NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
July 28 - 31, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 28 – 31, 2025, and Posted on the New York Appellate Digest Website on Monday, August 4, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Contents

CIVIL PROCEDURE, DENTAL MALPRACTICE. 3

IF THE STATUTE OF LIMITATIONS RUNS OUT ON A SATURDAY, PLAINTIFF HAS UNTIL THE FOLLOWING MONDAY TO COMMENCE THE ACTION (SECOND DEPT). 3

CIVIL PROCEDURE, EVIDENCE, JUDGES, ATTORNEYS. 4

THE JUDGE SHOULD NOT HAVE ISSUED A PROTECTIVE ORDER REQUIRING PLAINTIFFS' COUNSEL TO INFORM DEFENDANTS' FORMER EMPLOYEES THAT COUNSEL'S INTERESTS ARE ADVERSE TO THEIRS AND TO RECOMMEND THE FORMER EMPLOYEES RETAIN COUNSEL BEFORE ANY DISCUSSION WITH PLAINTIFFS' COUNSEL (SECOND DEPT)..... 4

CRIMINAL LAW, EVIDENCE, APPEALS. 5

THE VICTIM OF THE ASSAULT AND ATTEMPTED ROBBERY COULD NOT IDENTIFY THE DEFENDANT; THE VIDEO OF THE INCIDENT DIDN'T HELP; DEFENDANT WAS ARRESTED BECAUSE HE WAS DEPICTED IN SURVEILLANCE VIDEO NEAR THE SCENE WEARING DISTINCTIVE RIPPED AND PATCHED PANTS WHICH WERE NOT MENTIONED BY THE VICTIM OR DEPICTED IN THE INCIDENT VIDEO; THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE; INDICTMENT DISMISSED AFTER GUILTY PLEA (FIRST DEPT). 5

CRIMINAL LAW, JUDGES, APPEALS. 6

EVEN WHERE DEFENDANT PLED GUILTY AND WAIVED APPEAL WITH THE UNDERSTANDING HE WILL NOT BE AFFORDED YOUTHFUL OFFENDER STATUS A MOTION TO VACATE THE SENTENCE BASED ON THE JUDGE'S FAILURE TO CONSIDER YOUTHFUL OFFENDER STATUS IS AVAILABLE (SECOND DEPT). 6

FORECLOSURE, EVIDENCE. 7

IN THIS FORECLOSURE ACTION, THE REFEREE'S AFFIDAVIT DID NOT LAY A PROPER FOUNDATION FOR ALL THE DOCUMENTS RELIED UPON; THEREFORE THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT). 7

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR, EVIDENCE. 9

IN A FORECLOSURE CONTEXT, THE BANK, WHEN MOVING FOR A DEFICIENCY JUDGMENT, GETS TWO CHANCES TO DEMONSTRATE THE VALUE OF THE PROPERTY; IF THE FIRST SUBMISSION IS DEEMED INADEQUATE, THE BANK MUST BE ALLOWED TO TRY AGAIN (FIRST DEPT). 9

FORECLOSURE. 10

THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY; THE FORECLOSURE ACTION HERE IS THEREFORE TIME-BARRED (THIRD DEPT). 10

INSURANCE LAW, CONTRACT LAW. 11

THE EXCLUSIONARY PROVISIONS IN THIS FIRE INSURANCE POLICY WERE AMBIGUOUS AND MUST THEREFORE BE CONSTRUED AGAINST THE INSURER; PLAINTIFF IS ENTITLED TO COVERAGE FOR THE FIRE DAMAGE DESPITE THE UNAUTHORIZED OCCUPANTS (SECOND DEPT). 11

JUDGES, CIVIL PROCEDURE, CONSTITUTIONAL LAW. 12

CPLR 7003(1), WHICH REQUIRES A JUDGE TO FORFEIT $1000 FOR AN IMPROPER DENIAL OF HABEAS CORPUS RELIEF, IS UNCONSTITUTIONAL AS A VIOLATION OF THE COMPENSATION CLAUSE OF THE NYS CONSTITUTION AND AS A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE (SECOND DEPT). 12

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW. 13

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF WAS DEFENDANT'S EMPLOYEE SUCH THAT THE PROTECTIONS OF THE LABOR LAW APPLY IN THIS LADDER-FALL CASE; DEFENDANT AGREED TO FIX PLAINTIFF'S CAR IN RETURN FOR PLAINTIFF'S FIXING THE ROOF OF DEFENDANT'S REPAIR SHOP (SECOND DEPT). 13

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 15

HEARSAY STATEMENTS IN A MEDICAL RECORD ARE ADMISSIBLE IN A PERSONAL INJURY ACTION WHEN (1) THE STATEMENTS ARE GERMANE TO DIAGNOSIS AND TREATMENT AND (2) THE STATEMENTS CAN BE ATTRIBUTED TO THE PLAINTIFF (SECOND DEPT)..... 15

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 16

PLAINTIFF WAS TAKING DOWN A PLYWOOD FENCE WHEN A PIECE OF PLYWOOD FELL AND STRUCK HIM ON THE HEAD; PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF THE INCIDENT WAS ELEVATION-RELATED; HIS MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT)..... 16

ZONING, MUNICIPAL LAW, APPEALS, CIVIL PROCEDURE..... 17

THE ZONING BOARD'S DENIAL OF A STREET FRONTAGE VARIANCE WAS NOT SUPPORTED BY SPECIFIC FACTUAL FINDINGS MAKING COURT-REVIEW IMPOSSIBLE; MATTER REMITTED TO THE BOARD (SECOND DEPT)..... 17

ZONING, TOWN LAW, MUNICIPAL LAW. 18

THE DENIAL OF AN AREA VARIANCE FOR A GARAGE WHICH WAS BELOW THE MAXIMUM HEIGHT BUT WAS FOUR FEET HIGHER THAN THE RESIDENCE WAS DEEMED "IRRATIONAL" (THIRD DEPT). 18

CIVIL PROCEDURE, DENTAL MALPRACTICE.

IF THE STATUTE OF LIMITATIONS RUNS OUT ON A SATURDAY, PLAINTIFF HAS UNTIL THE FOLLOWING MONDAY TO COMMENCE THE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dental malpractice action was timely commenced. The last day of the statute of limitations fell on a Saturday and General Construction Law section 25-a (1) provided an extension until the following Monday:

General Construction Law § 25-a(1) provides that when the period of time within which an act is required to be done ends on a Saturday, the act may be done on the next succeeding business day. A dental malpractice action must be commenced "within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214-a). In support of their motion, the defendants established that the plaintiff was last treated … on August 1, 2017. Although two years and six months from that date is February 1, 2020, we take judicial notice of the fact that February 1, 2020, was a Saturday … . Thus, pursuant to General Construction Law § 25-a(1), the plaintiff had until Monday, February 3, 2020, to commence this action … . As this action was commenced on February 2, 2020, it was timely commenced. Chen v New York Hotel Trades Counsel Health Ctr., Inc., 2025 NY Slip Op 04466, Second Dept 7-30-25

Practice Point: Pursuant to the General Construction Law, if the statute of limitations runs out on a Saturday the action can be timely commenced on the following Monday.

July 30, 2025

CIVIL PROCEDURE, EVIDENCE, JUDGES, ATTORNEYS.

THE JUDGE SHOULD NOT HAVE ISSUED A PROTECTIVE ORDER REQUIRING PLAINTIFFS' COUNSEL TO INFORM DEFENDANTS' FORMER EMPLOYEES THAT COUNSEL'S INTERESTS ARE ADVERSE TO THEIRS AND TO RECOMMEND THE FORMER EMPLOYEES RETAIN COUNSEL BEFORE ANY DISCUSSION WITH PLAINTIFFS' COUNSEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this action alleging sexual abuse of the plaintiffs in the steam rooms of defendants' fitness clubs should not have issued a protective order concerning interviews of defendants' former employees by plaintiffs' counsel. The order precluded plaintiffs' counsel from communicating with any former employees without advising them that their interests are, or are reasonably likely to become, adverse to counsel's interests and recommending that the former employees retain counsel before continuing the discussion:

Supreme Court improvidently exercised its discretion in granting that branch of the defendants' motion which was pursuant to CPLR 3103 for an order precluding the plaintiffs' counsel from communicating with any former employees of Equinox without advising them that their interests are, or are reasonably likely to become, adverse to counsel's clients' interests and recommending that the former employees retain counsel before continuing the discussion. The defendants failed to make the requisite showing pursuant to CPLR 3103(a) to warrant the issuance of a protective order … . The defendants' allegations of prejudice in the absence of a protective order were both conclusory and speculative … . G.B. v Equinox Holdings, Inc., 2025 NY Slip Op 04452, Second Dept 7-30-25

Practice Point: Here a protective order restricting communications between plaintiffs' counsel and defendants' former employees was reversed because the need for the order was not adequately demonstrated by conclusory and speculative allegations.

July 30, 2025

CRIMINAL LAW, EVIDENCE, APPEALS.

THE VICTIM OF THE ASSAULT AND ATTEMPTED ROBBERY COULD NOT IDENTIFY THE DEFENDANT; THE VIDEO OF THE INCIDENT DIDN'T HELP; DEFENDANT WAS ARRESTED BECAUSE HE WAS DEPICTED IN SURVEILLANCE VIDEO NEAR THE SCENE WEARING DISTINCTIVE RIPPED AND PATCHED PANTS WHICH WERE NOT MENTIONED BY THE VICTIM OR DEPICTED IN THE INCIDENT VIDEO; THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE; INDICTMENT DISMISSED AFTER GUILTY PLEA (FIRST DEPT).

The First Department, reversing defendant's conviction by guilty plea and dismissing the indictment, in a full-fledged opinion by Justice Manzanet-Daniels, determined defendant was arrested in the absence of probable cause requiring suppression of seized evidence and defendant's statements. Several arguments raised by the People on appeal were not considered because the arguments were not made below. Defendant was accused of assault and attempted robbery of a woman on the street.. The woman was unable to describe the assailant. Video of the incident did not help. Video near the scene depicted a man with distinctive ripped and patched pants, which led to the arrest of the defendant 10 days later. But there was no evidence the assailant was wearing the distinctive pants:

The detective obtained clearer video that depicted a male individual in distinctive ripped and patched pants near the scene and heading northbound, but that video did not capture the attack (nor any other incriminating behavior, for that matter). The detective concluded that the man in the distinctive pants was the perpetrator, apparently due to temporal and geographical proximity. Notably, when shown stills from the footage, the victim was still unable to recognize defendant as her assailant. The detective did not recollect the complainant stating that her assailant fled northbound; rather, the detective surmised the same from the surveillance videos. * * *

Because DHS arrested defendant without probable cause, all evidence flowing from the arrest, including defendant's statements and the contents of the shoe box,

was unlawfully obtained and must be suppressed … . The People are not entitled to a remand for further suppression proceedings, as they "had a full opportunity to present their case at the original hearing" and refrained from submitting alternative theories for denying suppression … .

Dismissal of the indictment is the appropriate remedy in this case. The People's remaining evidence — namely, the surveillance videos showing the suspect in the area before and after the attack and Detective Hostetter's "confirmatory" identification of defendant at the shelter — is not sufficient to establish a prima facie case if the People were to try defendant upon remand. The complainant could not provide a description of her assailant, the assailant is unidentifiable in the videos showing the attack, and defendant's now-suppressed statements and pants were the only evidence connecting him to the crime scene … . People v Williams, 2025 NY Slip Op 04526, First Dept 7-31-25

Practice Point: Here defendant pled guilty but the indictment was dismissed because his arrest was not supported by probable cause.

Practice Point: If the People were given a full opportunity to present available evidence and to make legal arguments at the motion stage, evidence not presented and arguments not made there will not be considered on appeal.

July 31, 2025

CRIMINAL LAW, JUDGES, APPEALS.

EVEN WHERE DEFENDANT PLED GUILTY AND WAIVED APPEAL WITH THE UNDERSTANDING HE WILL NOT BE AFFORDED YOUTHFUL OFFENDER STATUS A MOTION TO VACATE THE SENTENCE BASED ON THE JUDGE'S FAILURE TO CONSIDER YOUTHFUL OFFENDER STATUS IS AVAILABLE (SECOND DEPT).

The Second Department, reversing Supreme Court and vacating defendant's sentence, in a full-fledged opinion by Justice Wan, determined the sentencing judge's failure to consider defendant's youthful offender status can be raised in a motion to vacate the sentence, despite the failure to appeal the conviction on that

ground. Here defendant pled guilty and waived appeal with the understanding that he would not be afforded youthful offender status:

In this appeal, we must consider whether a defendant who has failed to take a direct appeal from a judgment of conviction and sentence may, in the first instance, seek to set aside his or her sentence pursuant to CPL 440.20 on the ground that the Supreme Court failed to make a determination as to whether the defendant was eligible for youthful offender treatment. We hold that, under such circumstances, a defendant may seek to set aside his or her sentence pursuant to CPL 440.20. * * *

Here, as the People conceded in opposition to the defendant's motion, the defendant was an "eligible youth" (see CPL 720.10). However, despite the defendant's status as an "eligible youth," the Supreme Court failed to make the required youthful offender determination at the sentencing proceeding. Since the court was required to make this determination on the record at sentencing, the court's failure to follow this statutorily-mandated procedure rendered the defendant's sentence invalid as a matter of law (see id. § 440.20[1] …). People v Steele, 2025 NY Slip Op 04494, Second Dept 7-30-25

Practice Point: Even where a defendant pleads guilty with the understanding he will not be afforded youthful offender status and waives appeal, the sentencing judge must consider affording defendant youthful offender status. The failure to appeal the conviction is not a bar to a motion to vacate the sentence on this ground.

July 30, 2025

FORECLOSURE, EVIDENCE.

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

The Second Department, reversing Supreme Court, determined a proper foundation was not laid for the documents supporting the referee's report:

In computing the amount due, the referee relied upon an affidavit of merit from an authorized signer of PNC Bank, National Association (hereinafter PNC). Although the referee stated in his report that PNC was the plaintiff's servicer, the documents in the record indicate that the plaintiff and PNC merged into one entity. Although the authorized signer stated in her affidavit that she was personally familiar with the record-keeping practices and procedures of PNC, her employer, she did not state that "she was personally familiar with the record-keeping practices and procedures" of the plaintiff … or that the records of any other entity, such as the plaintiff or a prior loan servicer, "were provided to [PNC] and incorporated into [PNC's] own records, that [PNC] routinely relied upon such records in its business, or that she had personal knowledge of business practices and procedures of any other relevant entity" … . Consequently, the affidavit did not provide a proper foundation for the business records allegedly submitted with the affidavit. Further, although business records are included in the record, the referee stated that the documents submitted by the plaintiff were the authorized signer's affidavit "and annexed exhibit: copies of Mortgage and Note," and the referee did not refer to the business records. National City Mtge. Co. v Wercberger, 2025 NY Slip Op 04488, Second Dept 7-30-25

Practice Point: Consult this decision for an example of common flaws in the evidentiary foundation for documents submitted in support of a referee's report in a foreclosure proceeding.

July 30, 2025

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR, EVIDENCE.

IN A FORECLOSURE CONTEXT, THE BANK, WHEN MOVING FOR A DEFICIENCY JUDGMENT, GETS TWO CHANCES TO DEMONSTRATE THE VALUE OF THE PROPERTY; IF THE FIRST SUBMISSION IS DEEMED INADEQUATE, THE BANK MUST BE ALLOWED TO TRY AGAIN (FIRST DEPT).

The First Department, reversing Supreme Court, determined the bank in this foreclosure action should have been given a second opportunity to present evidence of the value of the property for purposes of a deficiency judgment:

A lender in a foreclosure action moving for a deficiency judgment "bears the initial burden of demonstrating, prima facie, the property's fair market value as of the date of the auction sale" … . Upon a lender's motion for a deficiency judgment, RPAPL 1371(2) provides, in part: "the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment."

The Court of Appeals has interpreted this provision as "a directive that a court must determine the mortgaged property's 'fair and reasonable market value' when a motion for a deficiency judgment is made. As such, when the court deems the lender's proof insufficient in the first instance, it must give the lender an additional opportunity to submit sufficient proof, so as to enable the court to make a proper fair market value determination" … . Valley Natl. Bank v 252 W. 31 St. Corp., 2025 NY Slip Op 04528, First Dept 7-31-25

Practice Point: In a foreclosure action, if the bank is seeking a deficiency judgment it gets two shots at proving the value of the property.

July 31, 2025

FORECLOSURE.

THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY; THE FORECLOSURE ACTION HERE IS THEREFORE TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, reiterated that the Foreclosure Abuse Prevention Act (FAPA) applies retroactively. Here the foreclosure action was deemed time-barred because the bank's attempt to stop the running of the statute of limitations by de-accelerating the debt was precluded by FAPA:

… [T]his action is time-barred, and must be dismissed. "[T]he six-year statute of limitations applicable to a foreclosure action begins to run when a mortgage debt has been accelerated by the commencement of an action seeking the entire sum due" … . The first action was commenced in 2007, and such commencement accelerated the loan and called due the entire outstanding balance; thus, the six-year statute of limitations began to run at that time. Pursuant to FAPA, enacted during the pendency of this action, the parties' 2012 stipulation discontinuing the first action, by itself, did not reset the statute of limitations, which expired in 2013 (see CPLR 3217 [e] …). Plaintiff did not commence this action until 2019, well after expiration of the statute of limitations … . Thus, defendant demonstrated prima facie that this action, which is based upon the same mortgage debt as the first action, is time-barred (see CPLR 213 [4]). In opposition to defendant's showing, plaintiff failed to raise a triable issue of fact, and Supreme Court should have dismissed the foreclosure action … .

We have recently addressed plaintiff's position that FAPA does not apply retroactively, and we again reject it. U.S. Bank N.A. v Craft, 2025 NY Slip Op 04510, Third Dept 7-31-25

Practice Point: This decision demonstrates how the Foreclosure Abuse Prevention Act (FAPA) can be applied retroactively to render a foreclosure action time-barred.

July 31, 2025

INSURANCE LAW, CONTRACT LAW.

THE EXCLUSIONARY PROVISIONS IN THIS FIRE INSURANCE POLICY WERE AMBIGUOUS AND MUST THEREFORE BE CONSTRUED AGAINST THE INSURER; PLAINTIFF IS ENTITLED TO COVERAGE FOR THE FIRE DAMAGE DESPITE THE UNAUTHORIZED OCCUPANTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the exclusionary provisions of the fire insurance policy were ambiguous and therefore must be construed in favor of the insured. At the time of the fire unauthorized occupants were living in the building and the insurer disclaimed coverage on that ground:

Here, the disputed exclusionary provisions read as follows:

"C. We do not cover loss resulting directly or indirectly:

Vacancy or Occupancy

1. While a described building, whether intended for occupancy . . . is vacant or unoccupied beyond a period of sixty (60) consecutive days.

Increase in Hazard

2. While the hazard is increased by any means within the control or knowledge of the insured."

Construed in the context of the contract as a whole, the plain and ordinary meaning of these exclusionary provisions is not apparent. The exclusionary provisions at issue are listed in the supplemental special provisions that modified the original dwelling insurance policy. The contract provides for certain general exclusions in parts A and B, and thereafter included the above referenced supplemental general exclusions as part C. Part A provides that, "[w]e do not insure for loss caused directly or indirectly by any of the following" … , and lists conditions or events that could damage the insured premises, including, for example, earth movement, water damage, and power failure. Part C, as referenced above, does not contain any language after "directly or indirectly." Thus, it is not clear whether the "vacancy or occupancy" or "increase in hazard" must cause the loss or whether the condition

must simply exist at the time of the loss. Because the exclusionary provisions are ambiguous, and any ambiguity is construed against the insurer in favor of the insured, the plaintiff has established her prima facie entitlement to coverage … . Eubanks v New York Prop. Ins. Underwriting Assn., 2025 NY Slip Op 04460, Second Dept 7-30-25

Practice Point: At the time of the fire the building was inhabited by "unauthorized occupants" and coverage was disclaimed. However, the exclusionary provisions of the policy were ambiguous. The ambiguity must be construed in favor of the insured. Therefore the disclaimer constituted a breach of contract.

July 30, 2025

JUDGES, CIVIL PROCEDURE, CONSTITUTIONAL LAW.

CPLR 7003(1), WHICH REQUIRES A JUDGE TO FORFEIT $1000 FOR AN IMPROPER DENIAL OF HABEAS CORPUS RELIEF, IS UNCONSTITUTIONAL AS A VIOLATION OF THE COMPENSATION CLAUSE OF THE NYS CONSTITUTION AND AS A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE (SECOND DEPT).

The Second Department, in a comprehensive full-fledged opinion by Justice Golia, in a matter of first impression, determined CPLR 7003(1), which requires a judge to forfeit $1000 when a petitioner's request for habeas corpus relief is improperly denied, is unconstitutional. The statute violates the Compensation Clause of the NYS Constitution and the separation of powers doctrine:

… [W]hile CPLR 7003(c) is not a direct diminution of judicial compensation, the language of that provision explicitly "targets judges for disadvantageous treatment," as it provides that a $1,000 forfeiture be paid personally by a judge who does not issue a writ of habeas corpus where one should have been issued … . CPLR 7003(c) is, thus, an indirect diminution of the salary of judges within the meaning of the Compensation Clause of the New York State Constitution. Accordingly, the Supreme Court properly determined that "[b]y its nature, CPLR 7003(c) singles out judges for financially adverse treatment because of their

exercise of their judicial functions and does so in a manner that discriminates based on how they decide an application for a writ. To impose a forfeiture on a judge based on which way they decide an application undermines the core objective of the [C]ompensation [C]lause of protecting judicial independence." * * *

By imposing a penalty on a judge who refuses a petitioner's request for habeas corpus [*14]relief where such relief should have been issued, the Legislature, through CPLR 7003(c), is interfering with judicial functions by incentivizing one specific outcome, namely, issuance of the writ, because a judge only faces a penalty if he or she refuses to issue a writ. Such influence is impermissible, as "'the mere existence of the power to interfere with or to influence the exercise of judicial functions contravenes the fundamental principles of separation of powers embodied in our State constitution and cannot be sustained'" … . Poltorak v Clarke, 2025 NY Slip Op 04496, Second Dept 7-30-25

Practice Point: CPLR 7003(1) requires a judge to forfeit $1000 for an improper denial of habeas corpus relief. The statute violates the Compensation Clause of the NYS Constitution and the separation of powers doctrine.

July 30, 2025

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF WAS DEFENDANT'S EMPLOYEE SUCH THAT THE PROTECTIONS OF THE LABOR LAW APPLY IN THIS LADDER-FALL CASE; DEFENDANT AGREED TO FIX PLAINTIFF'S CAR IN RETURN FOR PLAINTIFF'S FIXING THE ROOF OF DEFENDANT'S REPAIR SHOP (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether the relationship between defendant Houghtaling and plaintiff was an "employment" relationship such that the Labor Law applies to plaintiff's fall from a ladder. Houghtaling agreed to repair plaintiff's car in return for plaintiff's seal-coating the roof of defendant's automotive repair ship. Houghtaling argued plaintiff was a "volunteer," not an employee:

… [T]he defendants failed to eliminate triable issues of fact as to whether the plaintiff was a hired worker entitled to the protections of the Labor Law. Houghtaling, who owned and operated the repair shop, testified at his deposition that a friend of the plaintiff had approached him about helping the plaintiff, who was "down and out," by fixing the plaintiff's car. Houghtaling responded that the plaintiff should bring in his car and that he would "do the best that [he] c[ould], like [he did] for everybody." When the plaintiff came in, Houghtaling told him that the repairs would cost $900. The plaintiff asked what he could do for Houghtaling "in return." According to Houghtaling, the roof of the shop had been leaking for five years and he had intended to fix the roof himself. Houghtaling told the plaintiff that he could seal coat the roof of the shop. Houghtaling performed the repairs on the plaintiff's car at no charge, and the following weekend, the plaintiff began the work on the roof.

Under these circumstances, triable issues of fact remain as to whether the arrangement between the plaintiff and Houghtaling bore "the traditional hallmarks of an employment relationship" … , including a "mutual obligation . . . revealing an economic motivation for completing the task" and the employer's right to decide "whether the task undertaken by the employee has been completed satisfactorily" … . Zampko v Houghtaling, 2025 NY Slip Op 04507, Second Dept 7-30-25

Practice Point: The protections of the Labor Law apply where there is a employment relationship between plaintiff and defendant. Here defendant agreed to fix plaintiff's car in return for plaintiff's repairing the repair shop's roof. Plaintiff fell from a ladder when working on the roof. There was a question of fact whether the agreement created an employment relationship entitling plaintiff to the Labor Law protections.

July 30, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

HEARSAY STATEMENTS IN A MEDICAL RECORD ARE ADMISSIBLE IN A PERSONAL INJURY ACTION WHEN (1) THE STATEMENTS ARE GERMANE TO DIAGNOSIS AND TREATMENT AND (2) THE STATEMENTS CAN BE ATTRIBUTED TO THE PLAINTIFF (SECOND DEPT).

The Second Department, affirming the denial of plaintiff's summary judgment motion, in a full-fledged opinion by Justice Connolly, determined that hearsay statements attributed to plaintiff in a medical record were admissible and created a question fact in this Labor Law 240(1) ladder-fall case. Plaintiff alleged he was knocked off an A-frame ladder by a piece of sheetrock. However, the medical record indicated he was on a ladder lifting sheetrock when he felt a pull in his lower back and shoulder. The opinion is comprehensive and offers guidance to the admissibility of hearsay statements in a medical record:

The first page of the Precision Pain medical records contains, among other things, the following statement: "Accident: Patient was on a ladder, was picking up heavy [sheetrock] and felt a pull on his lower back and R shoulder." On the third and fourth pages, the following three statements appear: "Incident patient described the competent medical cause of this injury? YES. "Are the patient's complaints consistent with his/her history of injury? YES. "Is the patient's history of the injury consistent with my objective findings? YES." * * *

Because we find that the challenged statement was germane to medical diagnosis and treatment, we conclude that it was part of Khaimov's [the doctor's] regular business practice to record the challenged statement.

Nevertheless, this conclusion "satisfies only half the test" … . Each participant in the chain producing the challenged statement in the Precision Pain medical records, "from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" … . Firsthand accounts from the patient to the medical provider are presumptively reliable, as the patient has a clear motivation to report accurately … . However, "where the source of the information on the hospital or doctor's record is unknown, the record is inadmissible" … . * * *

Considering both the plaintiff's deposition testimony and the statements on the third and fourth pages of the Precision Pain medical records, [defendant] sufficiently established that the plaintiff was the source of the information in the challenged statement … . Pillco v 160 Dikeman St., LLC, 2025 NY Slip Op 04495, Second Dept 7-30-25

Practice Point: Consult this opinion for a comprehensive discussion of the two-prong test for the admissibility of hearsay statements in a medical record.

July 30, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS TAKING DOWN A PLYWOOD FENCE WHEN A PIECE OF PLYWOOD FELL AND STRUCK HIM ON THE HEAD; PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF THE INCIDENT WAS ELEVATION-RELATED; HIS MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was not entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff was tasked with taking down a plywood fence when a piece of plywood struck his head. The Second Department held that plaintiff did not present sufficient evidence demonstrating the incident was elevation-related:

With respect to "falling object" cases, "Labor Law § 240(1) applies where the falling of an object is related to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured" … . A plaintiff "must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for purposes of the undertaking" … .

Here, the plaintiff failed to eliminate all triable issues of fact as to whether the accident was the result of an elevation-related hazard or gravity-related risk encompassed by Labor Law § 240(1) … . The plaintiff failed to establish his height or the height and weight of the plywood sheet that struck him … . Further, the

plaintiff failed to eliminate triable issues of fact as to how the accident occurred and whether, under the circumstances of this case, this was a situation where a securing device of the kind enumerated in Labor Law § 240(1) would have been necessary or even expected … . Joya v E 31 Partners, LLC, 2025 NY Slip Op 04461, Second Dept 7-30-25

Practice Point: Here plaintiff was taking down a plywood fence when a piece of plywood "fell" and struck him on the head. The Second Department held plaintiff did not present sufficient evidence to demonstrate the accident was "elevation-related." Therefore he was not entitled to summary judgment. Before moving for summary judgment consult the statutory requirements for a violation of Labor Law 240(1).

July 30, 2025

ZONING, MUNICIPAL LAW, APPEALS, CIVIL PROCEDURE.

THE ZONING BOARD'S DENIAL OF A STREET FRONTAGE VARIANCE WAS NOT SUPPORTED BY SPECIFIC FACTUAL FINDINGS MAKING COURT-REVIEW IMPOSSIBLE; MATTER REMITTED TO THE BOARD (SECOND DEPT).

The Second Department, reversing Supreme Court and remitting the matter to the town Zoning Board of Appeals, determined the Board must set forth its reasons for denying a variance. Without specific factual support for the denial in the record, court review is impossible:

… [T]he Board failed to sufficiently set forth the specific factual support in the record, or the specific findings, upon which it relied in denying the requested street frontage variance … . Although at the hearing, certain Board members put on the record their individual grounds for denying a street frontage variance, the Board granted the request for an area variance for the same proposed lot, approving the three-lot subdivision. Thus, the record contains inconsistencies between the written determination and the hearing transcript with respect to the grounds for the Board's determination.

When the Supreme Court, in effect, affirmed the Board's denial of a street frontage variance, the court improperly "surmised or speculated as to how or why the board reached its determination" … . Accordingly, absent adequate grounds to support the challenged determination, the judgment must be reversed and the matter remitted to the Board so that it may set forth factual findings in proper form … . Matter of Mancuso v Zoning Bd. of Appeals of the Town of Mount Pleasant, 2025 NY Slip Op 04479, Second Dept 7-30-25

Practice Point: A Zoning Board of Appeals must support its ruling with a specific factual record to allow court review. If the record does not support the ruling, the court is forced to speculate. Here the matter was remitted to the Board to make factual findings.

July 30, 2025

ZONING, TOWN LAW, MUNICIPAL LAW.

THE DENIAL OF AN AREA VARIANCE FOR A GARAGE WHICH WAS BELOW THE MAXIMUM HEIGHT BUT WAS FOUR FEET HIGHER THAN THE RESIDENCE WAS DEEMED "IRRATIONAL" (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the denial of petitioner's request for an area variance for a garage which was four feet higher than the residence was irrational:

The relevant question presented by petitioner's application was whether a four-foot area variance would be out of character with the surrounding neighborhood in an instance, as here, where both structures are under the maximum height limit for an accessory structure and the residence is far below the height limit for a dwelling. … Respondent did not explain why this height differential, in context, would prove detrimental to the neighboring community. * * *

As to "feasible" alternatives, the difficulty here is that the garage had already been constructed before petitioner consolidated the lots and applied for the variance. While this situation may fairly be characterized as self-created, * * * neither respondent nor Supreme Court accounted for the statutory qualifier that a self-

created problem, while relevant, "shall not necessarily preclude the granting of the area variance" (Town Law § 267-b [3] [b] [5]). Nor did respondent or Supreme Court address the clear benefit to petitioner of maintaining her garage, as compared to the prospect of having to remove the structure and the attendant financial loss … . Matter of Williams v Town of Lake Luzerne Zoning Bd. of Appeals, 2025 NY Slip Op 04509, Third Dept 7-31-25

July 31, 2025