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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in February 2025. 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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ACTION BROUGHT IN WRONG FORM, CONVERSION TO CORRECT FORM, MEDICAL MALPRACTICE.

ALTHOUGH THIS MEDICAL MALPRACTICE ACTION WAS IMPROPERLY BROUGHT AS AN ORDER TO SHOW CAUSE AND PETITION, IT SHOULD NOT HAVE BEEN DISMISSED; RATHER IT SHOULD HAVE BEEN CONVERTED BY DEEMING THE ORDER TO SHOW CAUSE A SUMMONS AND THE PETITION A COMPLAINT; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the action should not have been dismissed because it was in the form of a proceeding rather

than an action. Supreme Court should have converted the proceeding into the proper form:

The petitioner commenced this purported proceeding by the filing of an order to show cause and a petition, inter alia, for injunctive relief and to recover damages for medical malpractice. In opposition to the order to show cause and the petition, the respondent submitted an affirmation of counsel, in which counsel argued, among other things, that the proceeding should be dismissed because it was not brought in the proper form. The Supreme Court conducted a hearing on the petition. Thereafter, the court issued a judgment, in effect, denying the petition and dismissing the proceeding. The petitioner appeals.

Although this matter was improperly commenced in the form of a proceeding instead of an action, dismissal is not required. "Pursuant to CPLR 103(c), a proceeding should not be dismissed 'solely because it is not brought in the proper form,' and the court has the power to convert a proceeding into the proper form" … . Accordingly, we convert this proceeding into an action, inter alia, for injunctive relief and to recover damages for medical malpractice, with the order to show cause deemed to be the summons and the petition deemed to be the complaint (see CPLR 103[c] …), and remit the matter to the Supreme Court, Nassau County, to afford the respondent an opportunity to serve and file an answer within 20 days of service upon it of this decision and order with notice of entry … . Matter of Robinson v NYU Langone Hosps., 2025 NY Slip Op 00870, Second Dept 2-13-25

Practice Point: A proceeding brought in the wrong form can be converted to the proper form by the court pursuant to CPLR 103 (c).

February 13, 2025

CHILD VICTIMS ACT, ALLEGATIONS DID NOT STATE A CAUSE OF ACTION AGAINST A SCHOOL.

BARE ALLEGATIONS THAT A SCHOOL KNEW OR SHOULD HAVE KNOWN OF A TEACHER'S PROPENSITY TO ABUSE STUDENTS, UNSUPPORTED BY ANY FACTUAL ALLEGATIONS, ARE NOT ENOUGH TO STATE A CAUSE OF ACTION FOR NEGLIGENCE OR NEGLIGENT RETENTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case against a school (Central Yeshiva), determined the complaint did not state causes of action for negligence or negligent retention of the teacher (Charitonov) who allegedly sexually abused the plaintiff. Bare allegations that the school knew or should have known of the teacher's propensity for abuse are not enough to avoid dismissal:

Here, the complaint failed to state causes of action alleging negligence and negligent retention, supervision, and direction against Central Yeshiva, as the complaint did not sufficiently plead that Central Yeshiva knew or should have known of Charitonov's propensity to commit the alleged wrongful acts and failed to provide any factual allegations from which it could be inferred that Central Yeshiva had prior notice of similar conduct at its dormitory … . The complaint merely asserted bare legal conclusions that Central Yeshiva knew or should have known of Charitonov's propensity for improper conduct without providing any factual allegations that Charitonov's abuse of the plaintiff was foreseeable … . Moreover, the plaintiff failed to adequately demonstrate any basis to allow him to conduct discovery prior to directing dismissal of those causes of action (see CPLR 3211[d] …). Doe v Educational Inst. Oholei Torah, 2025 NY Slip Op 00948, Second Dept 2-19-25

Practice Point: In a Child Victims Act case against a school stemming from the abuse of a child by a teacher, bare allegations that the school knew or should have known of the teacher's propensity for abuse do not state a cause of action for negligence or negligent retention. The complaint must include supporting factual allegations.

February 19, 2025

CHILD VICTIMS ACT, FOSTER CARE, SPECIAL DUTY OWED BY MUNICIPALITY FOR NEGLIGENT PLACEMENT.

A MUNICIPALITY OWES A CHILD IT PLACES IN FOSTER CARE A SPECIAL DUTY SUCH THAT THE MUNICIPALITY CAN BE LIABLE FOR A NEGLIGENT PLACEMENT WHICH LEADS TO FORESEEABLE HARM TO THE CHILD (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge dissenting opinion, determined a municipality owes a child placed in foster care a special duty, such that the municipality, although performing a governmental function, can be liable for negligent placement of a child:

Today we hold that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children. As a result, we reverse the decision of the Appellate Division.

Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (see CPLR 214-g) against defendant Cayuga County and "Does 1-10," who she alleged were "persons or entities with responsibilities for [p]laintiff's safety, supervision and/or placement in foster care." According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound. * * *

By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child's life … . We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from "foreseeable risks of harm" arising from the child's placement with the municipality's choice of foster parent … . Weisbrod-Moore v Cayuga County, 2025 NY Slip Op 00903, CtApp 2-18-25

Practice Point: A municipality generally is not liable for injury resulting from the exercise of a governmental function absent a special duty owed to the injured party. Resolving a split of authority, here the Court of Appeals held a municipality owes a special duty to a child it places in foster care.

February 18, 2025

DEBTOR-CREDITOR, APPEAL DID NOT DECIDE CERTAIN ISSUES WHICH WERE LEFT TO THE DISCRETION OF THE JUDGE ON REMAND.

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

DEFAULT JUDGMENTS, 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

DEFAULT JUDGMENTS, FORECLOSURE.

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

FAMILY LAW, FAILURE TO HOLD CUSTODY HEARING.

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, FAILURE TO SERVE OBJECTIONS TO CHILD SUPPORT ORDER.

MOTHER'S OBJECTIONS TO THE CHILD SUPPORT ORDER WERE NEVER SERVED ON FATHER'S COUNSEL; THE SUBSEQUENT ORDER GRANTING THE OBJECTIONS IS VOID (THIRD DEPT).

The Third Department, reversing Family Court, determined that the mother's objections to the Support Magistrate's child support order, which Family Court granted, should have been served on father's counsel. Under the circumstances of the case, the failure to serve counsel rendered the related court orders void:

Family Ct Act § 439 (e) directs that "[a] party filing objections shall serve a copy of such objections upon the opposing party, who shall have [13] days from such service to serve and file a written rebuttal to such objections." This provision does not address the issue of whether service on an attorney representing a party constitutes service on the opposing party. Where a method of procedure is not prescribed, Family Ct Act § 165 (a) provides that "the provisions of the [CPLR] shall apply to the extent that they are appropriate to the proceedings involved … ." CPLR 2103 specifically pertains to the service of papers and provides that "papers to be served upon a party in a pending action shall be served upon the party's attorney" (CPLR 2103 [b]). Accordingly, "service on an opposing party represented by counsel requires service on the attorney, not the party" … . The record supports that counsel was not served with the objections, and in fact only became aware of them upon receipt of Family Court's order granting same. * * * … [C]ounsel never obtained a copy of the objections, and thus never responded to

same. Matter of Andersen v Bosworth, 2025 NY Slip Op 01029, Third Dept 2-20-25

Practice Point: Here the failure to serve father's counsel with mother's objections to the child support order, which were subsequently granted by Family Court, rendered the order granting the objections void.

February 20, 2025

FAMILY LAW, TERMINATION OF PARENTAL RIGHTS, FAILURE TO HOLD DISPOSITIONAL HEARING.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ABSENT THE CONSENT OF THE PARTIES TO DISPENSE WITH IT, A DISPOSITIONAL HEARING MUST BE HELD AFTER THE COMPLETION OF THE FACT-FINDING HEARING (THIRD DEPT).

The Third Department determined the record supported termination of father's parental rights, but the order must be reversed because the court failed to hold a dispositional hearing after the completion of the fact-finding hearing. The matter was remitted:

Family Court erred in failing to hold a dispositional hearing. "Family Ct Act § 625 (a) expressly provides that, upon completion of a fact-finding hearing, a dispositional hearing may commence immediately after the required findings are made; provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing" … . Given that the record is devoid of the parties' consent to dispense with a dispositional hearing, the matter is remitted for a dispositional hearing "or to otherwise affirmatively gain the parties' consent to dispense of the matter without one" … . Matter of Konner N. (Justin O.), 2025 NY Slip Op 01017, Third Dept 2-20-25

Practice Point: Here the order terminating father's parental rights was reversed because no dispositional hearing was held, and there was no indication the parties consented to proceeding without one. The matter was remitted.

February 20, 2025

FAMILY LAW, CUSTODY, DENIAL OF FATHER'S REQUEST FOR AN ADJOURNMENT DEPRIVED HIM OF HIS RIGHT TO BE HEARD.

DENYING FATHER'S REQUEST FOR AN ADJOURNMENT IN THIS CUSTODY MODIFICATION PROCEEDING EFFECTIVELY DEPRIVED HIM OF HIS RIGHT TO TESTIFY AND HIS RIGHT TO A FULL AND FAIR EVIDENTIARY HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court improvidently exercised its discretion when it denied father's request for an adjournment of the custody modification proceedings. Father was effectively denied his right to testify:

"The granting of an adjournment rests in the sound discretion of the hearing court upon a balanced consideration of all relevant factors" … . "The determination to grant or deny an adjournment will not be overturned absent an improvident exercise of discretion" … . While adjournments are within the discretion of the hearing court, the range of that discretion is narrowed where a fundamental right of the parties is involved … . Generally, in a proceeding pursuant to Family Court Act article 6 seeking modification of a prior custody and visitation order, a full and comprehensive hearing is required, where due process requires that a parent be afforded a full and fair opportunity to be heard … .

After balancing the relevant factors, we find that under the circumstances of this case, the Family Court improvidently exercised its discretion in denying the father's request for an adjournment, as the court's denial of the requests for adjournment deprived the father entirely of his right to testify on his own behalf in the custody modification hearing, thereby depriving him of a full and fair evidentiary hearing … . Matter of Panizo v Douglas, 2025 NY Slip Op 00966, Second Dept, 2-19-25

Practice Point: Although the decision to grant or deny a request for an adjournment is discretionary, here the denial of the request effectively deprived father of his right to a full and fair evidentiary hearing in this custody modification proceeding, requiring reversal.

February 19, 2025

FAMILY LAW, STANDING TO SEEK CUSTODY OR VISITATION.

PETITIONER, WHO IS NOT RELATED TO THE CHILD, DID NOT HAVE STANDING BY EQUITABLE ESTOPPEL TO SEEK CUSTODY OR VISITATION; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing Family Court, determined petitioner, who is not related to the child, did not have standing by equitable estoppel to seek custody of or visitation with the child. The evidence did not demonstrate the relationship between petitioner and the child rose to the level of parenthood:

While the record contains evidence suggesting that petitioner and the child had an ongoing relationship throughout the child's formative years, the record does not support the idea that disrupting such a relationship would be harmful to the child's best interests. Petitioner never lived with the child or assumed any financial responsibilities for her. Although petitioner credibly testified that the child visited her frequently during the first three years of the child's life, there was no evidence that petitioner consistently cared for the child or that the child looked upon petitioner as a parental figure.

… [T]here was evidence that the child did not recognize or view petitioner as parental figure … . From the child's perspective, the only other parent she knew, aside from respondent, the child's biological mother, was the mother's companion, whom she regarded as her father and with whom she reported having a close, bonded relationship with, undercutting petitioner's equitable estoppel claim … . Matter of April B. v Relisha H., 2025 NY Slip Op 00782, First Dept 2-11-25

Practice Point: To demonstrate standing to bring a custody petition by equitable estoppel, the petitioner must demonstrate a relationship with the child which rises to the level of parenthood, not the case here.

February 11, 2025

LANDLORD-TENANT, YELLOWSTONE INJUNCTION.

HERE THE PLAINTIFFS-TENANTS WERE ENTITLED TO A YELLOWSTONE INJUNCTION WHICH TOLLS THE CURE PERIOD UNTIL A COURT DETERMINES WHETHER THE TENANT HAS ACTUALLY DEFAULTED; PURPOSES OF AND CRITERIA FOR A YELLOWSTONE INJUNCTION CLEARLY EXPLAINED (FIRST DEPT).

The First Department reversed Supreme Court and granted plaintiff's a "Yellowstone" injunction to allow time for a court to determine the nature and status of an ambiguous lease. Supreme Court had erroneously struck the "temporary restraining order" paragraph in plaintiffs-tenants' order to show cause, which allowed the period to cure the alleged defaults to run out resulting in termination of the lease. The opinion includes a clear explanation of the nature and equitable purpose of a Yellowstone injunction, which is applicable to commercial leases. One of the issue here was whether the lease was commercial or residential:

A Yellowstone injunction "maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" … .

… [T]he Yellowstone injunction tolls the relevant cure period, thereby preventing the termination of the lease … . With the Yellowstone injunction in place, the tenant can litigate with some confidence: if the tenant prevails in the underlying dispute with the landlord, the tenant walks away from the litigation with the lease intact; if the tenant loses the underlying dispute, the tenant can cure the demonstrated lease defaults before the expiration of the remaining cure period … .

* * * Yellowstone relief is a unique injunction. Unlike a standard preliminary injunction that can be granted only upon a demanding three-part showing of a likelihood of success on the merits, irreparable injury, and that the equities favor the party seeking the preliminary injunction, a Yellowstone injunction is granted on "far less" a showing … .

The party seeking Yellowstone relief must demonstrate the following four elements: "(1) It holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it

requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" … . Wharton-Bickley v 388 Broadway Owners LLC, 2025 NY Slip Op 00802, First Dept 2-11-25

Practice Point: Consult this decision for a clear explanation of the purposes of and the criteria for a Yellowstone injunction.

February 11, 2025

MISTRIAL, ATTORNEYS, IMPROPER CROSS-EXAMINATION.

IMPROPER CROSS-EXAMINATION OF PLAINTIFF ABOUT HIS STATUS AS A DEFENDANT IN A PENDING LAWSUIT WARRANTED GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL (SECOND DEPT).

The Second Department, reversing the denial of plaintiff's motion for a mistrial, determined plaintiff was improperly cross-examined about his status as a defendant in a pending lawsuit:

… Supreme Court should have granted the plaintiff's motion for a mistrial based upon improper cross-examination of the plaintiff about a pending lawsuit against him relating to his alleged failure to pay for an unrelated medical procedure. Where a lawsuit has not resulted in an adverse finding against a witness, counsel should not be permitted to ask the witness if he or she has been sued since the fact that a lawsuit has been commenced, in and of itself, has little or no probative value with regard to credibility … . Here, the court improvidently permitted defense counsel to cross-examine the plaintiff as to whether he was the defendant in a pending lawsuit alleging nonpayment, since the lawsuit had not resulted in an adverse finding against the plaintiff and the fact that the lawsuit had been commenced, in and of itself, had little to no probative value with regard to the plaintiff's credibility … . Moreover, defense counsel's reference to an allegation that the plaintiff had taken $200,000 in insurance proceeds that was not forwarded to medical providers and, after being precluded from ascertaining from the plaintiff whether that allegation was true, defense counsel's reference to "someone" taking $250,000 that "didn't belong to them," prejudiced the plaintiff, who was the sole eyewitness on his behalf. Drayton v Putnam Hosp. Ctr., 2025 NY Slip Op 00845, Second Dept 2-13-25

Practice Point: The cross-examination of the plaintiff about his status as a defendant a pending lawsuit was improper and warranted a mistrial.

February 13, 2025

NOTE OF ISSUE, FAILURE TO FILE BY DEADLINE.

WHERE PLAINTIFF HAS FAILED TO FILE A NOTE OF ISSUE BY A COURT-ORDERED DEADLINE, RESTORATION TO THE ACTIVE CALENDAR IS AUTOMATIC WHERE NO 90-DAY NOTICE HAD BEEN SERVED AND THERE HAD BEEN NO COURT-ORDERED DISMISSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar should have been granted. Although plaintiff had failed to file a note of issue by the court-ordered deadline, no 90-day notice had been served nor had the court ordered dismissal of the action:

"When a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27" … . "In the absence of those two circumstances, the court need not consider whether the plaintiff had a reasonable excuse for failing to timely file a note of issue" … . Adams v Frankel, 2025 NY Slip Op 00939, Second Dept 2-19-25

Practice Point: Where plaintiff fails to fails to file a note of issue by the court-ordered deadline, restoration of the action to the active calendar is automatic where no 90-day notice has been served and dismissal has not been ordered by the court.

February 19, 2025

STATUTE OF LIMITATIONS, CONTRACT LAW, CONVERSION, UNJUST ENRICHMENT.

ALTHOUGH THE CAUSES OF ACTION WERE PLED AS "CONVERSION" AND "UNJUST ENRICHMENT," THEY STEMMED FROM ALLEGED BREACHES OF THE PARTNERSHIP AGREEMENT; THEREFORE THE SIX-YEAR BREACH-OF-CONTRACT STATUTE OF LIMITATIONS APPLIED, NOT THE THREE-YEAR TORT STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department determined that, although the causes of action were couched as "conversion" and "unjust enrichment," they stemmed from the alleged breach of a partnership agreement. Therefore the six-year contract, not the three-year tort, statute of limitations applied:

… [T]he causes of action were subject to a six-year statute of limitations rather than a three-year statute of limitations. "In determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties" … . "[W]hen damage to property or pecuniary interests is involved, the six-year statute governs regardless of how the theory of liability is described, as long as the asserted liability had its genesis in the contractual relationship of the parties" … . Thus, "where liability is premised on a contractual relationship, the six-year statute of limitations applies" … . Fernandes v Fernandes, 2025 NY Slip Op 00848, Second Dept 2-13-25

Practice Point: Here the causes of action for conversion and unjust enrichment stemmed from alleged breaches of the partnership agreement, so the breach-of-contract, not the tort, statute of limitations applied.

February 13, 2025

STATUTE OF LIMITATIONS, CHILD VICTIMS ACT, REVIVAL OF TIME-BARRED ACTIONS.

THE SIX-MONTH WAITING PERIOD ASSOCIATED WITH THE REVIVAL OF OTHERWISE TIME-BARRED ACTIONS PURSUANT TO THE CHILD VICTIMS ACT IS NEITHER A STATUTE OF LIMITATIONS NOR A CONDITION PRECEDENT; THEREFORE, PURSUANT TO FEDERAL PROCEDURAL LAW, THE SECOND CIRCUIT MAY RULE THAT DEFENDANT FORFEITED THE RIGHT TO A TIMELINESS DISMISSAL OF THE FEDERAL COMPLAINT (BASED ON THE ARGUMENT PLAINTIFF'S ACTION WAS PREMATURE) BY FAILING TO TIMELY RAISE THE ISSUE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, answering a certified question from the Second Circuit, determined the six-month waiting period associated with the revival of negligence actions pursuant to the Child Victims Act, creating a two-year window for the filing of otherwise time-barred actions, was neither a statute of limitations nor a condition precedent. Therefore, under federal procedural law, the defendant's failure to timely raise the issue in the federal proceedings forfeited his right to dismissal of the complaint on the ground plaintiff's action was premature:

In 2019, the legislature passed the Child Victims Act (CVA), which provided that previously time-barred tort claims based on sex offenses against children could be brought within a specified time (see CPLR 214-g). As amended, the CVA provided that such a claim "is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after" February 14, 2019—i.e., "the effective date of this section" (id.). In other words, actions on these claims could be commenced "not earlier than" August 14, 2019 and "not later than" August 14, 2021. * * *

On April 26, 2019, plaintiff commenced a negligence action in state court against defendant, alleging that a teacher employed in one of defendant's schools engaged in unlawful sexual conduct with her in and around 2009 and 2010, when she was a student under age 17, and that, in 2013, as a result of that conduct, the teacher pleaded guilty to rape in the third degree. * * *

On September 3, 2021, defendant moved for summary judgment dismissing the complaint on statute of limitations grounds. Defendant argued, for the first time, that the complaint must be dismissed because plaintiff commenced her action before CPLR 214-g's period for filing claims began. Significantly, defendant filed its motion less than three weeks after the statutory period for filing claims ended, meaning that plaintiff would be unable to recommence a timely action if defendant's motion succeeded. Jones v Cattaraugus-Little Val. Cent. Sch. Dist., 2025 NY Slip Op 01007, CtApp 2-20-25

Practice Point: Here the Court of Appeals, answering the Second Circuit's question, determined the six-month waiting period for an otherwise time-barred action brought pursuant to the Child Victims Act was not a statute of limitations or a condition precedent. Therefore the Second Circuit was free to deny a federal defendant's motion to dismiss the Child Victims Act complaint on the ground the action was premature.

February 20, 2025

STATUTE OF LIMITATIONS, FIDUCIARY DUTY.

WHERE THE ONLY RELIEF SOUGHT FOR BREACH OF FIDUCIARY DUTY IS MONEY DAMAGES, THE STATUTE OF LIMITATIONS IS THREE YEARS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "breach of fiduciary duty" cause of action was subject to a three-year, not a six-year, statute of limitations and was time-barred:

"'New York law does not provide a single statute of limitations for breach of fiduciary duty claims'" … . Rather, "[t]he statute of limitations for a cause of action sounding in breach of fiduciary duty is dependent on the relief sought" … . Generally, "[a] cause of action [alleging] breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature (see CPLR 213[1]), or by a three-year statute of limitations where the only relief sought is money damages (see CPLR 214[4])" … . "Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" … . "The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the

fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" … . Berejka v Huntington Med. Group, P.C., 2025 NY Slip Op 00942, Second Dept 2-19-25

Practice Point: Where the relief sought for breach of fiduciary duty is equitable, or where fraud is an essential element, the applicable statute of limitations is six years. Where the only relief sought is money damages, the applicable statute of limitations in three years.

February 19, 2025

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

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.

February 5, 2025

REPLY PAPERS, NEW EVIDENCE SHOULD NOT BE CONSIDERED, NEGLIGENCE, REAL PROPERTY LAW.

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

RETROACTIVE APPLICATION OF AMENDMENTS, LANDLORD-TENANT, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE 2024 AMENDMENTS WHICH SET A STANDARD FOR DETERMINING CLAIMS ALLEGING A FRAUDULENT SCHEME TO DEREGULATE A RENT-STABILIZED APARTMENT APPLY TO CLAIMS PENDING AT THE TIME OF ENACTMENT AND ARE CONSTITUTIONAL (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Connolly, determined the 2024 amendments (the "chapter amendments"), which set forth a standard for determining claims alleging a fraudulent scheme to deregulate a rent-stabilized apartment, applied retroactively to claims pending when the amendments were enacted and are constitutional:

First, we must determine whether so much of the chapter amendments as set forth the standard for determining a fraudulent scheme to deregulate a rent-stabilized apartment unit applies to actions such as this one, which were commenced before the effective date of the chapter amendments but were pending before a court on the effective date. We hold that it does.

Next, we must determine whether the defendant established that so much of the chapter amendments as set forth the standard for determining a fraudulent scheme to deregulate an apartment unit is unconstitutional on its face or whether it would be unconstitutional to apply that portion of the chapter amendments to this action. We hold that the defendant did not establish that the relevant portion of the chapter amendments is unconstitutional, either on its face or as applied in this action.

Finally, applying the standard set forth in the chapter amendments, we must determine whether the plaintiffs met their prima facie burden of demonstrating that the defendant engaged in a fraudulent scheme to deregulate the subject apartment units such that the formula set forth in Rent Stabilization Code (9 NYCRR) §§ 2522.6(b)(3) and 2526.1(g) (hereinafter the default formula) should be used to calculate the legal regulated rent and any rent overcharges. We hold that the plaintiffs did not meet their prima facie burden. Gomes v Vermyck, LLC, 2025 NY Slip Op 00849, Second Dept 2-13-25

February 13, 2025