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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts April 1 – 4, 2025, and Posted on the New York Appellate Digest Website on Monday, April 7, 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. Copyright 2025 New York Appellate Digest, Inc.

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ADMINISTRATIVE LAW, MEDICAID, SOCIAL SERVICES LAW, CONSTITUTIONAL LAW.

THE NYS DEPARTMENT OF HEALTH'S CLARIFICATION OF BILLING PRACTICES FOR PHYSICIANS WHO DISPENSE PRESCRIPTION DRUGS UNDER THE MEDICAID PROGRAM IS VALID; THE CLARIFICATION IS NOT A "RULE" AND IS NOT VOID FOR VAGUENESS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined a clarification issued by the respondent NYS Department of Health, was valid, was not a rule, and was not void for vagueness. The clarification concerned the billing practices for physicians who dispense prescription drugs:

As it regularly does, respondent [NYS Department of Health] took steps to clarify appropriate billing practices. This included issuance of the July 2022 edition of its official newsletter of the New York State Medicaid Program — Medicaid Update. In a section entitled "Policy Clarification for Practitioner Dispensing" … , which purported to "supersede[ ] previous communications on this topic," respondent stated that the state Medicaid program reimburses for drugs furnished by practitioners to their patients on the basis of the acquisition cost to the practitioner and that additional registration or ownership of a pharmacy is not required. The

clarification went on to provide that practitioners billing for medications dispensed to its fee-for-service patients should use the medical claim format and that practitioners still participating in managed care should check with the patient's health plan to determine the billing policy for prescription drugs dispensed directly to patients. Reportedly confused by the alleged change in billing practice, petitioner subsequently contacted respondent for further clarification. In response, respondent reiterated that a practitioner that dispenses drugs to their patients is not considered a pharmacy under either statutory or enrollment requirements and therefore should not be enrolled or billing as a pharmacy provider.

Petitioner then commenced this CPLR article 78 proceeding to annul the clarification as an unpromulgated rule, unconstitutionally vague, irrational and violative of section 504 the Rehabilitation Act of 1973 (see 29 USC § 794). Citing anticipated financial losses for expenses attendant to medication dispensing, that is, beyond the acquisition cost of the drugs, petitioner argued that respondent's alleged new rule would force it to cease its physician-dispensing services altogether, thereby both irrationally depriving cancer patients from effective treatment and discriminating against them by effectively precluding them from meaningful access to the provider of their choice. Matter of North Shore Hematology-Oncology Assoc., P.C. v New York State Dept. of Health, 2025 NY Slip Op 01985, Third Dept 4-3-25

April 3, 2025

APPEALS, CIVIL PROCEDURE.

HERE THE PARTY WHO WAS AWARDED COSTS ON APPEAL WAS ENTITLED TO REIMBURSEMENT OF THE COST OF PROCURING THE TRANSCRIPTS FOR THE RECORD ON APPEAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the party who has been awarded costs on appeal is entitled the cost of procuring the transcripts included in the record on appeal:

Pursuant to CPLR 8301(a)(13), a party to whom costs are awarded on appeal is entitled to tax his or her necessary disbursements for "reasonable and necessary

expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." Under the circumstances of this case, the defendant was entitled to disbursements for the expense of procuring trial transcripts for the purpose of preparing a record on appeal pursuant to CPLR 8301(a)(13) … . Thandi v Otsego Mut. Fire Ins. Co., 2025 NY Slip Op 01967, Second Dept 4-2-25

Practice Point: Here is a concrete example of what it means to be awarded "costs" after an appeal.

April 2, 2025

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW, EVIDENCE.

DEFENSE COUNSEL VOUCHED FOR THE CREDIBILITY OF THE VICTIM, DID NOT OBJECT WHEN THE PROSECUTOR VOUCHED FOR THE CREDIBILITY OF THE VICTIM, AND ALLOWED EVIDENCE OF DEFENDANT'S PRIOR CRIMES TO COME IN DESPITE A SANDOVAL RULING KEEPING IT OUT; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction in this sex-offense case and ordering a new trial, determined defense counsel did not provide effective assistance. Defense counsel vouched for the credibility of the victim and allowed evidence of defendant's prior crimes to come in, despite a Sandoval ruling keeping it out:

… [D]uring counsel's opening statement, he commented that, in his training representing victims of sexual assault, "the first thing I had to do was believe the accuser. I didn't have a problem with that. I mean, why would someone make up an important detail or leave out certain details and accuse someone of a crime like rape?" Not only did counsel seemingly vouch for the victim's credibility in this first opportunity to address the jury, but he also did the same in his summation, again reminding the jury that he had represented victims of sexual assault, stating that he "start[s] by believing it. I don't sense any ill will from [the victim]" and that

he knew "a verdict of not guilty in this case is not going to make anyone happy." … . * * *

… [D]efense counsel elicited testimony that defendant had been in and out of jail for 10 years, was a regular drug user, had sold cocaine before and was a parolee who was violating parole conditions by being out past curfew as well as consuming alcohol and cocaine … on the night of the incident. Thereafter, when defendant chose to testify as to his version of events, County Court determined that since defense counsel had questioned the friend regarding defendant having been on parole at the time of the incident and in and out of prison for 10 years, the door had been opened for the People to pursue those lines of questioning with defendant on cross-examination. * * *

Compounding these errors, during the People's summation, the prosecutor repeatedly improperly vouched for the victim's credibility … , without objection from defense counsel, one time going so far as to say that the victim "testified credibly, consistently, believably and authentically." Defense counsel's failure to object to this repeated vouching is even more problematic given his own insinuations that the victim, as a sexual assault victim, should be believed. People v Monk, 2025 NY Slip Op 01976, Third Dept 4-3-25

Practice Point: It is difficult to think of a defense trial strategy that would include vouching for the credibility of the victim in a sex offense case. It is difficult to think of a defense trial strategy that would include allowing evidence of defendant's prior crimes, which was the subject of a Sandoval ruling keeping it out, to come in. A trial, first and foremost, is an adversarial proceeding.

April 3, 2025

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

ALTHOUGH THE ISSUE SHOULD HAVE BEEN RAISED IN A DIRECT APPEAL, AND DESPITE DEFENDANT'S FAILURE TO RAISE THE WINNING ARGUMENT IN THE MOTION TO VACATE THE CONVICTION,

THE THIRD DEPARTMENT GRANTED DEFENDANTS REQUEST TO REMOVE THE SEX OFFENDER CLASSIFICATION FROM HIS SENTENCE; THE OFFENSE OF WHICH DEFENDANT WAS CONVICTED IS NOT A REGISTRABLE OFFENSE (THIRD DEPT).

The Third Department, vacating defendant's judgment of conviction and reinstating it without the sex-offender certification, determined the offense of which defendant was convicted, burglary third degree as a sexually motivated felony, is not a registrable offense under the Correction Law. The court noted that a sex-offender certification is part of the sentence and therefore should have been challenged on direct appeal. Because an appeal is no longer possible, the court accepted the motion to vacate as an appropriate mechanism for correcting the error. Although the court rejected defendant's "ineffective assistance of counsel" argument, it still granted the relief defendant sought on the constitutional ground that defendant has a "liberty interest" in not being misclassified as a sex offender:

Although defendant did not expressly raise such grounds in his motion, we note the People's concession at oral argument that, in advocating that defendant pursue a different procedural course to obtain the requested relief, they do not oppose the ultimate result sought by defendant — the vacatur of the provisions of his judgment certifying him as a sex offender. * * * … [B]earing in mind that no party disputes that defendant should be afforded the discrete relief that he seeks in this proceeding and that defendant's motion broadly seeks relief pursuant to CPL 440.10 (1) (h), we believe it appropriate, in the interest of judicial economy, to address this matter now rather than require defendant to file a new motion asserting a different constitutional basis for the same relief. We therefore exercise our discretion, in the interest of justice, and grant defendant's motion, vacate the judgment, and thereafter reinstate the judgment without the provisions thereof certifying defendant as a sex offender pursuant to SORA and requiring him to pay the $50 sex offender registration fee … . People v Richardson, 2025 NY Slip Op 01980, Third Dept 4-3-25

Practice Point: Here is a rare instance of an appellate court's overlooking defendant's failure to raise the sex-offender-misclassification issue on direct appeal and defendant's failure to raise the winning constitutional argument in the motion

to vacate the conviction. The reason? No one objected to the relief defendant sought, i.e. correction of the misclassification of the defendant as a sex offender. The objections were to the mechanism used to request the relief.

April 3, 2025

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL ALLOWED EVIDENCE PRECLUDED BY A SANDOVAL RULING TO COME IN, AND DID NOT OBJECT TO HEARSAY WHICH REFUTED DEFENDANT'S ALIBI; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined defense counsel was ineffective for allowing the introduction of evidence which violated a Sandoval ruling. The court ruled the People could not introduce evidence of defendant's rape conviction. But the People elicited testimony from defendant's parole officer (Kellett) indicating defendant was a sex offender. In addition, hearsay testimony which refuted an alibi defendant did not attempt to present at trial was allowed in without objection by defense counsel:

Kellett's testimony effectively circumvented the court's earlier Sandoval ruling precluding the introduction of defendant's past rape conviction by allowing her to testify that defendant was a sex offender … . The People had already affirmed on the record that they would not seek to introduce the basis for defendant's parole supervision, and defendant had consented to this so long as the testimony be restricted and a limiting instruction provided. The details offered by Kellett were not necessary to establish defendant's status as a parolee, as she could have merely testified that defendant was under parole supervision without elaborating upon his status as a sex offender. Despite the crimes charged not being of a sexual nature, the testimony in question introduced highly prejudicial information that "ha[d] no purpose other than to show that . . . defendant is of a criminal bent or character and thus likely to have committed the crime[s] charged" … . However, trial counsel made no objection to this testimony or, in the alternative, no request for a curative

instruction. Thus, the prejudice resulting from this testimony was not dissipated "by promptly and clearly advising the jury that the comments were improper and should be completely disregarded" … . * * *

Although we find this error on the part of trial counsel to have, by itself, deprived defendant of a fair trial … , we would be remiss not to briefly address trial counsel's failure to object to law enforcement testimony describing interviews with individuals who refuted defendant's previously claimed alibi. This testimony presented arguably inadmissible evidence of a hearsay nature, which defendant claims presented a Crawford violation … . However, trial counsel lodged no objection, essentially allowing defendant to be impeached regarding an alibi he did not attempt to present at trial. People v Franklin, 2025 NY Slip Op 01975, Third Dept 4-3-25

Practice Point: Here a Sandoval ruling excluded evidence defendant had been convicted of rape but the People, through defendant's parole officer, introduced evidence defendant was a sex offender. Defense counsel did not object. The failure to object was deemed ineffective assistance requiring a new trial.

April 3, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

THE POLICE TESTIMONY AT THE SUPPRESSION HEARING WAS NOT WORTHY OF BELIEF; THEREFORE THE PEOPLE DID NOT DEMONSTRATE THE LEGALITY OF THE POLICE CONDUCT; INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing defendant's conviction by guilty plea and dismissing the indictment, determined the police did not demonstrate the legality of the street stop which culminated in the pursuit of the defendant and the seizure of the firearm in defendant's possession. The testimony of the arresting officer, Tofalli, at the suppression hearing was deemed unworthy of belief. Therefore the People did not meet their initial burden at the hearing, i.e., proving the legality of the police conduct:

"'In order to justify police pursuit, the officers must have reasonable suspicion that a crime has been, is being, or is about to be committed'" … . Reasonable suspicion exists where there is a "quantum of knowledge sufficient to induce an ordinarily prudent and cautious man [or woman] under the circumstances to believe criminal activity is at hand" … . "A suspect's flight alone or in conjunction with equivocal circumstances that might suggest a police request for information is insufficient to justify pursuit," and "[p]ursuit is only authorized when flight is combined with circumstances indicating that the suspect might be engaged in criminal activity" … .

Here, the People failed to establish the legality of the police conduct in the first instance, as Tofalli's testimony was incredible as a matter of law and patently tailored to meet constitutional objections … . Tofalli's testimony that when the defendant pulled up his pants he was able to see an "L-shape" outline in the defendant's waistband while the initial target was standing two feet in front of the defendant directly between Tofalli and the defendant defies common sense and strains credulity. Moreover, Tofalli's testimony was inconsistent with the notes he made in his memo book, arrest reports generated after the incident, and his testimony before the grand jury, none of which made any mention of the initial target … , and was further inconsistent with the recording obtained from Tofalli's body-worn camera, which revealed that prior to his interaction with the initial target, the defendant was not touching his pants, and does not depict the defendant's T-shirt tightening around an "L-shape" object. Accordingly, under the circumstances presented, we find Tofalli's testimony unworthy of belief … . People v Black, 2025 NY Slip Op 01943, Second Dept 4-2-25

Practice Point: The flight of the subject of a street stop, without some other indication of criminal activity, does not justify pursuit.

Practice Point: If the police testimony at the suppression hearing is not worthy of belief, the People have failed to meet their burden to demonstrate the legality of the police conduct. Suppression must be granted.

April 2, 2025

CRIMINAL LAW, EVIDENCE.

UNDER THE NEW DISCOVERY ARTICLE, CRIMINAL PROCEDURE LAW ARTICLE 245, THE DEFENDANT WAS ENTITLED TO "AUTOMATIC" DISCLOSURE OF THE TESTIMONY (IN A PRIOR CASE) OF AN ARRESTING OFFICER WHICH HAD BEEN DEEMED INCREDIBLE; THE FAILURE TO TURN OVER THE EVIDENCE RENDERED THE STATEMENT OF READINESS ILLUSORY; INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, affirming Supreme Court, in a full-fledged opinion by Justice Voutsinas, determined the Certificates of Compliance filed by the People were improper and the statement of readiness was illusory because evidence which could be used to impeach the credibility of one of the arresting officers (Lt. Ruiz) was not turned over. The indictment was dismissed on speedy-trial grounds. The opinion is comprehensive and cannot be fairly summarized here:

This appeal concerns the new disclosure obligations in criminal cases, enacted by the New York State Legislature, effective January 1, 2020, as part of sweeping criminal justice reform legislation under the new CPL article 245 … . The new legislation provides, inter alia, for "[a]utomatic" disclosure by the People to the defendant of "all items and information that relate to the subject matter of the case" that are in the People's possession or control (CPL 245.20[1]). Specifically, this appeal concerns CPL 245.20(1)(k)(iv), which requires that the People disclose "[a]ll evidence and information" that "tends to . . . impeach the credibility of a testifying prosecution witness." We hold that, under the circumstances of this case, the People were required to disclose, pursuant to CPL 245.20(1)(k)(iv), underlying records from a prior case where one of the prosecution witnesses was found to be incredible, and that the Supreme Court properly determined, based upon the record before it, that the People's certificates of compliance were improper, properly struck a statement of readiness as illusory, and properly granted the defendants' motions, inter alia, pursuant to CPL 30.30 to dismiss the indictment on the ground that they were deprived of their statutory right to a speedy trial. * * *

This Court holds that the underlying records in the case in which Lt. Ruiz's testimony was found to be incredible did relate to the subject matter of this case for

impeachment purposes … . Here, the underlying records pertaining to Lt. Ruiz's incredible testimony, including the transcript of his testimony, did relate to the subject matter of the case because the material went toward the weight of the credibility of the witness and could be used for impeachment purposes. Therefore, the People were required to provide the records. People v Coley, 2025 NY Slip Op 01945, Second Dept 4-2-25

Practice Point: Consult this decision for a comprehensive discussion of the People's obligation to provide "automatic" disclosure of evidence which can be used to impeach the credibility of an arresting officer.

April 2, 2025

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

PLAINTIFF'S WORKPLACE GENDER-DISCRIMINATION CASE SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court, in a necessarily fact-specific decision, determined plaintiff's employment-discrimination suit should not have been dismissed:

To establish a claim for gender discrimination under the Human Rights Law, a plaintiff must "show (1) that he or she was a member of a protected class, (2) that he or she suffered an adverse employment action, (3) that he or she was qualified to hold the position for which he or she suffered the adverse employment action, and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination" … . "Verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue" … . "Employers are . . . required to provide reasonable avenues for discrimination and harassment complaints, to respond appropriately to such complaints, and to take reasonable steps to eliminate the harmful conduct; where they fail to do so, they are subject to liability under [the Human Rights Law]" … . * * *

The gravamen of plaintiff's allegations is that Gulnick's [plaintiff's immediate boss's] sexist views toward women fostered a workplace where women's

legitimate grievances were met with dismissal and ridicule, and conflicts that would otherwise have been dealt with were instead allowed to fester. When plaintiff sought to have her valid claims of harassment addressed in-house and ultimately in an outside mediation, Gulnick's rebuke of her efforts envenomed with discriminatory commentary turned to anger, ultimately leading to plaintiff's demotion and decrease in wages. Mikesh v County of Ulster, 2025 NY Slip Op 01987, Third Dept 4-3-25

Practice Point: Consult this decision for a detailed fact-specific analysis of the criteria for a prima facie demonstration of gender discrimination in the workplace.

April 3, 2025

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

ISSUING A RULING BEFORE FATHER COMPLETED HIS TESTIMONY IN THIS CUSTODY PROCEEDING DEPRIVED THE PARTIES OF DUE PROCESS OF LAW (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge's issuing a ruling awarding custody to father before father's direct testimony had been completed violated due process:

The parties, as well as the attorney for the child, share the view that Family Court improperly ended the hearing before its completion, and we agree. At a hearing on an initial custody determination, due process requires that each party be provided a full and fair opportunity to be heard … . The parties must be permitted to present evidence on their own behalf and " 'cross-examine . . . key witness[es]' " … . Aside from due process considerations, a court's "abrupt termination of the proceedings [may] preclude[ ] a meaningful best interests analysis, leaving the court . . . with insufficient information upon which to reach a reasoned conclusion" … .

Recognizing that this custody proceeding largely turned upon the credibility of the mother and the father, each of whom alleged that the other was an unfit parent,

Family Court deprived both parties of a full and fair opportunity to be heard by inexplicably cutting off the father's direct testimony and failing to allow any cross-examination of him. Further, given that the court granted the father sole legal and primary physical custody of the child in the face of the mother's allegations that the father had committed numerous acts of domestic violence, including in front of the child, the court's failure to allow cross-examination of the father deprived it of sufficient information to perform a meaningful best interests analysis … . Accordingly, we reverse and remit for a new fact-finding hearing … . Matter of Casey Q. v Jeffrey O., 2025 NY Slip Op 01981, Third Dept 4-3-25

Practice Point: Here in this child custody dispute, the judge issued a ruling awarding custody to father before father had completed his direct testimony. The premature ruling deprived the parties of due process of law.

April 3, 2025

FAMILY LAW, JUDGES, CIVIL PROCEDURE.

THE PETITIONER WAS ENTITLED TO A HEARING ON WHETHER HIS ACKNOWLEDGMENT OF PATERNITY WAS BASED ON A MISREPRESENTATION BY MOTHER AND WHETHER PETITIONER IS ESTOPPED FROM DENYING PATERNITY BASED ON THE BEST INTERESTS OF THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined the petitioner was entitled to a hearing on the issues of whether petitioner's (appellant's) acknowledgment of paternity was procured by a misrepresentation by mother and, if so, whether the petitioner should be estopped from challenging the acknowledgment based on the best interests of the child. As is often the case in Family Court reversals, the failure to hold a hearing is the problem:

"Where . . . a party seeks to challenge an acknowledgment of paternity more than 60 days after its execution, Family Court Act § 516-a(b) requires the court to conduct a hearing to determine the issues of fraud, duress, or a material mistake of fact [in the execution of the acknowledgment of paternity] before ordering a

[genetic marker test]" … . "In the event the court determines that a valid ground for vacatur of the acknowledgment exists, the issue of whether the petitioner should be estopped, in accordance with the child's best interest, from vacating the acknowledgment of paternity, must [then also] be evaluated at a hearing" … . * * *

Here, the issue of the appellant's paternity was not actually litigated in connection with the prior proceedings … . The Family Court's findings … that the appellant, … would have been equitably estopped from seeking vacatur of the acknowledgment of paternity, were made without a hearing, during an appearance on the appellant's petitions to modify custody and visitation, when, in response to the appellant raising the issue of his attempts to vacate the acknowledgment of paternity, the attorney for the child indicated that the child viewed the appellant as her father. Thus, contrary to the court's determination, the doctrine of collateral estoppel is inapplicable … . Matter of Stephen B.J.B. v Marcia N.S.C., 2025 NY Slip Op 01921, Second Dept 4-2-25

Practice Point: The most frequent basis for Family Court reversals is the judge's failure to hold a hearing before making a ruling.

April 2, 2025

FREEDOM OF INFORMATION LAW (FOIL), SOCIAL SERVICES LAW.

THE SOCIAL SERVICES LAW PROHIBITS THE RELEASE OF THE NAMES AND ADDRESSES OF PERSONS RECEIVING PUBLIC ASSISTANCE; THEREFORE THE FOIL REQUEST FOR THE ADDRESSES OF HOMELESS SHELTERS SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the FOIL request for the addresses of homeless shelters should not have been granted. Social Services Law section 136(1) provides that "[t]he names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper" … :

A shelter constitutes the "address" of its occupants. "Address" means "[t]he place where mail or other communication is sent" … or "a place where a person . . . may

be communicated with" … . Shelter residents "have the right to receive and send mail" at their shelters, as well as "the right to receive visitors" there (18 NYCRR 491.12[c][6], [17]). There is nothing in the definition of "address" that would exclude temporary housing. Matter of NYP Holdings, Inc. v New York City Dept. of Social Servs., 2025 NY Slip Op 02013, First Dept 4-3-25

Practice Point: The Social Services Law prohibits the release of the names and addresses of persons receiving public assistance. Therefore the FOIL request for the addresses of homeless shelters should have been denied.

April 3, 2025

FREEDOM OF INFORMATION LAW (FOIL).

THE TOWN DID NOT ADEQUATELY EXPLAIN ITS FAILURE TO TURN OVER CERTAIN DOCUMENTS WHICH WERE CREDIBLY ALLEGED TO EXIST IN THE FOIL REQUEST; THE FOIL PETITION WAS REINSTATED AND THE MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court and remitting the matter, determined the Town did not adequately explain its refusal to turn over documents relating to an Amazon warehouse and distribution center that was to be built in the Town. Therefore the petition, which was dismissed by Supreme Court, was reinstated:

Here, Meyer [the appellant] credibly alleged the existence of records, such as email correspondence between Amazon and the Town and traffic studies which may have been undertaken in connection with the approval of the new warehouse and distribution center, which were not produced. When faced with a request for such records, the Town was required to "either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" … . Merely representing that "[u]pon information and belief" all documents had been provided, as was averred by the Town's FOIL appeals officer in connection with the Town's motion, is insufficient to comply with the

requirements of FOIL … . Matter of Meyer v Town of Hempstead, 2025 NY Slip Op 01930, Second Dept 4-2-25

Practice Point: Here the FOIL request credibly alleged that certain documents existed. The Town's response that "upon information and belief" all documents had been provided was not sufficient. The statute requires the Town to claim a specific exemption or certify it does not possess or could not locate the requested documents. The dismissed petition was reinstated.

April 2, 2025

NEGLIGENCE, CONTRACT LAW.

ALTHOUGH THE HIRING PARTY IS GENERALLY NOT RESPONSIBLE FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR, THERE IS A NONDELEGABLE-DUTY EXCEPTION TO THAT RULE; THE OWNER OF A BAR OPEN TO THE PUBLIC HAS A NONDELEGABLE DUTY TO MAINTAIN SAFE INGRESS AND EGRESS; HERE THE INDEPENDENT CONTRACTOR WAS REPAIRING THE BUILDING FACADE WHEN A CONCRETE BUCKET FELL ON THE PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant property owner, 6810 Wai, was liable for an action by an independent contractor hired to repair the facade of defendant's building. Defendant operated a bar on the ground floor of the building. The independent contractor apparently caused a concrete bucket to fall and strike the plaintiff, who was entering the bar:

[T]he well-settled general rule provides that a party who retains an independent contractor is not liable for the negligence of the independent contractor because it has no right to supervise or control the work" … . "An exception to this general rule is the nondelegable duty exception, which is applicable where the party is under a duty to keep premises safe" … . "Where, for example, premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress" … .

Here, 6810 Wai failed to establish its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it, as its submissions demonstrated that it had a nondelegable duty to the plaintiff. The ground floor hookah bar was open to the public during the construction work, which created a nondelegable duty to the general public to maintain a safe ingress and egress, and, thus, 6810 Wai could be held liable for any negligence of its independent contractor … . Sultan v 6810 Wai, Inc., 2025 NY Slip Op 01966, Second Dept 4-2-25

Practice Point: The owner of property which is open to the public has a nondelegable duty to maintain safe ingress and egress. Here the building owner operated a bar on the first floor of a building. The owner had hired an independent contractor to repair the facade of the building. The contractor apparently caused a concrete bucket to fall and strike the plaintiff. The building owner could be held liable for the negligence of the independent contractor.

April 2, 2025

NEGLIGENCE, EDUCATION-SCHOOL LAW, COURT OF CLAIMS.

THERE IS A QUESTION OF FACT WHETHER DECEDENT'S STATE UNIVERSITY OWED DECEDENT A DUTY TO WARN HIM OF THE HOSTILITY HARBORED BY ANOTHER STUDENT WHO ULTIMATELY MURDERED DECEDENT (THIRD DEPT).

The Third Department, reversing the Court of Claims, in a full-fledged opinion by Justice Lynch, determined there exists a question of fact whether decedent's university (Binghamton) owed decedent a duty to warn decedent of the hostility toward decedent harbored by another student (Roque), a former friend of the decedent, who murdered decedent:

To hold defendant liable for negligence, claimant must establish that the University owed decedent a duty, breached that duty, and that the breach was a proximate cause of decedent's death … . The threshold issue in any negligence action is whether the defendant owed the plaintiff a legally recognized duty of care … . The

existence and scope of a duty are legal questions for the courts to resolve in the first instance … .

… Claimant … is not seeking to hold the University liable for failing to protect decedent simply by virtue of his status as a student on campus … . The crux of claimant's argument, as we understand it, is that counselors employed by the University's Counseling Center were negligent in failing to make a threat assessment referral to the Dean of Students' office upon learning of Roque's hostility toward decedent in the months before the attack and in failing to warn decedent of Roque's threats against him. Since the specific acts of negligence occurred during the University's provision of mental health services — a proprietary function … — we conclude that no special duty need be established to hold the University liable and it is "held to the same duty of care as private individuals and institutions engaging in the same activity" … . * * *

Given that the University had threat assessment and referral procedures in place governing actions to take when faced with a distressed student, we conclude that the University owed decedent a duty to reasonably comply with those policies, if applicable … . Cuomo v State of New York, 2025 NY Slip Op 01991, Third Dept 4-3-25

Practice Point: Here the Third Department held a state university may have a "general" (not a "special") duty to warn a student of hostility harbored by another student.

April 3, 2025

NEGLIGENCE, MUNICIPAL LAW.

THE QUESTION WHETHER THE MUNICIPALITY TIMELY RECEIVED ACTUAL NOTICE OF THE CLAIM IS MORE IMPORTANT THAN THE QUESTION WHETHER THERE IS A REASONABLE EXCUSE FOR MISSING THE 90-DAY DEADLINE; HERE THE PETITIONER DID NOT HAVE A REASONABLE EXCUSE BUT THE MUNICIPALITY DID RECEIVE TIMELY ACTUAL NOTICE; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, noting that the absence of a reasonable excuse is not dispositive, determined petitioner should have been granted leave to file a late notice of claim against the New York City Housing Authority (NYCHA). Petitioner, a plumber, allegedly tripped over a piece of rebar protruding from the ground at a construction site:

Here, while the petitioner concedes that his claim of clerical error does not qualify as a reasonable excuse for his delay in serving a notice of claim, "the absence of a reasonable excuse is not, standing alone, fatal to the petitioner's application" … .

While the lack of a reasonable excuse is not dispositive on an application for leave to serve a late notice of claim, "whether the municipality acquired timely actual knowledge of the essential facts constituting the claim is of great importance" … . Here, while there is no proof that the petitioner served the notice of claim upon NYCHA on January 27, 2020, NYCHA admits to receiving the first petition on or about January 31, 2020, less than three weeks after the expiration of the 90-day notice period. NYCHA additionally admits that it was able to schedule and conduct a General Municipal Law § 50-h hearing with the petitioner on April 20, 2020. Matter of Herry v New York City Hous. Auth., 2025 NY Slip Op 01928, Second Dept 4-2-25

Practice Point: In determining a request for leave to file a late notice of claim, whether the petitioner has a reasonable excuse for failing to file the notice of claim within 90 days is less important than whether the municipality timely received actual notice of the claim. Here the excuse was not valid but the municipality

received timely notice. The request for leave to file a late notice should have been granted.

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