NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
November 3 – 7, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts November 3 – 7, 2025, and Posted on the New York Appellate Digest Website on Monday, November 10, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CRIMINAL LALW, JUDGES, EVIDENCE, APPEALS.

THE "REFRAIN FROM GANG-RELATED ASSOCIATIONS" PROBATION CONDITIONS WERE STRUCK BECAUSE THERE WAS NO EVIDENCE DEFENDANT HAD ANY CONNECTION WITH GANGS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined a probation condition imposed by the court must be stricken because it was not shown to be related to "defendant's rehabilitative prospects:"

Defendant's challenges to two of his probation conditions as unrelated to his rehabilitation do not require preservation and survive his waiver of the right to appeal … . * * *

… [T]he probation condition requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" must be stricken, as there is no evidence that defendant's crime was connected to any gang activities or that he has any history of gang membership or gang … . Accordingly, this condition was not reasonably necessary to further defendant's rehabilitative prospects based on his background and proclivities …. . People v Holguin, 2025 NY Slip Op 06141, First Dept 11-6-25

Practice Point: Challenges to probation conditions need not be preserved for appeal and survive a waiver of appeal.

Practice Point: The appellate courts will strike probation conditions which are not demonstrated to be relevant to the defendant's offense. Two other decisions, not summarized here, were released this week in which the probation condition

requiring defendant to financially support dependents was struck because it was not shown to be relevant to defendant's rehabilitation for the charged offense. (People v Bonfante, 2025 NY Slip Op 06068, Second Dept 11-6-25; People v Larkin, 2025 NY Slip Op 06077, Second Dept 11-6-25)

November 6, 2025

EMPLOYMENT LAW, CORPORATION LAW, CONTRACT LAW.

PLAINTIFF RADIATION ONCOLOGIST, THE SOLE SHAREHOLDER IN PLANTIFF PROFESSIONAL SERVICE CORPORATION, WHICH PAID PLAINTIFF ONCOLOGIST'S SALARY, SUCCESSFULLY SUED THE HOSPITAL WHICH EMPLOYED HIM FOR BREACH OF CONTRACT; THE COURT, IN A MATTER OF FIRST IMPRESSION, HELD THAT PLAINTIFF'S SALARY WAS NOT A CORPORATE EXPENSE AND THEREFORE WAS RECOVERABLE AS LOST PROFITS IN THE BREACH OF CONTRACT ACTION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Fisher, determined plaintiff's salary, paid to hm as the sole shareholder in a professional service corporation, was not a corporate expense and therefore could be recoverable as damages for lost profits in this breach of contract action. Plaintiff, a radiation oncologist, successfully sued the hospital for breach of contract after the hospital terminated him. The instant dispute is about the available damages. In addition to ruling plaintiff could recover his lost salary from his professional service corporation as damages, the Third Department held defendant could present proof plaintiff mitigated his damages by finding employment, through another professional service corporation, with another hospital. The Third Department affirmed Supreme Court's rulings:

Plaintiffs commenced this action asserting causes of action for, among others, breach of contract, wrongful termination, libel and slander. Following the completion of disclosure and motion practice, a judgment was entered in favor of plaintiffs on the four remaining causes of action for breach of contract. A jury trial

on damages was scheduled, and the parties filed respective motions in limine disputing the method of calculating damages and whether evidence of]plaintiffs'] duty to mitigate the damages suffered from defendant's breach may be submitted to the jury. Such dispute essentially distills to whether the salary paid by a professional service corporation to its sole shareholder must be treated as an expense in calculating the lost profits, thus subtracting it from the corporation's profits and correspondingly reducing its damages. Supreme Court, in a pair of well-reasoned decisions, determined that [plaintiff's] salary as paid by [plaintiff professional service corporation] under the coverage agreement is not an expense and could be recoverable as damages for lost profits. Supreme Court further found that evidence of [plaintiffs'] efforts to mitigate the damages suffered from defendant's breach may be submitted to the jury, and whether or not [plaintiff's] postbreach earnings are income derived because of defendant's breach is a question to be resolved by the jury in determining damages. Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc., 2025 NY Slip Op 06112, Third Dept 11-6-25

Practice Point: Here, in a matter of first impression, the Third Department ruled that plaintiff oncologist, whose salary was paid by plaintiff professional service corporation in which plaintiff oncologist was the sole shareholder, could, in a breach of contract action, recover his lost salary as lost profits. In other words, in this situation, plaintiff's salary was not considered to be a corporate expense which must be deducted from lost profits when calculating damages for breach of contract.

November 6, 2025

ENVIRONMENTAL LAW, MUNICIPAL LAW, ZONING.

A NEW APPLICATION FOR APPROVAL OF CONSTRUCTION OF A STORAGE FACILITY SUBMITTED WHILE THE CHALLENGE TO A PRIOR APPLICATION WAS PENDING REQUIRED A NEW SITE PLAN REVIEW OR A WRITTEN DETERMINATION WAIVING A NEW REVIEW; MATTER REMITTED TO THE PLANNING BOARD (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the Planning Board, when faced with a new application for approval of construction of a storage facility while a challenge to the prior application was still pending, should have conducted a new site plan review or issued a written determination waiving a new site plan review. The matter was remitted to the Planning Board. In the initial application, the proposed building encroached on a residential zoning district. In the new application, the proposed building was entirely within the commercial zoning district:

… [I]t is evident from the application materials and the Planning Board minutes that the second application was meant to serve as a separate application for the purpose of bypassing the challenge still pending [*4]in Supreme Court on the first application.

The new application required the Planning Board to either conduct the site plan review process anew or issue a written determination waiving same, neither of which it did … . Instead, the Planning Board issued site plan approval with little discussion save for a brief question on the topic of parking and ascertaining the status of the proceeding in Supreme Court challenging the initial plan. Based upon this exceedingly limited discussion of the new plan and the utter failure to set forth a record-based elaboration for its decision to grant site plan approval, we cannot find that the Planning Board "identified the relevant areas of environmental concern, took [the requisite] hard look at them, and made a reasoned elaboration of the basis for its determination," as required by SEQRA [State Environmental Quality Review Act] … . Therefore, that part of the court's judgment dismissing the causes of action asserting SEQRA violations must be reversed, and that aspect of the petition seeking to annul the Planning Board's grant of site plan approval

granted. Matter of Bigelow v Town of Willsboro Planning Bd., 2025 NY Slip Op 06105, Third Dept 11-6-25

Practice Point: A new application to the the Planning Board for approval of construction which is designed to bypass a prior application for which a challenge is pending must either be reviewed anew by the Planning Board or the Board must issue a written determination waiving a new review. Neither was done here and the matter was remitted to the Planning Board.

November 6, 2025

LANDLORD-TENANT, REAL PROPERTY LAW, CIVIL PROCEDURE.

IN THIS EJECTMENT ACTION, DEFENDANT-TENANT'S "FAILURE TO STATE A CAUSE OF ACTION," "WAIVER," "CONSTRUCTIVE EVICTION," "BREACH OF COVENANT OF QUIET ENJOYMENT," "IMPROPER NOTICE OF DEFAULT," AND "TRESPASS" AFFIRMATIVE DEFENSES SHOULD NOT HAVE BEEN DISMISSED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined several affirmative defenses in this ejectment action should not have been dismissed. Plaintiff landlord sought to eject defendant tenant from a parking lot for nonpayment of rent. Defendant alleged, and plaintiff acknowledged, plaintiff had rented certain parking spaces to a third party. The Second Department held: (1) no motion lies to dismiss a "failure to state a cause of action" defense because plaintiff cannot test the sufficiency of its own claim; (2) the "waiver" defense should not have been dismissed based despite the "nonwaiver" provision in the lease; (3) the constructive eviction and breach of covenant of quiet enjoyment defenses were supported by plaintiff's renting spaces to a third party; (4) the 'improper notice of default" defense was supported by the plaintiff's failure to provide the notice called for by the lease; and (5) the "trespass" defense was supported by the rental of spaces to a third party:

CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "When

moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" … . "'On a motion pursuant to CPLR 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true'" … . "'Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed'" … . Diversified Bldg. Co., LLC v Nader Enters., LLC, 2025 NY Slip Op 06047, Second Dept 11-5-25

Practice Point: Consult this decision for insight into the criteria for dismissal of an affirmative defense and the elements of "waiver," "constructive eviction," "breach of covenant of quiet enjoyment," "Improper notice of default," and "trespass" affirmative defenses as alleged by defendant-tenant in this ejectment action brough by plaintiff-landlord.

November 5, 2025

MENTAL HYGIENE LAW, CIVIL PROCEDURE, JUDGES, APPEALS.

RESPONDENT THREATENED SELF HARM AND WAS TAKEN INTO CUSTODY PURSUANT TO THE MENTAL HYGIENE LAW; THE JUDGE DECLINED TO ISSUE A TEMPORARY "EXTREME RISK PROTECTION ORDER" (ERPO) AND SET THE MATTER DOWN FOR A HEARING; SUBSEQUENTLY THE JUDGE, SUA SPONTE, CANCELED THE HEARING AND DISMISSED THE PETITION, ACTIONS FOR WHICH THE JUDGE HAD NO AUTHORITY; MATTER REMITTED FOR A HEARING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the judge, who had declined to issue a temporary "extreme risk protection order" (ERPO) for respondent and had set the matter down for a hearing, did not have the authority to, sua sponte, cancel the hearing and dismiss the petition. After respondent had

threatened self harm he was taken into custody pursuant to the Mental Hygiene Law:

… [O]ne day prior to the scheduled hearing, Supreme Court, sua sponte, issued a decision canceling the hearing and dismissing the petition. As grounds for the dismissal, the court found that dismissal best served the interest of preserving judicial and law enforcement resources given respondent's inability to purchase a firearm due to the arrest pursuant to Mental Hygiene Law § 9.41, purported hospital admission pursuant to Mental Hygiene Law § 9.39 (a) and the lack of any indication that respondent owned any firearms in New York at the time of the proceeding. …

To begin, as the order on appeal was issued on a sua sponte basis, no appeal lies as of right (see CPLR 5701 [a] [2]). Nevertheless, "we treat the notice of appeal as a request for permission to appeal and grant the request" … .

… Supreme Court's sua sponte order dismissing the petition must be reversed. "[S]ua sponte dismissals are to be used sparingly and only when extraordinary circumstances exist to warrant them" … . Here, there is no indication that such extraordinary circumstances exist. The grounds relied upon by Supreme Court — that the relief that would be provided by an ERPO was "duplicative and an inefficient use of judicial and law enforcement resources" — to the extent that they could constitute meritorious grounds for dismissal, require that petitioner be given the opportunity to respond and object … . Moreover, CPLR 6343 (1) clearly mandates that if a temporary ERPO is denied, such as occurred here, the court hold a hearing, no later than 10 business days after the application for the ERPO is served on the respondent, to determine whether an ERPO should be issued. Supreme Court's sua sponte dismissal on grounds that are entirely absent from the statute was improper, and we therefore reverse and remit to conduct a hearing as required. Matter of Hogencamp v Matthew KK., 2025 NY Slip Op 06106, Third Dept 11-6-25

Practice Point: Sua sponte orders are not appealable as of right. Permission to appeal must be requested.

Practice Point: Here the respondent threatened self harm and was taken into custody pursuant to the Mental Hygiene Law. A judge's authority is constrained by

the Mental Hygiene Law. Once an "extreme risk protection order" (ERPO) is denied by the judge and the matter is set down for a hearing, the judge cannot, sua sponte, cancel the hearing and deny the petition for reasons not prescribed in the Mental Hygiene Law.

November 6, 2025

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

7/8 INCH HEIGHT DIFFERENTIAL BETWEEN THE FLOOR AND DOORWAY THRESHOLD WAS DEEMED TRIVIAL AS A MATTER OF LAW IN THIS SLIP AND FALL CASE; THE NYC BUILDING CODE, WHICH REQUIRES A HEIGHT DIFFERENTIAL OF NO MORE THAN 1/2 INCH, DID NOT APPLY TO THE HOME PURCHASED IN 1980 (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the 7/8 height-differential between the floor and the threshold was trivial as a matter of law in thus slip and fall case. The court noted that the NYC Building Code, which requires a height-differential of no more than 1/2 inch did not apply to the home which was purchased in 1980:

The 7/8-inch height differential between defendant's kitchen tile floor and the door saddle is readily discernible from the photographs authenticated by plaintiff, and the alleged defect had none of the characteristics of a trap or snare … . Plaintiff's deposition testimony established that she was not distracted and could see the door saddle before the accident. Plaintiff had repeatedly walked over the saddle in the days leading up to her accident and had noticed the raised condition of the door saddle … . Defendant was not required to provide an expert's affidavit to make a prima facie showing that the height differential was trivial … . * * *

"Existing buildings are generally exempt from the provisions of the current [New York City Building Code] unless there is substantial renovation or change in use" … . Defendant testified that the linoleum flooring adjacent to the door saddle was changed to tile in the "late" 1990s. However, plaintiff's professional engineer made no showing that changing the flooring constituted a substantial renovation or

change in use causing the 2008, 2010, and 2022 Building Codes to apply. Mejias v Basch, 2025 NY Slip Op 06137, First Dept 11-6-25

Practice Point: Here a 7/8 inch height differential between the floor and a doorway threshold was deemed trivial as a matter of law and the slip and fall case was dismissed. The Building Code, which requires a height differential of no more than 1/2 inch, did not apply because the home was purchased before that building code provision was enacted.

November 6, 2025