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Reversal Report
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HERE AN ARGUMENT RAISED FOR THE FIRST TIME IN PLAINTIFF'S REPLY PAPERS WAS DEEMED NOT PROPERLY BEFORE THE APPELLATE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-bank's argument in this foreclosure action should not have been considered because it was raised for the first time in reply papers. In its reply, the plaintiff argued that the foreclosure action was not time-barred because defendant revived the statute of limitations by making payments within the six years prior to the commencement of the action:

[Plaintiff] failed to establish, prima facie, that this action was not time-barred. The plaintiff's submissions revealed that the mortgage debt was accelerated in January 2007, when the plaintiff commenced the first prior action to foreclose the mortgage … . This action was commenced in July 2018, more than six years later. The plaintiff's contention that payments the defendant made on the loan as late as September 2013 served to renew the statute of limitations, making this action

timely, is not properly before this Court, as it was raised for the first time in reply papers submitted to the Supreme Court, and there is no indication that the defendant was afforded an opportunity to submit a surreply or that this new argument responded to allegations the defendant raised for the first time in his opposition papers … . Bank of N.Y. Mellon v Cooper, 2025 NY Slip Op 03297, Second Dept 6-4-25

Practice Point: Here the Second Department noted that an argument raised for the first time in reply papers was not properly before the appellate court. There was no indication sur-reply papers were submitted or that the reply-argument was a response to an issue raised by the other party.

June 4, 2025

APPEALS, MOTION TO RENEW AN APPEAL, FORECLOSURE.

HERE A MOTION TO RENEW AN APPEAL WAS GRANTED AND THE PRIOR APPELLATE DECISION WAS VACATED BASED ON THE ENACTMENT OF THE FORECLOSURE ABUSE PREVENTION ACT (FAPA); THE THIRD DEPARTMENT HAD HELD THE FORECLOSURE ACTION WAS TIMELY BECAUSE THE BANK HAD DE-ACCELERATED THE DEBT; BUT FAPA RENDEREDTHE DE-ACCELERATION INVALID; SO THE INITIAL SUPREME COURT DECISION GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS WAS REINSTATED (THIRD DEPT).

The Third Department granted defendants' motion to renew an appeal and vacated its prior decision because of the subsequent enactment of the Foreclosure Abuse Prevention Act (FAPA). The Third Department had reversed summary judgment in defendants' favor on the ground the bank had de-accelerated the debt rendering the foreclosure action timely. But the FAPA now precludes such a de-acceleration and applies retroactively. Therefore Supreme Court's decision granting summary judgment dismissing the foreclosure action was reinstated:

Defendants now move to renew, contending that the enactment of the Foreclosure Abuse Prevention Act (hereinafter FAPA) is a change in law that requires reversal

of our prior decision. Specifically, defendants claim that the second action is now barred by the statute of limitations because FAPA applies retroactively, and such law prohibits the reset of a statute of limitations by the unilateral act of a party such as by a de-acceleration letter. * * *

… [S]ince the second action was brought more than six years after plaintiff accelerated the debt, it is barred by the statute of limitations applicable to foreclosure actions … . Thus, defendants' motion to renew is granted and this Court's previous decision is vacated. On the merits of the underlying appeal, pursuant to FAPA, defendants were entitled to summary judgment dismissing the complaint. Accordingly, we affirm the judgment of Supreme Court, albeit on different grounds. HSBC Bank, USA, N.A. v Bresler, 2025 NY Slip Op 03363, Third Dept 6-5-25

Practice Point: Although the issue was not discussed in the Third Department's decision, apparently CPLR 2221 [e] [2] applies to a motion for renewal of an appeal.

June 5, 2025

ARBITRATION, WRONGFUL DEATH VERSUS NEGLIGENCE, CONTRACT LAW, TRUSTS AND ESTATES, APPEALS.

PLAINTIFF'S DECEDENT WAS KILLED WHEN THROWN FROM A RENTED MOPED; THE RENTAL AGREEMENT INCLUDED AN ARBITRATION CLAUSE; THE NEGLIGENCE CAUSES OF ACTION ARE SUBJECT TO THE ARBITRATION CLAUSE; HOWEVER, THE WRONGFUL DEATH CAUSE OF ACTION IS NOT SUBJECT TO THE ARBITRATION CLAUSE; NEGLIGENCE AND WRONGFUL-DEATH CAUSES OF ACTION ARE DISTINCT AND ADDRESS DIFFERENT INJURIES; THE WINNING ISSUE WAS RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice McCormack, determined the plaintiffs in this wrongful death action, who

are the parents of plaintiffs' decedent and the administrators of decedent's estate, are not bound by the decedent's agreement to arbitrate. The decedent rented an electric moped from defendant Ravel by downloading an app with an arbitration clause. Decedent was killed when he was thrown from the moped and struck by a car. All agreed that the negligence causes of action were subject to the arbitration clause. Plaintiffs successfully argued the wrongful death action is distinct from the negligence actions and is not subject to the arbitration clause. The winning argument was first raised on appeal. The court heard the appeal because it "present[ed] a pure question of law that appears on the face of the record and could not have been avoided if raised at the proper juncture" …:

Here, it is undisputed that the plaintiffs, individually, did not enter into an agreement with Revel to arbitrate. However, the plaintiffs are the administrators of the decedent's estate, and the causes of action arise from the same incident that caused the decedent's death. The issue, therefore, turns on the nature of wrongful death causes of action and whether they are derivative of negligence causes of action or independent of negligence causes of action. * * *

The law of this State is clear that a wrongful death cause of action is a separate and distinct cause of action to redress the injuries suffered by a decedent's distributees as a result of the decedent's death. "'A cause of action to recover damages for wrongful death is a property right belonging solely to the distributees of the decedent and vests in them at the decedent's death'" … . This is true even where no cause of action alleging negligence exists. * * * … [T]his Court [has] determined that a cause of action alleging wrongful death was not derivative of a negligence cause of action, but [is] an independent cause of action vested in the distributees. "… [T]he surviving personal injury action and the wrongful death cause of action … are different in many respects. The two causes of action exist in order to protect the rights of different classes of persons, and the measure of damages is entirely different" … . "Wrongful death actions are brought not to compensate the decedent or his [or her] estate for the pain and suffering attendant to the injury, but rather to recover, on behalf of decedent's distributees, the pecuniary value of the decedent's life" … . Further, the different causes of action accrue at different times. A negligence cause of action accrues at the time of the injury, while a wrongful death cause of action does not accrue until the decedent's death, which can occur after

the injury is sustained … . Marinos v Brahaj, 2025 NY Slip Op 03561, Second Dept 6-11-25

Practice Point: Negligence and wrongful death causes of action are distinct and address different injuries. Here an arbitration clause in a moped rental contract executed to by plaintiffs' decedent was deemed to apply to the negligence causes of action stemming from the moped accident, but not to the related wrongful death cause of action.

Practice Point: Consult this opinion for an example of when an issue raised for the first time on appeal will be considered by the appellate court.

June 11, 2025

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW, JUDGES.

A COURT'S POWER TO VACATE AN ARBITRATOR'S AWARD IS EXTREMELY LIMITED; AN ARBITRATOR'S INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT CANNOT BE REVIEWED UNLESS IT IS "COMPLETELY IRRATIONAL;" HERE THE ARBITRATOR'S AWARD UPHOLDING THE SUSPENSION OF PETITIONER-DENTAL-HYGIENIST FOR HER FAILURE TO OBTAIN A COVID-19 VACCINE WAS CONFIRMED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the arbitrator's award in this COVID-19 vaccine-mandate case should not have been vacated. The arbitrator found that the petitioner-employee, a dental hygienist, was properly suspended without pay and issued a Notice of Discipline for failure to obtain a COVID-19 vaccine. A court's power to vacate an arbitration award is extremely limited:

We agree with respondent that the court "erred in vacating the award on the ground that it was against public policy because petitioner[] failed to meet [her] heavy burden to establish that the award in this employer-employee dispute violated public policy" … . We further agree with respondent that the court "erred in

vacating the award on the ground that it was irrational" … . " 'An award is irrational if there is no proof whatever to justify the award' " … . Where, however, "an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" … . Here, there is no dispute that respondent directed petitioner to fully receive the COVID-19 vaccine by a specific date, that it apprised her that her continued employment was contingent upon her compliance, and that petitioner refused to be vaccinated by the required date. It is also undisputed that petitioner was never granted a reasonable accommodation that excused her compliance with the vaccine mandate. Consequently, the court erred in concluding that the arbitrator's award was irrational … . To the extent petitioner argues that the arbitrator erred in not considering the propriety of respondent's denial of petitioner's request for a reasonable accommodation based on a pre-existing health condition, we note that the arbitrator interpreted the CBA as precluding any review of that decision. Inasmuch as we conclude that "the arbitrator's 'interpretation of the [CBA] [is] not . . . completely irrational, [it] is beyond [our] review power' " … . Finally, we note that the court was not permitted to vacate the award merely because it believed vacatur would better serve the interest of justice … . Matter of Davis (State of New York Off. of Mental Health), 2025 NY Slip Op 03910, Fourth Dept 6-27-25

Practice Point: Consult thee decisions for an explanation of the limits on a court's review of an arbitration award.

June 27, 2025

BILL OF PARTICULARS, MOTION TO AMEND, NEGLIGENCE, EVIDENCE, JUDGES.

IN THIS CHILD VICTIMS ACT CASE AGAINST A TEACHER, PLAINTIFF'S MOTION TO AMEND THE BILL OF PARTICULARS TO ADD DEPOSITION TESTIMONY CONCERNING STATEMENTS MADE BY WITNESSES TO PLAINTIFF'S ATTORNEYS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act suit, determined plaintiff should have been allowed to amend the bill of particulars to add deposition testimony which included witness statements made to plaintiff's attorneys concerning the defendant teacher:

"Pursuant to CPLR 3025(b), leave to amend or supplement a pleading is to be 'freely given'" … . "'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" … . "The burden of proof in establishing prejudice or surprise, or that the proposed amendment lacks merit, falls to the party opposing the motion for leave to amend" … . "[T]he decision of whether to grant or deny leave to amend is subject to the discretion of the trial court" … .

The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to include the proposed witness's statements to [plaintiff's attorneys]. The proposed amendment was not palpably insufficient or patently devoid of merit … . In this case, having failed to oppose the motion, the District defendants failed to satisfy their burden of demonstrating any prejudice or surprise … . Fitzpatrick v Pine Bush Cent. Sch. Dist., 2025 NY Slip Op 03794, Second Dept 6-25-25

Practice Point: Amendments to pleadings should be freely allowed. Here deposition testimony about vague and contradictory statements made to plaintiff's counsel by witnesses concerning defendant teacher's alleged interaction with students can properly be added to the bill of particulars, criteria explained.

June 25, 2025

CLASS ACTIONS, EMPLOYMENT LAW, JUDGES, LABOR LAW.

IN THIS CLASS-ACTION-CERTIFICATION PROCEEDING ALLEGING FAILURE TO PROVIDE NOTICE OF PAY RATE AND PAY DAY AS REQUIRED BY LABOR LAW SECTION 195(1), THE COURT SHOULD NOT HAVE GRANTED CERTIFICATION FOR THE CLAIM FOR LIQUIDATED DAMAGES AND SHOULD NOT HAVE GRANTED THE REQUEST FOR THE SOCIAL SECURITY NUMBERS OF CLASS MEMBERS WHOSE CLASS-ACTION NOTICE WAS RETURNED AS UNDELIVERABLE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this class-action-certification proceeding concerning wage notice violations, noted that CPLR 901(b) prohibits class actions seeking liquidated damages and the request for social security numbers for class members whose notice was returned as undeliverable should not have been granted:

… [T]he court should not have granted class certification for the wage notice claims, which are based on the alleged failure to provide a notice of pay rate and pay day as required by Labor Law § 195(1), and seek liquidated damages, plus reasonable attorneys' fees and costs under Labor Law § 198(1-b). Where, as here, defendant pleaded a Labor Law § 198 statutory affirmative defense to the wage notice claim, the court should have declined to grant certification by applying the CPLR 901(b) prohibition against class actions seeking liquidated damages … .

To the extent the court ordered defendants to provide the names, addresses, phone numbers, and email addresses of all class members, as well as social security numbers for all class members whose notice is returned as undeliverable without a forwarding address, the order is modified to deny the request for social security numbers. The court otherwise properly granted the request for phone numbers and e-mail addresses, which is a reasonable request to expedite class notification. Idahosa v MFM Contr. Corp., 2025 NY Slip Op 03762, First Sept 6-24-25

Practice Point: Where class-action notices are returned as undeliverable, the request for phone numbers and e-mail addresses is properly granted to expedite class notification, but the request for social security numbers should not be granted.

June 24, 2025

COURT OF CLAIMS, SUBJECT MATTER JURISDICTION, MONEY JUDGMENT AGAINST STATE, DEBTOR-CREDITOR, INSURANCE LAW.

SUPREME COURT HAS SUBJECT MATTER JURISDICTION OVER THIS PROCEEDING UNDER CPLR ARTICLE 52 TO ENFORCE A MONEY JUDGMENT AGAINST THE STATE INSURANCE FUND TO THE EXTENT THE STATE IS A GARNISHEE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined Supreme Court had subject matter jurisdiction over this CPLR article 52 action to enforce a money judgment against New York State Insurance Fund. Ordinarily an action for money damages against a state agency is litigated in the Court of Claims:

In this proceeding, the State Insurance Fund is postured not as a judgment debtor but as a garnishee. As such, under CPLR 5207, all procedures for the enforcement of money judgments against other judgment debtors are applicable to it, as a garnishee, "except where otherwise prescribed by law" and except that an order "shall only provide for the payment of moneys not claimed by the [S]tate" and that no judgment may be entered against the State in such a procedure.

The State Insurance Fund has not shown that this proceeding is otherwise prescribed by law. To the contrary, CPLR 5221(a)(4) provides that the Supreme Court or a County Court has authority to hear enforcement proceedings "authorized by this article," meaning the entirety of CPLR article 52, which, of course, includes CPLR 5207 garnishment proceedings against the State. … The petition seeks entry of an order, not a judgment. Thus, contrary to the State Insurance Fund's contention, we hold that the Supreme Court possessed subject

matter jurisdiction over this proceeding pursuant to CPLR article 52 to enforce a money judgment as against the State Insurance Fund to the extent that the State's role in this instance is that of a garnishee. Matter of Doran Constr. Corp. v New York State Ins. Fund, 2025 NY Slip Op 03716, Second Dept 6-18-25

Practice Point: Here, under very complicated facts, Supreme Court was deemed to have subject matter jurisdiction over an action to enforce a money judgment against a state agency where the state's role is that of a garnishee.

June 18, 2025

COURT RULES, FAILURE TO COMPLY WITH, FORECLOSURE, JUDGES.

THE BANK'S FAILURE TO OFFER A REASONABLE EXCUSE FOR FAILURE TO COMPLY WITH A COURT RULE REQUIRING THAT A MOTION FOR A JUDGMENT OF FORECLOSURE BE FILED WITHIN ONE YEAR OF THE ENTRY OF THE ORDER OF REFERENCE WARRANTED DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's failure to comply with Kings County Supreme Court Uniform Civil Term Rule 8, which requires the bank to file a motion for judgment of foreclosure withing one year of entry of the order of reference, warranted dismissal of the action:

"Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference" … . "Where the plaintiff offers an excuse for its failure to comply with Rule 8, '[t]he determination of whether [the] excuse is reasonable is committed to the sound discretion of the motion court'" … . "Reversal is warranted 'if that discretion is improvidently exercised'" … .

Here, the Supreme Court improvidently exercised its discretion in denying that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against her for failure to comply with Rule 8. The order of reference was entered on August 28, 2012, * * * [and] the plaintiff failed to provide a reasonable excuse as to why [the bank] did not move for a judgment of foreclosure and sale

prior to August 28, 2013. Contrary to the court's determination, the failure to comply with Rule 8 is a sufficient ground upon which to dismiss a foreclosure action … . Wells Fargo Bank N.A. v Kahan, 2025 NY Slip Op 03354, Second Dept 6-4-25

Practice Point: Here the bank's failure to comply with a Kings County Supreme Court Uniform Civil Term Rule warranted dismissal of the foreclosure action.

June 4, 2025

CPLR 205(A), SECOND SIX-MONTH EXTENSION, NEGLIGENCE, PUBLIC HEALTH LAW, TRUSTS AND ESTATES.

HERE, EVEN THOUGH THE INITIAL ACTION WAS TIMELY ONLY BECAUSE OF THE SIX-MONTH "SAVINGS PROVISION" EXTENSION IN CPLR 205(A), THE SECOND ACTION, COMMENCED AFTER THE DISMISSAL OF THE FIRST FOR LACK OF STANDING, CAN BE DEEMED TIMELY UNDER A SECOND CPLR 205(A) SIX-MONTH "SAVINGS PROVISION" EXTENSION (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice LaSalle, determined the "savings provision" of CPLR 205(a) allows a second six-month extension of the time to file a new action after a dismissal which is not on the merits. In this wrongful death and Public Health Law 2801-d action against a nursing home and hospital, the complaint was filed an served while the application for appointment of an executor was pending. The complaint was dismissed because the plaintiff did not have standing. Although the statute of limitations had run, the initial action was timely because of the savings provision in CPLR 205(a). The action was commenced again whiled the application for appointment of an executor was still pending. This time the complaint was dismissed with prejudice on the ground the six-month extension in CPLR 205(a) is only available once:

The primary issue raised on this appeal is whether CPLR 205(a) permits a litigant to commence an otherwise untimely new action within six months of the dismissal of a prior action where that prior action was, itself, made timely only by a previous application of CPLR 205(a). This issue appears to be one of first impression in a State apellate court. Although the United States Court of Appeals for the Second Circuit (hereinafter the Second Circuit) has answered this question in the negative (see Ray v Ray, 22 F4th 69 [2d Cir]), that holding is not binding on this Court, and we respectfully disagree with it and conclude that the plain language of CPLR 205(a) does allow a litigant to commence such an action. Accordingly, while the Supreme Court properly dismissed the instant complaint on the ground that the plaintiff had not yet obtained letters testamentary to become the personal representative of the decedent's estate, the dismissal should have been without prejudice instead of with prejudice. Tumminia v Staten Is. Univ. Hosp., 2025 NY Slip Op 03352, Second Dept 6-4-25

Practice Point: Here an action which was timely only by the application of the six-month "savings provision" extension in CPLR 205(a), and which was dismissed for lack of standing, did not preclude a second identical action which could only be deemed timely by a second application of the CPLR 205(a) savings provision.

June 4, 2025

FAMILY LAW, PATERNITY ALLEGATIONS SUFFICIENT, JUDGES.

FATHER'S PETITION FOR CUSTODY SHOULD NOT HAVE BEEN DISMISSED BECAUSE HIS PATERNITY HAD NOT BEEN ADJUDICATED AT THE TIME THE PETITION WAS BROUGHT; THE PETITION ADEQUATELY ALLEGED PATERNITY WHICH WAS SUBSEQUENTLY CONFIRMED BY A DNA TEST (SECOND DEPT).

The Second Department, reversing Family Court, determined father's custody petition should not have dismissed on the ground he had not been adjudicated the biological father at the time the custody petition was brought. The petition sufficiently alleged paternity, which was subsequently confirmed by a DNA test:

The Family Court, in effect, granted that branch of the petitioner's cross-motion which was for a genetic marker test. The DNA test results of the court-ordered genetic marker test revealed that the probability of the petitioner's paternity was 99.99%. Thereafter, the court issued an order of filiation, on consent, adjudging the petitioner to be the child's biological father. However, in a separate order, the court, inter alia, granted that branch of the mother's motion which was to dismiss the custody petition, determining that the petitioner lacked standing to file the custody petition because at the time he filed the custody petition, "his parentage of the child had not yet been legally established." The petitioner appeals.

"Pursuant to Domestic Relations Law § 70, parents have standing to seek custody of or parental access with their children" .. . Here, the custody petition sufficiently alleged that the petitioner was the biological father of the child. The mother's affidavits did not expressly deny the petitioner's paternity, nor offer any facts to refute his allegations of paternity. Moreover, the Family Court entered the order of filiation on consent, and it is undisputed that the petitioner was adjudicated to be the child's biological father before, or at the same time that, the court granted that branch of the mother's motion which was to dismiss the custody petition. Accordingly, the court erred in determining that the petitioner did not have standing to file the custody petition because he had not been adjudicated the biological father of the child before the custody petition was filed … . Matter of Kevin C. v Trisha J., 2025 NY Slip Op 03324, Second Dept 6-4-25

Practice Point: Father's standing to bring a custody petition is not dependent upon an adjudication of paternity.. Here the custody petition adequately alleged paternity, which was subsequently confirmed by a DNA test.

June 4, 2025

FORECLOSURE, REFEREE'S REPORT, NO FOUNDATION FOR ATTACHED DOCUMENTS.

THE ACCOMPANYING AFFIDAVIT DID NOT LAY A PROPER FOUNDATION FOR THE ADMISSIBILITY OF THE DOCUMENTS RELIED UPON BY THE REFEREE IN THIS FORECLOSURE ACTION; THEREFORE THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department determined the referee's report in this foreclosure action should not have been confirmed because a proper foundation for the admissibility of the records relied upon by the referee was not provided by the accompanying affidavit:

"The report of a referee should be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility" … . Here, in computing the amount due on the mortgage loan, the referee relied upon the affidavit of Frank Rosas, a vice president of Nationstar Mortgage, LLC (hereinafter Nationstar), the servicer of the mortgage loan. Rosas stated in his affidavit that Nationstar's records pertaining to the mortgage loan included records of PHH Mortgage, a prior servicer. However, Rosas did not state when Nationstar began servicing the loan, did not state that "[he] was personally familiar with the record-keeping practices and procedures" of PHH Mortgage … , and did not "establish that the records provided by [PHH Mortgage] were incorporated into [Nationstar's] own records and routinely relied upon by [Nationstar] in its own business" … . Thus, Rosas's affidavit failed to satisfy the admissibility requirements of CPLR 4518(a) … . HSBC Bank USA, N.A. v Coxall, 2025 NY Slip Op 03557, Second Dept 6-11-25

Practice Point: An affiant's failure to lay a proper foundation for the admissibility of business records in a foreclosure action results in reversal.

June 11, 2025

JUDGES, JURY INSTRUCTIONS, LIABLITY FOR EMPLOYEE'S BATTERY.

DEFENDANT DINER'S SECURITY GUARD KNOCKED PLAINTIFF TO THE GROUND AND CHOKED HIM; WHETHER THE DINER DEFENDANTS ARE VICARIOUSLY LIABLE DEPENDED UPON WHETHER THE SECURITY GUARD WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ASSAULT; THE FAILURE TO PROVIDE THE JURY WITH AN INTERROGATORY ON THE SCOPE-OF-EMPLOYMENT QUESTION REQUIRED A NEW TRIAL (SECOND DEPT).

The Second Department, reversing the denial of defendants' motion to set aside the verdict and ordering a new trial, held the jury should have been instructed to determine whether the security guard (Vetell) who assaulted plaintiff was acting within the scope of his employment at the time of the assault. Apparently plaintiff left the defendant diner to get money at an ATM to pay the bill. When he retuned to the diner, the security guard knocked him to the ground and choked him:

… Supreme Court erred in denying the appellants' counsel's request to ask the jury to determine whether Vetell was acting within the scope of his employment when he attacked the plaintiff. The interrogatories that were given to the jury made it possible for the jury to find the appellants liable for Vetell's acts based only on his being a special employee without determining that he was acting within the scope of his employment when he attacked the plaintiff. Since a determination that Vetell was acting within the scope of his employment is a necessary element to render the appellants vicariously liable for his acts, the court should have added the requested interrogatory to the verdict sheet … . Eaton v Fiotos, 2025 NY Slip Op 03553, Second Dept 6-10-25

Practice Point: Whether an employer is vicariously liable for the actions of an employee depends upon whether the employee's conduct was within the scope of employment. Here the failure to so instruct the jury required a new trial.

June 11, 2025

JUDGES, SUA SPONTE DISMISS OF COMPLAINT.

IN THE ABSENCE OF A MOTION TO DISMISS THE COMPLAINT BY THE DEFENDANTS, THE JUDGE DID NOT HAVE THE AUTHORITY TO DISMISS THE ACTION ON THE EVE OF TRIAL "IN THE INTEREST OF JUDICIAL ECONOMY" BASED UPON PERCEIVED EVIDENTIARY DEFICIENCIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint on the eve of trial, in the interest of judicial economy, based on an evidentiary issue. Absent a motion by the defendants, the judge lacked the power to dismiss the action:

… [I]t is undisputed that there was no motion by defendants requesting dismissal of the complaint. Rather, defendants opposed the request by plaintiff that he be permitted to admit in evidence at trial certain medical records. Inasmuch as there was no motion for dismissal pending before the court—either on the basis that defendants were entitled to judgment as a matter of law or based on plaintiff's admissions—the court lacked authority to dismiss the complaint in the interest of judicial economy … . Indeed, by sua sponte dismissing the complaint before plaintiff presented any evidence, the court deprived plaintiff of an opportunity to oppose dismissal and deprived defendants of an opportunity to state the grounds that supported dismissal (see generally CPLR 4401). Additionally, we can find no legal authority (nor do the parties identify any), that permits a court to, on its own volition, dismiss a complaint on the eve of trial without any request for such relief—absent extraordinary circumstances not present here … . Although the court determined that plaintiff cannot substantiate his claims, the court nevertheless erred in dismissing the complaint on that basis moments before trial was to commence without any request for such relief from defendants. Wallace v Kinney, 2025 NY Slip Op 03879, Fourth Dept 6-27-25

Practice Point: On the eve of trial, absent a motion to dismiss by the defendant, a trial judge generally does not have the authority to dismiss complaint "in the interest of judicial economy" based on perceived evidentiary deficiencies.

June 27, 2025

JUDGMENT NOTWITHSTANDING THE VERDICT, NEGLIGENCE, EVIDENCE.

IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT PRESENT EVIDENCE OF A NONNEGLIGENT EXPLANATION OF THE ACCIDENT; PLAINTIFF WAS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT FINDING DEFENDANT NEGLIGENT; THE ARGUMENT THAT PLAINTIFF STOPPED QUICKLY IN STOP AND GO TRAFFIC IS NOT A NONNEGLIGENT EXPLANATION OF A REAR-END COLLISION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this rear-end collision case, determined plaintiff's motion for a judgment not withstanding the verdict finding defendant rear-driver negligent should have been granted. Plaintiff was stopped when her car was struck from behind. Defendant had struck the car directly behind plaintiff. Although there was evidence plaintiff stopped suddenly (in stop and go traffic), defendant did not offer proof of a nonnegligent explanation for the accident:

We … agree with plaintiff that the court erred in denying that part of her posttrial motion for judgment as a matter of law on the issue of defendant's negligence (see generally CPLR 4404 [a]). A party is entitled to judgment notwithstanding the verdict where there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" … . As relevant here, "[t]he rearmost driver in a chain-reaction collision bears a presumption of responsibility . . . , and . . . a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" … .

Here, the evidence at trial established that, at the time of the collision, plaintiff and defendant were driving in "stop-and-go" traffic during rush hour on a "wet, [d]rizzly" morning. Plaintiff testified that, at the time of the collision, she had come

to a stop because the vehicle in front of her had stopped. Defendant testified that the collision occurred when the vehicle in front of her suddenly stopped; she thought the middle vehicle hit plaintiff's vehicle first. Defendant tried to turn her vehicle to avoid the collision, but was unsuccessful and collided with the middle vehicle. The driver of the middle vehicle in the chain testified that plaintiff's vehicle stopped suddenly. He denied initially colliding with plaintiff's vehicle; it was only after he was hit by defendant that his vehicle collided with plaintiff's vehicle.

In short, the undisputed evidence at trial established that defendant was the rear-most driver involved in the chain-reaction collisions and, therefore, is presumed negligent absent the proffering of a nonnegligent explanation for the collision. We conclude that there is no valid line of reasoning and permissible inferences establishing such a nonnegligent explanation based on the trial record here. Specifically, under the circumstances of this case, the " '[e]vidence that plaintiff's lead vehicle was forced to stop suddenly in [stop-and-go] traffic' " did not constitute a nonnegligent explanation for the collision sufficient to support the jury's verdict inasmuch as " 'it can easily be anticipated that cars up ahead will make frequent stops in [stop-and-go] traffic' " Blatner v Swearengen, 2025 NY Slip Op 03880, Fourth Dept 6-27-25

Practice Point: The plaintiff in this rear-end collision case made a motion for judgment notwithstanding the verdict, which preserved the issue of defendant's negligence for appeal. The appellate court held defendant was negligent as a matter of law. The matter was remitted for a trial to determine proximate cause (there was a car between defendant's and plaintiff's cars) and, if necessary, damages.

June 27, 2025

LANDLORD-TENANT, APPLICABILITY OF HOUSING STABILITY AND TENANT PROTECTION ACT.

THE HOUSING STABILITY AND TENANT PROTECTION ACT (HSTPA), BY ITS TERMS, APPLIES TO THIS HOLDOVER ACTION WHICH WAS PENDING WHEN THE HSTPA WAS ENACTED BUT HAS NOT PROCEEDED TO JUDGMENT; THEREFORE THE ACT NEED NOT BE APPLIED RETROACTIVELY TO PRECLUDE THE HOLDOVER ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ford, reversing the Appellate Term, determined the Housing Stability and Tenant Protection Act (HSTPA), which was enacted after the landlord brought the holdover proceedings but before judgment, applied to preclude the holdover action. The First Department did not need to determine whether the HSTPA applied retroactively. Under the terms of the statute, the Act applies to actions which were pending when it was enacted:

As of the date of the enactment of HSTPA, the petitioner had not yet obtained judgments of possession of the respondents' respective apartments. The application of the subject provision of HSTPA, under these circumstances, does not expand the scope of the petitioner's liability based on prior conduct, nor impair other rights the petitioner possessed in the past … When HSTPA was enacted, the petitioner had no vested right to recover any units in the building for personal use … . Thus, application of HSTPA here has no potentially problematic retroactive effect … .

HSTPA unequivocally states that the subject amendments to the Rent Stabilization Law of 1969 applied to matters pending as of the date of HSTPA's enactment … . As there is no potentially problematic retroactive effect to the amended provision in this matter, and it is undisputed that the petitioner is not entitled to the relief sought pursuant to the amended provision, the respondents were entitled to dismissal of the respective petitions pursuant to CPLR 3211(a)(7) … . Matter of Karpen v Andrade, 2025 NY Slip Op 03719, Second Dept 6-18-25

Practice Point: Where there has not been a judgment in a holdover action which was pending whin the HSTPA was enacted, there is no need to determine whether

the Act should be applied retroactively. The Act, by its terms, applied to the pending action.

June 18, 2025

LATE ANSWER, FAILURE TO REJECT WITHIN 15 DAYS, JUDGES.

FAILURE TO REJECT A LATE ANSWER WITHIN 15 DAYS WAIVES LATE SERVICE AND THE DEFAULT (SECOND DEPT). The Second Department, reversing Supreme Court, determined plaintiff waived any objection to late service of the answer by not rejecting it within 15 days:

Pursuant to CPLR 2101(f), "[t]he party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections" … . Here, the plaintiff's undisputed failure to reject [the] answer within the 15-day statutory time frame constituted a waiver of the late service and the default … . Moreover, the plaintiff did not move for leave to enter a default judgment against [defendants] … . Therefore, the Supreme Court should not have rejected the answer … .Globalized Realty Group, LLC v Crossroad Realty NY, LLC, 2025 NY Slip Op 03797, Second Dept 6-25-25

Practice Point: Failure to reject a late answer following the procedure in CPLR 2101(1) waives late service and the default.

June 25, 2025

LITIGATION PRIVILEGE, IMMUNITY, CONTRACT LAW, DEFAMATION.

THE LITIGATION PRIVILEGE WHICH APPLIES TO DEFAMATION ACTIONS WAS NOT APPLICABLE HERE IN THIS BREACH OF CONTRACT ACTION ALLEGING BREACH OF CONFIDENTIALITY AND NONDISPARAGEMENT PROVISIONS; DEFENDANT ALLEGEDLY THREATENED TO PROVIDE DAMAGING TESTIMONY IN ANOTHER ACTION INVOLVING PLAINTIFFS, IN WHICH DEFENDANT WA S NOT A PARTY, IF DEFENDANT'S DEMANDS WERE NOT MET (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant was not entitled to immunity in this breach of contract action alleging breach of confidentiality and nondisparagement provisions. The immunity and privilege which applies to statements made in defamation litigation does not apply in breach of contract litigation:

Plaintiffs allege that defendant breached the confidentiality and nondisparagement provisions of their agreement when he threatened to provide damaging testimony in a separate action between plaintiffs and Reebok (a litigation to which defendant was not a party) if his demands in an unrelated arbitration with plaintiffs were not accepted. Plaintiffs further allege that when his demands were rejected, defendant acted on his threats, contacted Reebok, and offered to provide damaging false testimony in that action.

Defendant … argues … that the Court of Appeals' recent holding in Gottwald v Sebert (40 NY3d 240 [2023]) bars plaintiffs' action. In Gottwald, the court held that there is no "sham exception" to the litigation privilege in a defamation action, thus conferring absolute litigation privilege no matter the motivation for the suit … . The motion court agreed that Gottwald barred plaintiff's action and granted defendant summary judgment on that basis.

Gottwald specifically holds that "absolute immunity from liability for defamation exists for . . . statements made . . . in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved" … . However, here, plaintiffs' sole cause of action is for breach of contract, not defamation, and thus, Gottwald is not applicable. Moreover, the absolute litigation

privilege granted by the Gottwald court was conferred upon parties to the suit. Gottwald does not speak to whether that privilege extends to individuals ancillary or collateral to the litigation, such as a potential witness. TRB Acquisitions LLC v Yedid, 2025 NY Slip Op 03872, First Dept 6-26-25

Practice Point: The litigation privilege which applies in defamation actions was not applicable here in this breach of contract action where defendant threatened to give damaging testimony in another action involving plaintiffs in which defendant was not a party.

June 26, 2025

LONG-ARM JURISDICTION, JURISICTIONAL DISCOVERY, MASS SHOOTING.

A SHOOTER WEARING BODY ARMOR OPENED FIRE AT A BUFFALO GROCERY STORE KILLING TEN AND INJURING MANY OTHERS; THE COMPLAINT ALLEGED THE BODY ARMOR ALLOWED THE SHOOTER TO KILL THE SECURITY GUARD WHICH LEFT THE SHOPPERS UNPROTECTED; THE ISSUE IS WHETHER NEW YORK HAS LONG-ARM JURISDICTION OVER THE MANUFACTURER OF THE BODY ARMOR AND TWO INDIVIDUAL DEFENDANTS; PLAINTIFFS' ALLEGATIONS WERE SUFFICIENT TO WARRANT JURISDICTIONAL DISCOVERY; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs were entitled to jurisdictional discovery to determine whether New York has long-arm jurisdiction over two individual employees of RMA, Waldrop and Clark, which sells body armor. An 18-year-old man committed a racially motivated mass shooting at a grocery store in Buffalo, killing ten people and injuring many others. The complaint alleges that the body armor protected the shooter, allowing him to kill the security guard and shoot more people inside and outside the store:

… "[I]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]" … . We agree with plaintiffs that they have set forth a "sufficient start" … to show that their position is not " 'frivolous' " … . …

… With respect to Waldrop, plaintiffs allege that he was intimately involved in the daily operations of RMA, was involved in developing the body armor used by the shooter, and was directly involved in the marketing and sales of that body armor. They also allege that he chose to allow the sale of body armor to civilians, i.e., non-military and non-law enforcement personnel, or was "deliberately indifferent" to such sales, and that he knew RMA body armor was being marketed to and sold in New York. We conclude that those allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Waldrop … . …

With respect to Clark, plaintiffs allege that he, personally, marketed the body armor to, and communicated directly with, the shooter, encouraging him to purchase the body armor, either knowing or having reason to know that the shooter was a civilian. Plaintiffs further allege that, as a result of that individual conduct, Clark knew that RMA's body armor was being sold to civilians in New York, presenting grave risks to New York residents. We thus likewise conclude that plaintiffs' allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Clark … . Salter v Meta Platforms, Inc., 2025 NY Slip Op 03896, Fourth Dept 6-27-25

Practice Point: Consult this decision for a concise explanation of New York's long-arm jurisdiction and the criteria for jurisdictional discovery.

June 27, 2025

MOTION TO COMPEL COMPLIANCE WITH DISCOVERY DEMANDS, JUDGES.

THE SUPREME COURT'S PART RULES REQUIRED PLAINTIFF TO FIRST CONFERENCE THE MATTER BEFORE MOVING TO COMPEL DEFENDANTS TO COMPLY WITH DISCOVERY DEMANDS; THE FAILURE TO CONFERENCE THE MATTER, HOWEVER, IS NOT A VALID GROUND FOR DENYING THE MOTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion to strike defendants' answer or compel compliance with discovery demands should not have been denied on the ground plaintiff failed to first conference the matter as required by the court's Part Rules:

… Supreme Court improvidently exercised its discretion in denying the motion on the ground that plaintiff failed to first conference the matter with the court in accordance with its Part Rules. The court may not condition the making of a motion on prior judicial approval … . Reyes v City of New York, 2025 NY Slip Op 03545, First Dept 6-10-25

Practice Point: Here plaintiff's failure to comply with Supreme Court's Part Rule requiring a conference before moving to compel discovery was not a valid ground for denying the motion. A court may not condition the making of a motion on prior judicial approval.

June 10, 2025

MOTION TO DISMISS, FAMILY LAW, EVIDENCE, JUDGES.

HERE FATHER MOVED TO DISMISS MOTHER'S PETITION TO MODIFY CHILD SUPPORT AT THE CLOSE OF MOTHER'S PROOF; AT THAT STAGE OF THE PROCEEDINGS THE COURT MUST ACCEPT PETITIONER'S EVIDENCE AS TRUE AND RESOLVE ALL CREDIBILITY QUESTIONS IN PETITIONER'S FAVOR; THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

he Third Department, reversing Family Court's dismissal of mother's petition to modify child support, determined that the judge applied the wrong standard when deciding father's motion to dismiss at the close of mother's proof. At that stage the judge must accept petitioner's evidence as true, and must resolve all credibility issues in petitioner's favor. The judge's comments on witness credibility indicated the correct standard was not applied:

A noncustodial parent's statutory duty to support his or her child until they reach 21 years of age may be suspended where the noncustodial parent establishes that the custodial parent has wrongfully interfered with or withheld visitation rights … . Although the parent seeking such suspension must ultimately demonstrate "deliberate frustration" or "active interference" with their visitation rights by a "preponderance of the evidence" … , where, as here, "Family Court is tasked with deciding a motion to dismiss at the close of the petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor" … . * * *

Family Court's commentary on witness credibility in resolving the subject motion to dismiss suggests to this Court that an incorrect legal standard was applied … . When viewed in the proper light, we find that the … proof was sufficient to withstand a motion to dismiss … Thus, without passing judgment upon the ultimate success of the mother's claim, we reverse. Matter of Crystal NN. v Joshua OO, 2025 NY Slip Op 03368, Third Dept 6-5-25

Practice Point: In this modification of child support proceeding, father moved to dismiss mother's petition at the close of mother's proof. In evaluating the motion at

that stage of the proceedings, the court must accept all of petitioner's evidence as true, afford the petitioner all favorable inferences from the evidence, and resolve all credibility issues in petitioner's favor. The failure to apply those standards to consideration of the motion to dismiss requires reversal.

June 5, 2025

MOTION TO INTERVENE, FORECLOSURE.

BEACH 12, A NONPARTY WHICH BECAME TITLE OWNER OF THE PROPERTY AFTER PLAINTIFF FILED THE NOTICE OF PENDENCY, WAS ENTITLED TO INTERVENE IN THE FORECLOSURE ACTION AS OF RIGHT; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined an nonparty (Beach 12) was entitled to intervene in the foreclosure action as of right:

"Upon a timely motion, a person is permitted to intervene as of right when the representation of that person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment, or when the action involves the disposition of property and that person may be affected adversely by the judgment" (… CPLR 1012[a][2], [3]). "In addition, CPLR 1013 provides that a court has discretion to permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact" … . "Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings" … . "Intervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties" … .

… Beach 12 was entitled to intervene [because] this "action involve[s] the disposition of title to real property" and … Beach 12, which became the title owner of the premises after the plaintiff's filing of a notice of pendency, "would be bound and adversely affected by a judgment of foreclosure and sale" … . Bank of Am., N.A. v Reed, 2025 NY Slip Op 03695, Second Dept 6-18-25

Practice Point: Consult this decision the criteria for a nonparty's intervention in a foreclosure action.

June 18, 2025

MUNICIPAL LAW, PREEMPTION OF LOCAL LAW BY STATE LAW, CONSTITUTIONAL LAW, LANDLORD-TENANT, SOCIAL SERVICES LAW.

THE NEW YORK CITY LOCAL LAWS REFORMING THE NYC FIGHTING HOMELESSNES AND EVICTION PREVENTION SUPPLEMENT ARE NOT PREEMPTED BY THE NEW YORK STATE SOCIAL SERVICES LAW (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined that the local laws passed by the City Council modifying the New York City Fighting Homelessness and Eviction Prevention Supplement (FHEPS) were not preempted by the New York State Social Services Law. The opinion is comprehensive and too detailed to fairly summarize here:

[The] FHEPS reform laws were prompted by three conditions faced by the City: the rising number of evictions of residential tenants, a dramatic increase in the rate of homelessness, and an overburdened shelter system. These laws were designed to broaden eligibility for City-funded rental assistance, and promote quantitatively and qualitatively greater assistance. Thus, the FHEPS reform laws increased the income eligibility threshold, eliminated a 90-day shelter residency requirement, eliminated recipient work requirements, prohibited the New York City Department of Social Services (City DSS) from deducting a utility allowance from the maximum rental allowance for a FHEPS voucher, and expanded the list of individuals eligible for rental assistance (see Local Law Nos. 99-102). * * *

Several individuals who hoped to avail themselves of the benefits of the FHEPS reform laws commenced this CPLR article 78 proceeding, challenging the Mayor's refusal to implement those laws. The individuals initiated the proceeding as a putative class action, and bring the case on behalf of themselves and others similarly situated. The City Council was granted leave to intervene in the

proceeding, and sought an order directing the Mayor to implement the FHEPS reform laws or, alternatively, a declaration that those laws are valid. With respect to the principal relief sought, the City Council makes plain that it "seeks only that the Mayor be directed to take action to implement [the new local laws]. How the administration implements the [FHEPS] Reform Laws is within the administration's discretion."

The Mayor opposed the article 78 petition on the ground that the FHEPS reform laws are preempted by the State's Social Services Law. Matter of Vincent v Adams, 2025 NY Slip Op 04146, First Dept 5-27-25

Practice Point: Consult this opinion for an analysis of the preemption doctrine in the context of NYC Local Laws and the NYS Social Services Law.

June 27, 2025

NINETY-DAY DEMAND TO FILE A NOTE OF ISSUE, FAILLURE TO RESPOND, ATTORNEYS, MEDICAL MALPRACTICE, NEGLIGENCE, TRUSTS AND ESTATES.

PLAINTIFF IN THIS MED-MAL WRONGFUL-DEATH ACTION DID NOT RESPOND TO THE NINETY-DAY DEMAND TO FILE A NOTE OF ISSUE, DID NOT PRESENT A REASONABLE EXCUSE FOR THE FAILURE TO RESPOND, AND DID NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's failure to respond to the ninety-day CPLR 3216 demand to file a note of issue required dismissal of the medical malpractice action. The law-office-failure excuse was vague and conclusory and plaintiff did not demonstrate a meritorious cause of action:

"Where, as here, a plaintiff has been served with a 90-day demand . . . pursuant to CPLR 3216(b)(3), the plaintiff must comply with the demand by filing a note of

issue or by moving, before the default date, either to vacate the demand or to extend the 90-day demand period" … . Here, the plaintiff did neither.

"In opposition to a motion to dismiss pursuant to CPLR 3216, a plaintiff may still avoid dismissal if he or she demonstrates 'a justifiable excuse for the failure to timely abide by the 90-day demand, as well as the existence of a potentially meritorious cause of action'" … . "'Although the court has the discretion to accept law office failure as a justifiable excuse (see CPLR 2005), a claim of law office failure should be supported by a detailed and credible explanation of the default at issue'" … . Here, the vague and conclusory claim of law office failure set forth by the plaintiff's attorney did not constitute a justifiable excuse … . Moreover, the plaintiff failed to submit evidentiary proof from a medical expert demonstrating the existence of a potentially meritorious cause of action … . Kresberg v Kerr, 2025 NY Slip Op 03559, Second Dept 6-11-25

Practice Point: Here a vague and conclusory allegation of law-office-failure was not a reasonable excuse for failure to respond to the ninety-day demand to file a note of issue.

June 11, 2025

NOTICE OF CLAIM ALLEGED WRONG DATE, NEGLIGENCE, MUNICIPAL LAW, JUDGES.

HERE IN THIS BUS-PASSENGER-INJURY ACTION AGAINST THE CITY TRANSIT AUTHORITY, PLAINTIFF STATED THE WRONG ACCIDENT-DATE IN THE NOTICE OF CLAIM; BECAUSE THE WRONG DATE WAS NOT USED IN BAD FAITH AND THE CITY WAS NOT PREJUDICED, PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the wrong accident-date in the notice of claim did not warrant dismissal of the action. The wrong date was not willful and the municipality was not prejudiced. The plaintiff

alleged she was injured when the driver of the defendant NYC Transit Authority's bus stopped short:

"'To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim'" … . General Municipal Law § 50-e(2) requires that the notice of claim set forth, among other things, "the time when, the place where and the manner in which the claim arose" … . "'[I]n determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident'" … . "Pursuant to General Municipal Law § 50-e(6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby" … .

Here, there is no indication in the record that the accident date listed in the notice of claim and the complaint was set forth in bad faith … . Rather, the plaintiff's mistake was based upon her reliance on a police report that incorrectly listed the accident date … . Moreover, contrary to the Supreme Court's determination, the proposed amendment to the accident date was purely technical in nature and did not substantively change the nature of the claim … .

Furthermore, the record does not reflect that the defendants will be prejudiced by the plaintiff's delay in moving for leave to amend the notice of claim. Under the circumstances of this case, including that the plaintiff received medical assistance at the accident site, that specific details regarding the circumstances of the accident, including the accident location and bus route, were set forth in a police report and the notice of claim, and that the plaintiff's error in listing an accident date several days prior to the actual date of the accident was minimal, the defendants could have ascertained the date of the accident "with a modicum of effort" … . Hernandez v City of New York, 2025 NY Slip Op 03312, Second Dept 5-4-25

Practice Point: Here the wrong accident-date was included in the notice of claim and the plaintiff moved to amend the notice. Because the wrong date was not used in bad faith (the date was taken from the police report) and because the city was

not prejudiced by the error, plaintiff's motion to amend the notice of claim should have been granted.

June 4, 2025

NOTICE OF CLAIM, LEAVE TO FILE LATE NOTICE, NEGLIGENCE, MUNICIPAL, EVIDENCE.

THE ABSENCE OF A REASONABLE EXCUSE FOR FAILING TO FILE A TIMELY NOTICE OF CLAIM IS NOT NECESSARILY FATAL TO A PETITION FOR LEAVE TO FILE A LATE NOTICE WHERE, AS HERE, THE MUNICIPALITY HAD ACTUAL TIMELY NOTICE OF THE FACTS UNDERLYING THE CLAIM AND IS NOT PREJUDICED BY THE DELAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioners' motion for leave to file a late notice of claim in this traffic accident case involving a city bus should have been granted. Although the excuse for failure to time file (petitioners' infancy) was not reasonable, that flaw was not fatal because the city had timely actual knowledge of the essential facts underlying the claim and was not prejudiced by the delay:

Here, the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim. Although a police report regarding an automobile accident does not, in and of itself, constitute notice of a claim to a municipality or public corporation, where the report reflects that an employee of the municipality or public corporation committed a potentially actionable wrong, such entity can be found to have actual knowledge … . In this case, the police report, which the petitioners sent to the NYCTA [NYC Transit Authority] on or about July 2, 2021, indicated that the multivehicle collision was set in motion by Robinson, who caused the bus to come into contact with the rear of another vehicle. The police report also indicated that several bus passengers reported injuries and named the injured petitioners, among others. In addition, the respondents were in possession of the injured petitioners' medical records. Under

these circumstances, the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim … .

Moreover, since the respondents acquired timely, actual knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing a lack of prejudice to the respondents' ability to maintain a defense … . Matter of Arvizu v New York City Tr. Auth., 2025 NY Slip Op 03323, Second Dept 6-4-25

Practice Point: A municipality will be deemed to have timely actual notice of a claim where, as here, the police report reflects that an employee of the municipality committed a potentially actionable wrong.

June 4, 2025

PRE-ACTION DISCOVERY, LATE NOTICE OF CLAIM, MUNICIPAL LAW.

CLAIMANT MADE AN APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM CONCERNING INJURIES INCCURRED WHEN WORKING FOR THE CITY; CLAIMANT WAS ENTITLED TO PRE-ACTION DISCOVERY TO ESTABLISH WHEN THE CITY GAINED ACTUAL KNOWLEDGE OF THE FACTS UNDERLYING THE CLAIM (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined claimant was entitled to pre-action discovery to support his allegation that the city had timely notice of his accident which would warrant leave to file a late notice of claim:

In determining whether to grant an application for leave to serve a late notice of claim, "the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" … . " 'While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner' " … .

… In support of his application, claimant sought, inter alia, any incident reports concerning the accident and any correspondence between respondents concerning the accident. Claimant alleged that he told his employer about the incident five days after it occurred and believed that his employer notified the City of the accident at that time.

… Supreme Court abused its discretion in denying that part of his application seeking pre-action discovery (see CPLR 3102 [c]). Under the circumstances of this case, claimant demonstrated that pre-suit discovery is needed in support of his application for leave to serve a late notice of claim for the purpose of establishing when the City had actual knowledge of the facts constituting the claim … . Matter of Wisnowski v City of Buffalo, 2025 NY Slip Op 03886, Fourth Dept 6-27-25

Practice Point: When applying for leave to file a late notice of claim, demonstrating the municipality had actual knowledge of the facts underlying the claim within 90 days of the accident is crucial. Here the claimant alleged his employer told the city about the accident five days after it occurred. Claimant was entitled to pre-action discovery on that issue.

June 27, 2025

SERVICE OF PROCESS, AUTHORITY TO ACCEPT SERVICE, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

HERE THE ASSISTANT SUPERINTENDENT WHO WAS HANDED THE SUMMONS AND COMPLAINT IN THIS PROPERTY-DAMAGE ACTION WAS AN AUTHORIZED AGENT OF THE SCHOOL DISTRICT; THEREFORE THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO COMPLETE PROPER SERVICE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Voutsinas, reversing Supreme Court, determined the assistant superintendent who was handed the summons and complaint in this property-damage action against the school district was an authorized agent of the district. Therefore the complaint should not have been dismissed for failure to complete proper service:

It is evident, however, that the role of assistant superintendent was intended, under Education Law § 2(13), to be considered another appointive officer whose duties generally relate to the administration of affairs within a school district. An assistant superintendent … directly carries out duties that typically would be carried out by the superintendent. These duties fit closely with the statutory definition of "school officer" as contemplated by Education Law § 2(13).

Moreover, as set forth in the Education Law, the role of assistant superintendent is generally created directly by an elected board of education, such as the defendant's Board of Education. Specifically, Education Law § 2503(5), applicable to the defendant herein, grants the Board of Education the ability to "create, abolish, maintain and consolidate such positions . . . as, in its judgment, may be necessary for the proper and efficient administration of its work" and "shall appoint properly qualified persons to fills such positions, including a superintendent of schools" and "such associate, assistant and other superintendents . . . as said board shall determine necessary for the efficient management of the schools." Here, the defendant, in accordance with the relevant provisions of the Education Law, has given … the assistant superintendent for curriculum and instruction … authority and command to administer the affairs of the defendant and its superintendent as it pertains to the offering of the curriculum to the student body and the instruction of each student. It is evident that [the assistant superintendent], in this role, reports directly to the superintendent of schools and the Board of Education and is charged with administering functions that otherwise would be tasked to the Board of Education and/or the superintendent of schools. Aideyan v Mount Vernon City Sch. Dist., 2025 NY Slip Op 03787, Second Dept 6-25-25

Practice Point: Consult this decision if you need to know who is authorized to accept service on behalf of a school district.

June 25, 2025

SERVICE OF PROCESS, HEARING TO DETERMINE VALIDITY OF SERVICE, JUDGES.

HERE THE FIRST "NAIL AND MAIL" AFFIDAVIT BY THE PROCESS SERVER FAILED TO DEMONSTRATE THE REQUIRED MAILING; A SECOND AFFIDAVIT WAS SUBMITTED WHICH DESCRIBED THE MAILING; THE SECOND AFFIDAVIT DID NOT CURE THE DEFECT IN THE ORIGINAL AFFIDAVIT; THEREFORE A HEARING ON THE VALIDITY OF THE SERVICE OF PROCESS WAS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing was required on whether defendant was properly served by "nail and mail." The first affidavit from the process server did not mention the required mailing. A second affidavit which described the mailing was subsequently submitted. The second affidavit did not cure the flaw in the original affidavit:

… Supreme Court erred in determining the defendant's cross-motion, inter alia, to vacate the judgment and to dismiss the complaint for lack of personal jurisdiction without first conducting a hearing to determine the validity of service of process. The original affidavit of service sworn to on July 26, 2018, failed to aver that the process server mailed the summons and complaint as required by CPLR 308(4). The new affidavit of service sworn to on November 23, 2021, submitted by the plaintiff in opposition to the defendant's cross-motion, could not be used to cure the apparent defect in the original affidavit of service … . Further, the defendant raised an issue of fact as to whether the summons and complaint were affixed to the door of the defendant's dwelling place or usual place of abode … . Miller v Fuentes, 2025 NY Slip Op 03564, Second Dept 6-11-25

Practice Point: If the original affidavit by the process server does not describe the mailing requirement for "nail and mail" service, that flaw is not cured by submitting a second affidavit which describes the mailing. The flaw in the original affidavit mandates a hearing on the validity of the service of process.

June 11, 2025

SLAPP STATUTE, CIVIL RIGHTS LAW, DEFAMATION.

PLAINTIFF STATED A CAUSE OF ACTION FOR DEFAMATION PER SE (DEFENDANT ALLEGEDLY STATED PLAINTIFF ENGAGED IN MONEY LAUNDERING); ALTHOUGH DEFENDANT DEMONSTRATED THE ACTION INVOLVED "PUBLIC PETITION AND PARTICIPATION" WITHIN THE MEANING OF THE SLAPP STATUTE, PLAINTIFF DEMONSTRATED THE DEFAMATION ACTION HAD A SUBSTANTIAL BASIS IN LAW; THEREFORE THE SLAPP STATUTE SHOULD NOT HAVE BEEN APPLIED TO DISMISS THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action for defamation and defendant was not entitled to dismissal of the complaint pursuant to the SLAPP statute (strategic lawsuit against public participation—Civil Rights Law section 70-a(1)(a)). Plaintiff operated a marina under a 60-year lease from the National Park Service, a US governmental agency. Defendant allegedly told plaintiff's customer that plaintiff was engaged in money-laundering:

… [D]efendant satisfied his initial burden of establishing that this action is an action involving public petition and participation, since it involves a claim based upon "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (id. § 76-a[1][a][2]). * * * … [T]he defendant established that the causes of action were asserted in connection with an issue of public interest, as the defendant allegedly accused an entity operating with the authority of a governmental agency of criminal conduct … .

Since the defendant established that this action constitutes an action involving public petition and participation, the burden shifted to the plaintiff to demonstrate that the causes of action had a substantial basis in law … .

… [T]he defendant's alleged statement that the plaintiff "is engaged in money laundering" did not constitute pure nonactionable opinion … . * * * …[T]he complaint alleged that the defendant acted with "actual malice" or reckless disregard as to whether the statements were true or false … . … [T]he complaint

was not required to allege special damages, since it asserted a cause of action alleging defamation per se based upon allegations that the defendant made statements charging the plaintiff with a serious crime or tending to injure it in its trade, business, or profession … . Thus, the plaintiff established that the cause of action alleging defamation per se had a substantial basis in law … . Moonbeam Gateway Mar., LLC v Tai Chan, 2025 NY Slip Op 03802, Second Dept 6-25-25

Practice Point: The motion court dismissed the defamation action on the ground it was precluded by the SLAPP statute. However the Second Department held that plaintiff had demonstrated the defamation action had a substantial basis in law. Therefore defendant did not demonstrate entitlement to dismissal under the SLAPP statute.

June 25, 2025

STATUTE OF LIMITATIONS, CORPORATION LAW, FIDUCIARY DUTY.

THE STATUTE OF LIMITATIONS FOR BREACH OF FIDUCIARY DUTY BEGINS TO RUN WHEN THERE HAS BEEN AN OPEN REPUDIATION OF FIDUCIARY OBLIGATIONS; HERE THERE HAS NOT BEEN SUCH AN OPEN REPUDIATION; THE STATUTE NEVER BEGAN TO RUN AND THE MOTION TO DISMISS THE SHAREHOLDER DERIVATIVE ACTION AS UNTIMELY SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that this shareholder derivative action, which alleged breach of fiduciary duty, should not have been dismissed as time barred. Open repudiation of the the fiduciary obligation, which triggers the running of the statute of limitations, never occurred:

To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" … . "[C]laims alleging a breach of fiduciary duty do not accrue until there is either an open repudiation of the fiduciary obligation or a judicial settlement of the account" … . This is so because, "absent either repudiation or

removal, the aggrieved part[y] [is] entitled to assume that the fiduciary would perform his or her fiduciary responsibilities" … . "The party asserting the statute of limitations defense bears the burden of proof on the issue" … . "Open repudiation requires proof of a repudiation by the fiduciary which is clear and made known to the beneficiaries" … . "Where there is any doubt on the record as to the conclusive applicability of a [s]tatute of [l]imitations defense, the motion to dismiss the proceeding should be denied, and the proceeding should go forward" … .

Here, defendants did not proffer, or even assert, that they have openly repudiated their obligations as fiduciaries or that the relationship has otherwise terminated. Lambos v Karabinis, 2025 NY Slip Op 03367, Third Dept 6-5-25

Practice Point: Here there was never an open repudiation of fiduciary obligations so the statute of limitations on the breach-of-fiduciary-duty cause of action never began to run.

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