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HERE PLAINTIFF HAD THE RIGHT-OF-WAY ENTERING AN INTERSECTION AND DEFENDANT FAILED TO YIELD; PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON LIABILITY AND DISMISSAL OF DEFENDANTS' COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs in this intersection-accident case was entitled to summary judgment on liability and dismissal of defendants' comparative negligence affirmative defense:

"'A driver who enters an intersection against a red traffic light in violation of Vehicle and Traffic Law § 1110(a) is negligent as a matter of law'" … . "A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield" … . Moreover, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield cannot be comparatively negligent for failing to avoid the collision" … .

"[T]he issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence" … . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defense alleging comparative negligence by demonstrating that the plaintiff driver entered the intersection with a green traffic light and had the right-of-way and that Mendez's conduct was the sole proximate cause of the accident … . In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff driver was comparatively negligent in causing the accident … . Ederi v Mendez, 2025 NY Slip Op 03041, Second Dept 5-21-25

Practice Point: A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent and is entitled to summary judgment dismissing the comparative negligence affirmative defense.

May 21, 2025

COMPLAINT DEFECTS ADDRESSED BY AFFIDAVIT, FRAUD, TRUSTS AND ESTATES, JUDGES.

PLAINTIFF SUBMITTED AN AFFIDAVIT TO REMEDY DEFECTS IN THE COMPLAINT IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS; SUPREME COURT SHOULD HAVE CONSIDERED THE AFFIDAVIT; THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint alleging that defendants improperly influenced the decedent to name them as beneficiaries of two bank accounts should not have been dismissed. The allegations in the complaint were supplemented by plaintiff's affidavit. The Second Department noted that the affidavit should have been considered in assessing the sufficiency of the complaint:

The defendants moved pursuant to CPLR 3211(a) to dismiss the complaint on the ground, among others, that it failed to state a cause of action. In opposition to the motion, the plaintiff submitted an affidavit in which she made statements to supplement the causes of action alleged in the complaint. … Supreme Court granted the defendants' motion. …

"On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), a court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" … . "'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss'" … . Where a

cause of action is based upon, inter alia, fraud, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail (see CPLR 3016[b]).

Here, the Supreme Court should have considered the plaintiff's affidavit to remedy any defects in the complaint when it assessed the defendants' motion … . Rauch v Rauch, 2025 NY Slip Op 02802, Second Dept 5-7-25

Practice Point: Here the court held that an affidavit submitted by the plaintiff to remedy defects in the complaint in response to a motion to dismiss should have been considered by the motion court. The complaint as supplemented by the affidavit was deemed to state a cause of action for undue influence.

May 7, 2025

DEBTOR-CREDITOR, TURNOVER OF PROPERTY, FRAUD, PERSONAL PROPERTY, REAL ESTATE, EVIDENCE.

PETITIONER JUDGMENT-CREDITOR WAS ENTITLED TO THE TURNOVER OF CERTAIN REAL PROPERTY WHICH HAD BEEN FRAUDULENTLY TRANSFERRED TO A TRUST BY THE RESPONDENT JUDGMENT-DEBTORS, AS WELL AS THE CONTENTS OF RESPONDENTS' SAFETY DEPOSIT BOX (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner was entitled to real property which was fraudulently transferred by respondents to a trust, as well as to the contents of respondents' safety deposit box, to satisfy a judgment against respondents in the approximate amount of $338,000:

… [P]etitioner commenced this proceeding pursuant to CPLR article 52, seeking … the turnover of a safety deposit box maintained by the respondents Zakhar Brener and Ninel Krepkina and of certain residential real property owned by the respondent B and K Trust. * * *

… [P]etitioner established her prima facie entitlement to judgment as a matter of law on the cause of action seeking relief pursuant to Debtor and Creditor Law

former § 273 by submitting evidence that Brener was insolvent at the time of the conveyance of the property, which was made without fair consideration … . * * *

… [P]etitioner established her prima facie entitlement to judgment as a matter of law on the cause of action seeking relief pursuant to Debtor and Creditor Law former § 276. "Pursuant to Debtor and Creditor Law former § 276, every conveyance made with actual intent to hinder, delay, or defraud either present or future creditors is fraudulent. The requisite intent required by this section need not be proven by direct evidence, but may be inferred from the circumstances surrounding the allegedly fraudulent transfer" … . "In determining whether a conveyance was fraudulent, the courts consider the existence of certain common 'badges of fraud,' which include 'a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance'" … . "A prime example of this type of fraud is where a debtor transfers his property to another while retaining the use thereof so as to continue . . . free from the claims of creditors" … . Here, the petitioner submitted, among other things, the Brener respondents' answer, wherein they admitted that Brener continued to occupy and use the property with Krepkina. …

… [P]etitioner established her prima facie entitlement to judgment as a matter of law on the cause of action to direct Chase Bank to turn over of the contents of the safe deposit box maintained by Brener and Krepkina by submitting a letter establishing that Brener and Krepkina jointly held a safe deposit box at one of Chase Bank's branches in Brooklyn … . Matter of Schiffman v Affordable Shoes, Ltd., 2025 NY Slip Op 02786, Second Dept 5-7-25

Practice Point: Consult this decision for a concise description of a CPLR Article 52 turnover proceeding by a judgment creditor against judgment debtors based in part upon respondents' fraudulent transfer of real property to avoid creditors (Debtor and Creditor Law sections 273 and 276).

May 7, 2025

DUPLICATIVE CAUSES OF ACTION, CHILD VICTIMS ACT, NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, EVIDENCE.

IN THIS CHILD VICTIMS ACT CASE ALLEGING SEXUAL ABUSE BY A SCHOOL JANITOR, THE NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSES OF ACTION AND THE DEMAND FOR PUNITIVE DAMAGES SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the causes of action against defendant school for negligent and intentional infliction of emotional distress, and the demand for punitive damages, should have been dismissed. This Child Victims Act case alleged plaintiff-student was sexually abused by a janitor:

… Supreme Court should have directed dismissal of the cause of action alleging negligent infliction of emotional distress insofar as asserted against each of the school defendants, as it is duplicative of the remaining negligence causes of action … . A cause of action is properly dismissed as duplicative when it is "based on the same facts and seek[s] essentially identical damages" … .

Furthermore, the amended complaint failed to state a cause of action to recover damages for intentional infliction of emotional distress. "The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" … . "The subject conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" … . Furthermore, conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress … . Here, even accepting the conclusory allegations in the amended complaint as true and according the plaintiff the benefit of every possible favorable inference, the plaintiff failed to allege conduct by the school

defendants that was "so outrageous in character, and so extreme in degree," as to qualify as intentional infliction of emotional distress … . Accordingly, the Supreme Court should have directed dismissal of the cause of action to recover damages for intentional infliction of emotional distress insofar as asserted against each of the school defendants pursuant to CPLR 3211(a)(7).

… Supreme Court should have directed dismissal of the demand for punitive damages insofar as asserted against each of the school defendants. "[P]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives" … . Here, the plaintiff's allegations against the school defendants amount to "nothing more than allegations of mere negligence and do not rise to the level of moral culpability necessary to support a claim for punitive damages" … . Redd v Brooklyn Friends Sch., 2025 NY Slip Op 03214, Second Dept 5-28-25

Practice Point: Consult this decision for the criteria for sufficiently alleging negligent and intentional infliction of emotional distress causes of action, as well as the criteria for a demand for punitive damages against a school in a Child Victims Act case.

May 28, 2025

FAMILY LAW, FAILURE TO HOLD HEARING, JUDGES.

ALTHOUGH FATHER IS INCARCERATED FOR ASSAULTING MOTHER WHEN SHE WAS SEVEN MONTHS PREGNANT, FATHER IS ENTITLED TO A HEARING ON WHETHER VISITATION WITH THE CHILD, WHICH NEED NOT INCLUDE CONTACT VISITATION, IS IN THE BEST INTERESTS OF THE CHILD; IT IS THE MOTHER'S BURDEN TO DEMONSTRATE VISITATION WOULD BE HARMFUL (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined the incarcerated father was entitled to a hearing on whether visitation would be in the best interests of the child. Father was convicted of assaulting mother when mother was seven months pregnant. Family Court had granted mother's summary judgment motion precluding father's contact until the child turns 18. The Third Department found that summary judgment in the absence of a hearing was inappropriate:

… [W]e agree with the father's contention that a hearing was required regarding the issue of visitation. Plainly stated, we do not find that, given the specific circumstances of this case, denying the father any contact with the child until the child's 18th birthday was appropriate on a summary judgment motion … . This is especially so given that "visitation . . . need not always include contact visitation at the prison" … . As such, the father is entitled to a hearing to determine what, if any, visitation is in the best interests of the child. By way of reminder, at this hearing, it is not the father's burden to demonstrate that visitation is in the child's best interests, but rather it is the mother, as the party opposing visitation, who has the burden of demonstrating, by a preponderance of the evidence, "that visitation with [the father] would, under all of the circumstances, be harmful to the child['s] welfare or contrary to [her] best interests" … . This includes a consideration of whether updates, photographs and/or letters may be appropriate and in the best interests of the child … . Matter of Jaime T. v Ryan U., 2025 NY Slip Op 02638, Third Dept 5-1-25

Practice Point: Once again it is Family Court's failure to hold a hearing which results in reversal. Here the incarcerated father is entitled to a hearing on whether

visitation, which need not include contact visitation, would be in the best interests of the child. At the hearing, it is mother's burden to demonstration visitation would be harmful to the child.

May 1, 2025

FORECLOSURE, DEFENDANT'S FAILURE TO SEEK STAY PENDING APPEAL, APPEALS, CONTRACT LAW, REAL ESTATE, REAL PROPERTY LAW.

THE JUDGMENT OF FORECLOSURE AND SALE WAS REVERSED ON APPEAL; THE DEFENDANT IN THE FORECLOSURE ACTION DID NOT SEEK A STAY PENDING APPEAL; THE FACT THAT THE NOTICE OF PENDENCY, FILED BY THE BANK AT THE OUTSET OF THE FORECLOSURE PROCEEDINGS, WAS STILL IN EFFECT AT THE TIME OF THE FORECLOSURE SALE DID NOT AFFECT THE TRANSFER OF TITLE TO A GOOD FAITH PURCHASER AT THE FORECLOSURE SALE (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Brathwaite Nelson, determined the defendant in the foreclosure action, Yesmin, upon reversal of the judgment of foreclosure and sale on appeal, was not entitled to cancel and discharge the referee's deed transferring title to a good faith purchaser of the foreclosed property. It is significant here that the defendant in the foreclosure action did not seek a stay pending appeal. The notice of pendency, filed by the bank in the foreclosure action, which was still in effect at the time of the foreclosure sale, did not affect the title acquired by the good faith purchaser:

This appeal raises the question of what effect an extant notice of pendency has on the title to real property acquired by a third party from a judicial foreclosure sale when the judgment of foreclosure and sale is reversed on the appeal of a defendant to the foreclosure action. For the reasons that follow, we hold that a notice of pendency that was unexpired at the time of the foreclosure sale has no effect on the

title acquired by a good faith purchaser for value from a sale conducted pursuant to the judgment of foreclosure and sale. * * *

Once a judgment is entered, the need to obtain a stay pending appeal in order to protect the right to restitution of the property is shared equally by a defendant or a plaintiff against whom the judgment is entered. Where a judgment has been entered against a plaintiff, "the plaintiff's right to impair the marketability of the property during the pendency of an appeal [is conditioned] upon the issuance of a discretionary CPLR 5519(c) stay" … . Thus, regardless of whether the judgment is issued in favor of a defendant or the plaintiff, once a judgment is entered, a stay is necessary to protect the property, and in the absence of a stay, the winning party is free to transfer the property as it sees fit. * * *

Since [the good faith purchaser of the foreclosed property] established that it is "a purchaser in good faith and for value" whose title would be affected by restitution of Yesmin's property rights lost by the judgment of foreclosure and sale, Yesmin may not seek restitution by canceling the referee's deed and, instead, is limited to monetary relief against the plaintiff to the foreclosure action (CPLR 5523 …). Yesmin v Aliobaba, LLC, 2025 NY Slip Op 02964, Second Dept 5-14-25

Practice Point: If the defendant in a foreclosure action which is appealed does not seek a stay pending appeal, the reversal on appeal does not affect title transferred to a good faith purchaser at the foreclosure sale.

May 14, 2025

FORECLOSURE, FORECLOSURE ABUSE PREVENTION ACT (FAPA), EVIDENCE.

THE BANK'S UNILATERAL ATTEMPT TO REVOKE THE ACCELERATION OF THE DEBT IS PRECLUDED BY THE FORECLOSURE ABUSE PROTECTION ACT (FAPA) WHICH APPLIES RETROACTIVELY TO THIS CASE; THE FORECLOSURE ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a letter from the bank in this foreclosure action purporting to revoke a prior acceleration of the debt

did not stop the running of the six-year statute of limitations. The action was therefore time-barred. The Second Department noted that the Foreclosure Abuse Prevention Act (FAPA), effective December 30, 2022, applies retroactively to this case. The FAPA essentially provides that once the debt is accelerated the six-year statute of limitations keeps running despite any attempt to "unilaterally waive, postpone, cancel, toll, revive or reset the accrual" of the foreclosure action:

Applying FAPA here, the revocation letter did not de-accelerate the mortgage debt nor did it "revive or reset" the statute of limitations … . Since the plaintiff commenced this action more than six years after the initial acceleration of the mortgage debt, the defendants demonstrated their prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against them as time-barred (see CPLR 213[4] …). US Bank Trust, N.A. v Horowitz, 2025 NY Slip Op 03095, Second Dept 5-21-25

Practice Point: Here the bank attempted to revoke a prior acceleration of the debt by sending defendants a "revocation letter." The Foreclosure Abuse Prevention Act (FAPA), which applies retroactively to this case, rendered the attempted revocation a nullity. Therefore the letter did not stop the running of the six-year statute of limitations and the foreclosure action was time-barred.

May 21, 2025

FORECLOSURE, STANDING, EVIDENCE.

THE AFFIDAVIT SUBMITTED TO DEMONSTRATE PLAINTIFF HAD POSSESSION OF THE NOTE PRIOR TO COMMENCING THE FORECLOSURE ACTION WAS HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate standing in this foreclosure action. The affidavit submitted to demonstrate plaintiff had possession of the note prior to commencing the action was hearsay:

… [T]he plaintiff relied on Harris's affidavit to demonstrate that it had possession of the note prior to commencing this action. Harris averred, in relevant part, that

the plaintiff received physical delivery of the original note on September 5, 2013. As the defendant correctly notes, Harris failed to attach any business record to her affidavit to demonstrate that fact or to aver that she had personal knowledge of the physical delivery of the note. Accordingly, Harris's averment that the plaintiff had possession of the note prior to the commencement of this action was inadmissible hearsay and insufficient to establish, prima facie, the plaintiff's standing … . Nationstar Mortage, LLC v Guarino, 2025 NY Slip Op 02925, Second Dept 5-14-25

Practice Point: Whoever submits an affidavit stating the plaintiff in a foreclosure action had possession of the note before the action was commenced must attach a probative business record or demonstrate personal knowledge of the delivery of the note, not the case here.

May 14, 2025

JUDICIAL ESTOPPEL, BANKRUPTCY, ATTORNEYS.

THE CRITERIA FOR JUDICIAL ESTOPPEL WERE NOT MET HERE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, over a dissent, determined plaintiff was not precluded by judicial estoppel from seeking attorney's fees deemed uncollectible in a bankruptcy proceeding:

Supreme Court incorrectly dismissed the complaint on the ground that judicial estoppel bars plaintiff from seeking attorneys' fees that were deemed uncollectible in a bankruptcy proceeding. Judicial estoppel applies where it is shown that a debtor omitted or concealed the existence of an asset and later brought suit to collect on that asset … . Here, the court made no such findings, and in fact assumed that plaintiff had not misled the bankruptcy trustee. Nor does the record establish that plaintiff obtained a benefit in the bankruptcy proceeding by taking one position in that proceeding and then assuming a contrary position in this action "simply because [his] interest changed" … . We respectfully disagree with our dissenting colleague that the record establishes that plaintiff unequivocally adopted

a conflicting legal position to obtain a bankruptcy discharge. Bohn v Tekulsky, 2025 NY Slip Op 02848, First Dept 5-8-25

Practice Point: In the context of a bankruptcy proceeding, the doctrine of judicial estoppel precludes a debtor from concealing the existence of an asset and subsequently bringing suit to collect on that asset. Although there was a dissent, the majority concluded plaintiff had not misled the bankruptcy court and therefore judicial estoppel did not apply.

May 8, 2025

MANDAMUS-TO-COMPEL, FAMILY LAW, JUDGES, APPEALS.

MOTHER BROUGHT A MANDAMUS-TO-COMPEL PROCEEDING TO REQUIRE THE SUPPORT MAGISTRATE TO HOLD A SUPPORT-ORDER-VIOLATION HEARING WITHIN THE TIME-LIMIT SET IN THE UNIFORM RULES FOR FAMILY COURT; THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE BECAUSE THE ISSUE IS LIKELY TO RECUR; THE SECOND DEPARTMENT HELD THE SUPPORT MAGISTRATE HAD THE DISCRETION TO ADJOURN THE MATTER BEYOND THE DEADLINE SET IN THE UNIFORM RULES, DESPITE THE MANDATORY LANGUAGE IN THE RULE (SECOND DEPT).

The Second Department, modifying Supreme Court, determined an exception to the mootness doctrine applied (to allow the appeal to be heard) and the mandamus-to-compel proceeding should have been denied on the merits. Petitioner mother sought to compel the support magistrate to hold a hearing on father's alleged support-order violation within the time allowed by the Uniform Rules for Family Court. The Appellate Division held that, although the relevant rule setting a deadline for a hearing used mandatory language, a judge has the discretion the adjourn matters beyond a deadline set in the Uniform Rules:

… [W]e conclude that the exception to the mootness doctrine applies. The petitioner has demonstrated that the issue is "capable of repetition" in other cases

… . It also involves a phenomenon that will typically evade appellate review, since a Family Court can render any challenge to an alleged failure to adhere to the provisions of the rule academic by advancing a hearing date or completing a hearing in its entirety … , as occurred in this case … . Further, the argument raised by the petitioner presents "a substantial and novel issue of statewide importance regarding the rights of [custodial] parents" to resolve child support disputes in a timely manner … . * * *

… [W]e conclude that a writ of mandamus is not available to compel judicial officers to comply with the deadlines set forth in 22 NYCRR 205.43(b) and (e). As our colleagues in the First Department recognized, "[t]he timely completion of [child support] hearings depends on discretionary determinations made by individual Family Court judges and support magistrates as to whether good cause exists for adjournments" … . Indeed, the decision of a Family Court judge or support magistrate to grant an adjournment in a support proceeding is discretionary in nature (see Family Ct Act § 435 …). This Court, for example, has reversed orders in circumstances where a court's denial of an adjournment request constituted an abuse or improvident exercise of discretion … . Further, the rule expressly states that judges and support magistrates may grant adjournments for various reasons, including to permit a party to secure counsel, in circumstances where a party's counsel establishes actual engagement, due to the illness of a party, or for other good cause shown … . Therefore, "[a]lthough the 90-day limit" of 22 NYCRR 205.43(b) "is written in mandatory terms," as is the 7-day limit of 22 NYCRR 205.43(e), these provisions do "not impose . . . nondiscretionary ministerial dut[ies]" upon judges or support magistrates that may be subject to mandamus … . In reaching this determination, we express no opinion as to whether a judicial officer's alleged failure to adhere to the relevant provisions of 22 NYCRR 205.43 may be successfully challenged under provisions of CPLR article 78 that are not at issue here … . Matter of Santman v Satterthwaite, 2025 NY Slip Op 03196, Second Dept 5-28-25

Practice Point: Consult this decision for an explanation for when a moot issue can be heard on appeal.

Practice Point: Although the Uniform Rules for Family Court use mandatory language in setting a deadline for holding a hearing on an alleged violation of a

support order, the support magistrate had the discretion to adjourn the hearing beyond the deadline set in the Rules.

May 28, 2025

PSEUDONYM USED IN CAPTION, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

PLAINTIFF'S REQUEST TO PROCEED UNDER THE PSEUDONYM "JANE DOE" SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's request to proceed using the pseudonym "Jane Doe" should have been granted. Plaintiff is apparently suing her former employer, a charter school, contesting her termination, which apparently was based upon a video depicting plaintiff masturbating:

As to the merits, Supreme Court improvidently exercised its discretion in denying plaintiff's request to proceed in this litigation under the pseudonym "Jane Doe" … . This action concerns information of a highly sensitive, intimate, and personal nature — namely, a video depicting plaintiff masturbating. Plaintiff's affidavit establishes the serious psychological harm that disclosure of her role in this video caused her and would continue to cause her, as well as the potential impact on her career in education … . That plaintiff was able to obtain a new job in education after her termination by defendants is of no moment, as she may still need to apply for other jobs in future and it is not clear whether her current employer is aware of the circumstances of her termination.

Defendants do not identify any source of prejudice to them from allowing plaintiff to proceed by pseudonym, as they know who she is and therefore are not impeded in mounting a defense … . The public interest in disclosure of plaintiff's identity is also minimal. Even if the charter school defendants were deemed public entities for these purposes (see Education Law § 2854[3][a], [c] …), that fact would not be dispositive, especially because plaintiff is not requesting that court records be sealed or public access denied … . Furthermore, the termination decision at issue here is not claimed to be the result of any government policy.

Plaintiff's privacy interest outweighs the reputational interest of the individual defendants' anonymity … . Jane Doe v KIPP N.Y., Inc., 2025 NY Slip Op 02718, First Dept 5-6-25

Practice Point: Consult this decision for a brief discussion of the factors which control whether a plaintiff can sue under a pseudonym, "Jane Doe" in this case.

May 6, 2025

PUNITIVE DAMAGES

A SEPARATE CAUSE OF ACTION FOR PUNITIVE DAMAGES WILL BE DISMISSED (FIRST DEPT).

The First Department, dismissing the cause of action for punitive damages, noted that "a separate cause of action for punitive damages is not legally cognizable…". Domen Holding Co. v Sanders, 2025 NY Slip Op 02871, First Dept 5-13-25

May 13, 2025

SERVICE OF PROCESS, EVIDENCE.

HERE MOTHER'S CONCLUSORY AFFIDAVIT CLAIMING SHE WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT BUT RATHER FOUND THE PAPERS ON THE GROUND IN FRONT OF THE FRONT DOOR WAS CONCLUSORY AND INSUFFICIENT TO REBUT THE PROCESS SERVER'S AFFIDAVIT; THEREFORE NO HEARING SHOULD HAVE BEEN HELD AND THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the conclusory affidavit by defendants' mother, alleging she was not served with the summons and complaint but rather found the papers on the ground in front of her front door, was

not sufficient to rebut the process server's affidavit demonstrating proper service upon a person identified as "aunt:"

… [T]he process server's affidavits constituted prima facie evidence that the defendants were properly served pursuant to CPLR 308(2) … . Contrary to the defendants' contention, the defendants' mother's affidavit was insufficient to rebut the presumption arising from the process server's affidavits because it was conclusory and not substantiated by specific facts … . The defendants' mother's conclusory averment that she did not receive service was insufficient to rebut the statement in the process server's affidavits that an "AUNT" had accepted service. Furthermore, the defendants' mother did not assert that there was no one else present at the premises who could have accepted service.

Therefore, because the defendants' mother's affidavit was insufficient to rebut the presumption of proper service, a hearing was not warranted … . … Supreme Court should have denied that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint … . Harvey v Usukumah, 2025 NY Slip Op 03050, Second Dept 5-21-25

Practice Point: Here defendants' mother's affidavit claiming she was not served with the summons and complaint but rather found the papers on the ground outside the front door was deemed insufficient to rebut the process server's affidavit. Therefore no hearing about the propriety of service should have been held and the motion to dismiss the complaint should have been denied.

May 21, 2025

STANDING, CORPORATION LAW, FIDUCIARY DUTY.

PURSUANT TO THE "INTERNAL AFFAIRS" DOCTRINE, PLAINTIFF, A NEW YORK CORPORATION AND BENEFICIAL OWNER OF SHARES IN BARCLAYS, AN ENGLISH CORPORATION, DID NOT HAVE STANDING TO BRING A DERIVATIVE SUIT ON BEHALF OF BARCLAYS AGAINST OFFICERS AND MANAGERS OF A NEW YORK AFFILIATE OF BARCLAYS IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a comprehensive dissenting opinion, determined that the Business Corporation Law (BCL) (sections 626(a) and 1319(a)(2)) has not displaced the "internal affairs" doctrine, a choice-of-law rule providing that the substantive law of the place of incorporation governs disputes about the rights and relationships of corporate shareholders and managers. The Court of Appeals affirmed the lower courts' rulings that plaintiff, a New York corporation and a beneficial owner of shares in England-based Barclays, did not have standing to sue, on behalf of Barclays, directors and officers of Barclays New York-based affiliate in New York:

The corporation at the center of this appeal is Barclays PLC (Barclays), a bank holding company incorporated under the laws of England and Wales and headquartered in London. Plaintiff Ezrasons, Inc. is a New York corporation and a beneficial owner of Barclays shares. In 2021, plaintiff commenced this action on behalf of Barclays against almost four-dozen current and former Barclays directors and officers and a New York-based affiliate, Barclays Capital Inc. (BCI). The complaint alleged that the individual defendants, aided and abetted by BCI, breached fiduciary duties owed to Barclays under English law, causing significant injuries to the company. * * *

Supreme Court granted defendants' motion to dismiss the complaint, explaining that under the internal affairs doctrine, foreign law governs the question of whether a plaintiff has the right to sue corporate management on behalf of a foreign corporation. The court rejected plaintiff's argument that the legislature intended to override that choice-of-law rule when it enacted sections 626 (a) and 1319 (a) (2) of the BCL, agreeing with four decades of case law holding that those provisions

"simply confer[] jurisdiction upon New York courts over derivative suits on behalf of out-of-state corporations, but do[ ] not require application of New York law in such suits" … .

The Appellate Division unanimously affirmed, agreeing with Supreme Court that plaintiff lacks standing to pursue this shareholder derivative action on behalf of Barclays … . … [T]he Appellate Division rejected plaintiff's argument that sections 626 (a) and 1319 (a) (2) displace the internal affairs doctrine and preclude application of English standing law … . Ezrasons, Inc. v Rudd, 2025 NY Slip Op 03008, CtApp 5-20-25

Practice Point: Business Corporation Law sections 626(a) and 1319(a)(2) do not displace the "internal affairs" doctrine which provides that the substantive law of the place of incorporation (England in this case) governs disputes about the rights and relationships of corporate shareholders and managers. Here a New York corporation which holds shares of an English corporation could not sue the officers and managers of a New York affiliate of the English corporation in New York.

May 20, 2025

STIPULATIONS, CONTRACT LAW, JUDGES.

HERE A DISPUTE AMONG BROTHERS ABOUT OWNERSHIP OF REAL PROPERTY WAS RESOLVED BY AN OPEN COURT STIPULATION (CONTRACT) WHICH CANNOT BE INVALIDATED ABSENT FRAUD, COLLUSION, MISTAKE OR ACCIDENT; THEREFORE SUPREME COURT SHOULD HAVE HELD A HEARING BEFORE APPROVING THE SUBSEQUENT APPORTIONMENT OF THE PROPERTY BY A RECEIVER WHICH WAS INCONSISTENT WITH THE STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the receiver's (Hafner's) apportionment of the proceeds of the sale of real property owned by several brothers was inconsistent with the open court stipulation which had

attempted to resolve the dispute before the receiver was appointed. Absent fraud, collusion, mistake or accident, a stipulation (contract) should not be invalidated. Therefore, Supreme Court should have held a hearing to determine whether there are grounds for avoiding the terms of the stipulation:

Supreme Court should have held an evidentiary hearing before approving Hafner's amended final report and account based on the factual issues raised by the parties and the contentious nature of the proceedings … . "Stipulations of settlement are favored by the courts and not lightly cast aside . . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" … . Here, Hafner's amended final report and account was confirmed without the off-the-top credits owed to John and Thomas pursuant to the stipulation. Further, the amended final report and account allocated receivership costs for insurance that were inconsistent with the allocation of costs agreed to in the stipulation.

Additionally, a hearing is necessary to calculate Hafner's commissions and to determine whether special circumstances exist warranting a recovery in excess of five percent of the sums received and disbursed … . CPLR 8004 allows a receiver to be paid commissions for his or her work "'not exceeding five percent of sums received and disbursed by him or her'" … . Feeney v Giannetti, 2025 NY Slip Op 03043, Second Dept 5-21-25

Practice Point: An open court stipulation is a contract which cannot be invalidated absent fraud, collusion, mistake or accident. Here the apportionment of disputed property by the receiver was inconsistent with the stipulation. The court, therefore, should not have upheld the receiver's apportionment without holding a hearing to determine whether there exist grounds for invalidating the stipulation.

May 21, 2025

TRANSLATED AFFIDAVIT INADMISSIBLE, NEGLIGENCE, EVIDENCE, VEHICLE AND TRAFFIC LAW.

PLAINTIFF'S TRANSLATED AFFIDAVIT WAS NOT ACCOMPANIED BY THE TRANSLATOR'S AFFIDAVIT AND WAS THEREFORE INADMISSIBLE; THE ROADWAY WHERE THE COLLISION OCCURRED WAS NOT DIVIDED INTO TWO OR MORE CLEARLY MARKED LANES; THEREFORE THE "UNSAFE LANE CHANGE" STATUTE (VEHICLE AND TRAFFIC LAW 1128(A)) DID NOT APPLY (FIRST DEPT).

The First Department, reversing Supreme Court, determined summary judgment should not have been awarded to plaintiff in this traffic accident case. Plaintiff submitted his affidavit which had been translated but did not submit an affidavit from the translator attesting to the translator's qualifications and the accuracy of plaintiff's affidavit. In addition, the roadway where the accident occurred was not divided into two or more clearly marked lanes. Therefore the unsafe-lane-change provision of the Vehicle and Traffic Law did not apply to the facts:

In support of his motion for summary judgment, plaintiff submitted his translated affidavit and dashcam footage from defendants' vehicle. He argued that defendant driver made an unsafe lane change in violation of Vehicle and Traffic Law § 1128(a), which provides that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Plaintiff failed to demonstrate his entitlement to summary judgment. His affidavit, which was not accompanied by an affidavit from a translator attesting to the translator's qualifications and the accuracy of the affidavit, does not comply with CPLR 2101(b) and is therefore inadmissible … . Even if the affidavit could be considered, the dashcam video does not "conclusively establish" that defendant driver violated Vehicle and Traffic Law § 1128(a) or eliminate issues of fact as to how the accident occurred … .

The dashcam video shows that Zerega Avenue was not divided into lanes in the southbound direction, and that neither vehicle was driving within a "clearly

marked" lane of traffic when plaintiff's vehicle drove up on the right side of defendants' tractor-trailer. Moreover, the dashcam footage does not establish that defendant driver caused the accident by moving into plaintiff's lane of traffic when it was not safe to do so. Richards v Walls, 2025 NY Slip Op 02889, First Dept 5-13-25

Practice Point: Where an affidavit submitted to support a summary judgment motion has been translated, it is not admissible unless it is accompanied by the translator's affidavit attesting the the translator's qualifications and the accuracy of the translation.

Practice Point: The unsafe-lane-change statute, Vehicle and Traffic Law 1128(a), does not apply unless there are two or more clearly marked lanes of travel.

May 13, 2025

VENUE, JUDGES.

IN THIS TRAFFIC-ACCIDENT CASE, PLAINTIFF BROUGHT THE ACTION IN AN IMPROPER VENUE; DEFENDANTS' MOTION TO CHANGE VENUE WAS SIX DAYS LATE; SUPREME COURT IMPROVIDENTLY EXERCISED ITS DISCRETION IN DENYING THE MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to change venue in this traffic-accident case should have been granted. Plaintiff had brought the action in an improper venue. Although the defendants' motion to change venue was six days late, Supreme Court had the discretion to grant it:

CPLR 510 sets forth grounds on which a motion to change venue may be made. When a defendant moves to change venue on the ground that the venue selected by the plaintiff is not proper … , the defendant must serve a timely demand on the plaintiff prior to making the motion … . When a motion to change venue on this ground is untimely, the motion is addressed to the court's discretion rather than based on right … . Here, the defendants acknowledge that, after serving a demand to change venue with their answer, they moved to change the venue of the action

six days late. Thus, their motion "became one addressed to the court's discretion" … .

Under the circumstances present here, the Supreme Court improvidently exercised its discretion in denying the defendants' motion pursuant to CPLR 510 to change the venue of the action from Kings County to Suffolk County. Venue is proper "in the county in which one of the parties resided when [the action] was commenced; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred " … . Here, there is no dispute that none of the parties resided in Kings County and that the accident did not occur in Kings County. By selecting an improper venue in the first instance, the plaintiff forfeited the right to choose venue … . Further, the plaintiff failed to show that the county specified by the defendants was improper and did not cross-move to retain venue in Kings County or to transfer venue to a county other than that urged by the defendants … . Moreover, although the defendants' motion was untimely, they promptly moved to change the venue of the action after confirming the true location of the accident … . Pujals v Haitidis, 2025 NY Slip Op 03213, Second Dept 5-28-25

Practice Point: Plaintiff brought the action in an improper venue. Defendants' motion to change venue was six days late. Under the facts, Supreme Court improvidently exercised its discretion when it denied defendants' motion.

May 28, 2025