to a judgment debtor, whether a plaintiff is entitled to an installment payment order, the criteria for a court's discretionary determination of the amount a judgment debtor can afford to pay every month, etc.

February 25, 2025

FIDUCIARY DUTY, CIVIL RIGHTS LAW.

THE ALLEGATION A PLASTIC SURGEON POSTED BEFORE AND AFTER PHOTOGRAPHS OF PLAINTIFF WITHOUT PERMISSION STATED A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Egan, determined plaintiff stated causes of action for both a violation of privacy pursuant to the Civil Rights Law, and breach of a fiduciary duty. Plaintiff alleged defendant plastic surgeon posted before and after photographs of the plaintiff without her consent. The breach of a fiduciary duty claim did not duplicate the violation of privacy claim. Physicians have a fiduciary duty not to disclose a patient's medical records without authorization:

Plaintiff instead alleges that defendants all had a physician-patient relationship with her and that they breached a distinct duty arising out of that relationship by publicly disclosing photographs of her that had been taken in the course of treatment without her agreement … . "It is well established that a patient may maintain a cause of action for breach of fiduciary duty against his or her physician resulting from the physician's unauthorized disclosure of the patient's medical records," broadly defined as essentially any information acquired by the physician that relates to the patient's diagnosis or treatment, as such disclosure violates "the implied covenant of trust and confidence that is inherent in the physician patient relationship" … . A claim for breach of fiduciary duty, based as it is upon the well-established duty a physician owes to his or her patient as opposed to a purported right of privacy, may be viable where claims based upon a generalized invasion of privacy are not … . Perry v Rockmore, 2025 NY Slip Op 01141, Third Dept 2-27-25

Practice Point: Here the allegation defendant plastic surgeon posted before and after photographs of plaintiff stated distinct causes of action for a violation of privacy pursuant to the Civil Rights Law, and breach of fiduciary duty (unauthorized disclosure of medical records).

February 27, 2025

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

THE FAILURE TO INCLUDE THE PHONE NUMBER FOR THE NYS DEPARTMENT OF FINANCIAL SERVICES IN THE RPAPL 1304 NOTICE OF FORECLOSURE RENDERED THE NOTICE FACIALLY DEFECTIVE; DEFENDANT ENTITLED TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's cross-motion for summary judgment in this foreclosure action should have been granted. The bank did not demonstrate strict compliance with the notice-of-foreclosure requirements of RPAPL 1304. The notice did not include the phone number for the NYS Department of Financial Services' toll-free helpline:

"Where an RPAPL 1304 notice fails to reflect information mandated by the statute, . . . the statute will not have been strictly complied with and the notice will not be valid" … . Here, at the time the RPAPL 1304 notices were purportedly sent to the defendant, the version of RPAPL 1304 in effect required the notice to include the following sentence: "If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (show number) or visit the Department's website at (show web address)" … .

Both RPAPL 1304 notices purportedly sent to the defendant included the sentence: "If you need further information, please call the toll-free helpline at or visit the Department's website at ." Since the notices failed to include the telephone number for the Department of Financial Services' toll-free helpline—a piece of information specifically required by the version of RPAPL 1304 in effect at the time the notices were sent—the notices were facially defective, and the defendant's motion for summary judgment dismissing the complaint insofar as asserted against her should

have been granted … . Federal Natl. Mtge. Assn. v Williams-Jones, 2025 NY Slip Op 01081, Second Dept 2-26-25

Practice Point: Strict compliance with the mandated contents of a RPAPL 1304 notice of foreclosure is required. Here the failure to include the phone number for the NYS Department of Financial Services rendered the notice facially defective and warranted a grant of summary judgment to the defendant.

February 27, 2025

NEGLIGENCE, EVIDENCE.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF A PROTRUDING NAIL IN A BASEMENT STAIRWAY WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; DEFENDANT DID NOT PRESENT EVIDENCE DEMONSTRATING WHEN THE STAIRWAY WAS LAST CLEANED OR INSPECTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owner did not demonstrate a lack of constructive notice of a protruding nail in a basement stairway which allegedly caused plaintiff to slip and fall. The defendant did not present any evidence demonstrating when the stairway was last inspected or cleaned:

… [T]he defendants failed to establish, prima facie, that 234-236 Elmendorf Street, LLC [the property owner], lacked constructive notice of the protruding nail condition alleged by the plaintiff … . Although the defendants submitted a transcript of the plaintiff's deposition testimony wherein she averred that she did not notice the protruding nail when she last used the staircase approximately one week prior to her accident, the defendants did not establish that the condition did not exist for a sufficient length of time prior to the alleged accident in order for it to be remedied … . Moreover, the defendants failed to submit sufficient evidence as to when 234-236 Elmendorf Street, LLC, had last cleaned or inspected the staircase at issue … . Jones v 234-236 Elmendorf St., LLC, 2025 NY Slip Op 01083, Second Dept 2-27-25

Practice Point: Here the plaintiff's deposition testimony that she did not notice the protruding nail the week before her fall was not sufficient to demonstrate defendant

property owner did not have constructive knowledge of the protruding nail. No evidence of when the stairway was last cleaned or inspected was presented.

February 27, 2025

NEGLIGENCE, EVIDENCE.

DEFENDANTS IN THIS SLIP AND FALL CASE FAILED TO DEMONSTRATE THE DEFECT WHICH CAUSED PLAINTIFF'S FOOT TO SINK INTO SOFT ASPHALT WAS TRIVIAL OR OPEN AND OBVIOUS AS A MATTER OF LAW (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants in this slip and fall case did not demonstrate the defect which allegedly caused plaintiff's foot to sink down about an inch into soft temporary asphalt was trivial or open and obvious as a matter of law:

Although defendants stress that the alleged defect was, at most by plaintiff's own admission, only an inch in height, even physically small defects can be actionable "when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot" … . When considering the attendant circumstances, including that the defect formed itself only as plaintiff stepped down on it, the location of the alleged defect in front of plaintiff's driveway and that defendants acknowledged temporary asphalt could depress or settle but had no record or knowledge if they performed any inspection in the area where plaintiff fell, we cannot say "as a matter of law that the condition was so trivial and slight in nature that it could not reasonably have been foreseen that an accident would happen" … . Nor can we say that the defect, which may have formed due to voids under the surface of the temporary asphalt and was not physically observable until after plaintiff stepped down on it, "did not constitute a trap for the unwary" … . To this point, the fact that the backfilled trench had a sharply contrasted hue as opposed to the rest of the roadway surface or the mouth of plaintiff's driveway simply does not translate to an open and obvious condition because of the nature of the defect, which only formed after it had been stepped on, and therefore defendants' reliance on these facts as an aegis is misplaced. Santiago v National Grid USA Serv. Co., Inc., 2025 NY Slip Op 01139, Third Dept 2-27-25

Practice Point: The defendant seeking summary judgment in a slip and fall case bears the burden of demonstrating the defect which allegedly caused plaintiff to fall was trivial or open and obvious. Here defendants did not submit sufficient evidence to eliminate questions of fact for either theory.

February 27, 2025

PRODUCTS LIABILITY, MEDICAL MALPRACTICE, NEGLIGENCE.

THE USE OF ICE PACKS WAS NOT PART OF THE DEFENDANT MANUFACTURER'S BURN-TREATMENT SYSTEM; THEREFORE THE DEFENDANT COULD NOT BE HELD LIABLE BY THE INJURED PLAINTIFF FOR THE FAILURE TO WARN AGAINST APPLYING ICE PACKS TO BARE SKIN (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant Zeltiq, the manufacturer of a system for treating burns (CoolSculpting Systems), could not be held liable for injury allegedly caused by the application of ice packs after the CoolSculpting treatment. The complaint alleged a failure to warn of the the danger of using ice packs. The use of ice packs was not part of the CoolSculpting treatment:

Zeltiq also had no duty to warn plaintiffs of any risks associated with using ice packs after treatment with the CoolSculpting System. Because the CoolSculpting System is a FDA Class II medical device that requires a prescription, Zeltiq's duty to warn runs to physicians, not directly to patients … . Thus, in this case, Zeltiq's duty ran to Silverstein's [plaintiff's] treating physician, Dr. Brauer. However, there is no duty to warn of risks that are obvious, including risks that are well-known to physicians because of their medical training … . Dr. Brauer testified that through his education and training, he was aware of and knew of the dangers of placing ice on bare skin, and that those dangers were basic medical knowledge … . Plaintiffs' expert does not dispute that these dangers are basic knowledge in the medical community and, in fact, opines that it is a deviation from the standard of care to place ice packs on bare skin.

In addition, given Dr. Brauer's awareness of the risk, his status as a "responsible intermediary" breaks the chain of proximate cause between any failure to warn by

Zeltiq and the harm to Silverstein … . Silverstein v Coolsculpting Zeltiq Aesthetics, Inc., 2025 NY Slip Op 01183, First Dept 2-27-25

Practice Point: Here the application of ice packs to bare skin was not part of the defendant manufacturer's burn-treatment system. The use of the burn-treatment system is by prescription only, so the duty to warn owed by the manufacturer runs to the physician, not the patient. Here the dangers of applying ice packs to bare skin are well known to physicians, so the use of ice packs by plaintiff's physician broke the chain of proximate cause re: the defendant manufacturer.

February 27, 2025