NEW YORK APPELLATE DIGEST, INC.

Civil Procedure
Reversal Report
November 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in November, 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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AFFIRMATIVE DEFENSES, LANDLORD-TENANT, CONTRACT LAW, REAL PROPERTY LAW.

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

APPEALS, 30-DAY COURT-OF-APPEALS "APPEAL CLOCK."

30-DAY COURT-OF-APPEALS "APPEAL CLOCK" EXPLAINED IN THE CONTEXT OF ELECTRONIC FILING (CT APP).

The Court of Appeals, in determining one of the party's appeal to the Court of Appeals was untimely, explained how the 30-day appeal clock works with electronic filing:

To be effective to start CPLR 5513 (b)'s 30-day clock, service must comply with CPLR 2103. CPLR 2103 (b) (7), in turn, empowers the Chief Administrative Judge to authorize electronic service. The Chief Administrative Judge has exercised this authority by promulgating Uniform Rules for Trial Courts (22 NYCRR) § 202.5-b (h) (2), which provides that in actions—such as this one—that are subject to electronic filing, parties may serve "notice of entry of an order" by filing "a copy of the order . . . and written notice of its entry" on its New York State Courts Electronic Filing System (NYSCEF) site, thus causing that site to transmit "notification of receipt of the documents, which shall constitute service thereof by the filer" (see also 22 NYCRR 202.5-bb [a] [1] [making section 202.5-b applicable to all electronic filing cases]). The relevant rules are not limited to service of trial court orders; and they neither prohibit nor render ineffective service of an intermediate appellate court order with notice of its entry by filing on the trial court's NYSCEF docket—as opposed to the NYSCEF docket of the intermediate appellate court (see generally CPLR 2103 [b] [7]; 5513 [b]; 22 NYCRR 202.5-b—202.5-bb). Thus, in an electronic filing case, service via filing on the NYSCEF docket for the trial court is effective to start CPLR 5513 (b)'s 30-day clock.

Here, plaintiffs moved for leave to appeal before this Court 31 days after defendant Structure Tone Inc. (Structure Tone) served plaintiffs by filing on the trial court's NYSCEF docket. Plaintiffs' motion to this Court was therefore untimely as to Structure Tone and, consequently, the portion of the motion to dismiss the appeal as against Structure Tone should be granted … . However, as to defendants 200 Park, LP (200 Park), Tishman Speyer Properties, L.P. (Tishman), and CBRE, Inc. (CBRE), the motion was timely. Ruisech v Structure Tone Inc., 2024 NY Slip Op 05866, CtApp 11-25-24

Practice Point: Here the 30-day period for taking an appeal to the Court of Appeals, in the context of electronic filing, is explained.

November 25, 2024

DEFAMATION, SUFFICIENCY OF ALLEGATIONS.

DEFENDANTS' MOTION TO AMEND THEIR COUNTERCLAIM FOR DEFAMATION, DEFAMATION PER SE AND DEFAMATION BY IMPLICATION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' cross-motion to amend the counterclaim for defamation should been granted. The allegations of defamation, defamation per se and defamation by implication were deemed sufficient. The decision is fact specific and cannot be fairly summarized here. The plaintiff and defendants, licensed investment advisors, entered an employment arrangement which broke down. Plaintiff sued for breach of a restrictive covenant. Defendants asserted a counterclaim for defamation based upon emails sent by plaintiff to their business clients:

Defendants sufficiently alleged that the statements made by the individual parties were false and that they were reasonably susceptible of a defamatory connotation. In determining the sufficiency of a defamation pleading, we must "consider 'whether the contested statements are reasonably susceptible of a defamatory connotation' " … , and, in doing so, we must "give the disputed language a fair reading in the context of the publication as a whole" … . Here, the emails were

sent to clients of plaintiff who had previously been clients of defendants and advised them that defendant was no longer employed by plaintiff. The emails stated that the investment trading industry was "highly regulated," that plaintiff had "compliance policies" to protect its clients against "conflicts of interest," and that defendant found those policies "overly burdensome." We conclude that the disputed language provides a basis "from which the ordinary reader could draw an inference" … that plaintiff was accusing defendant of failing to adhere to ethical standards in the investment trading industry. …

" 'A statement imputing incompetence or dishonesty to the [party] is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending to their utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by [the party]' " … . The statement "must be more than a general reflection upon [the party's] character or qualities[;] . . . [it] must reflect on [the party's] performance or be incompatible with the proper conduct of [their] business" …. Here, as alleged in the proposed amended counterclaim, the statements conveyed that defendant was unable to conduct her work in a legally compliant and ethical manner and that she lacked professional competence or integrity. …

" 'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" … . There is a heightened legal standard for a claim of defamation by implication … . "Under that standard, '[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the [party asserting the defamation claim] must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference' " … . The second part of the test is an objective inquiry and " 'asks whether the plain language of the communication itself suggests that an inference was intended or endorsed' " … . Armbruster Capital Mgt., Inc. v Barrett, 2025 NY Slip Op 06493, Fourth Dept 11-21-25

Practice Point: Consult this decision for a detailed discussion of the elements of defamation, defamation per se, and defamation by implication.

November 21, 2025

DEFAULT JUDGMENTS, MOTION TO VACATE, NON-MILITARY AFFIDAVIT, CONTRACT LAW, EVIDENCE.

ALTHOUGH THE FAILURE TO SUBMIT A "NON-MILITARY AFFIDAVIT" DEMONSTRATING DEFENDANT IS NOT IN THE MILITARY IS A VALID GROUND FOR DENYING A MOTION TO ENTER A DEFAULT JUDGMENT, IT IS NOT A GROUND FOR VACATING A DEFAULT JUDGMENT UNLESS THE DEFENDANT DEMONSTRATES HE OR SHE WAS, IN FACT, IN THE MILITARY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Genovesi, determined: (1) although the default judgement in this breach of contract action was improperly entered because a so-called "non-military affidavit" demonstrating defendant was not in the military was not submitted by the plaintiff, the absence of a "non-military affidavit" does not warrant vacatur of the default judgment unless the defendant demonstrates he or she was, in fact, in the military (not the case here); and (2) because the damages in this breach of contract action were estimated and were not for a "sum certain," an inquest is required. Here plaintiff hired defendant to do concrete work for a construction project. The complaint alleged the work was not completed and sought estimated damages over $900,000:

It is clear that a non-military affidavit is counted amongst the proof required for a movant to meet its burden on a motion for leave to enter a default judgment. A movant's failure to provide a non-military affidavit is sufficient to warrant denial of such a motion in the first instance … . * * *

It … that the [New York State Soldiers' and Sailors' Civil Relief Act] carves out a remedy for vacatur of default judgments … . However, this remedy is limited to applications made "by or on behalf of the servicemember" and "for the purpose of allowing the servicemember to defend the action" under certain circumstances. The statutory text does not support the defendants' assertion that any person may seek to vacate a default judgment based on a failure to comply with the Act. Therefore, we hold that a movant's failure to provide a non-military affidavit does not entitle a defendant to vacatur of an otherwise validly entered default judgment as of right.

Where, as here, the defaulting party has made no assertion of being on active military duty at the time of his or her default, he or she falls outside of the protection afforded by the Act. * * *

"Where the damages sought are for a 'sum certain or for a sum which can by computation be made certain,'" CPLR 3215(a) permits the clerk, upon proper proof, to enter judgment up to the amount demanded in the complaint, without notice to the defendant … . Otherwise, an application to the court pursuant to CPLR 3215 is required and an inquest is appropriate to assess damages … . Where damages cannot be determined without extrinsic proof, an inquest is required … . Tri-Rail Designers & Bldrs., Inc. v Concrete Superstructures, Inc., 2025 NY Slip Op 06209, Second Dept 11-12-25

Practice Point: The New York State Soldiers' and Sailors' Civil Relief Act requires a plaintiff seeking a default judgment to submit a "non-military affidavit" demonstrating defendant is not in the military. Consult this decision for instruction on how to do that. Failure to submit a "non-military affidavit" is a valid ground for denial of a motion for a default judgment but, it is not enough to warrant vacatur of a default judgment. Defendant must prove he or she was, in fact, in the military to warrant vacatur on this ground.

Practice Point: If damages are not based on a "sum certain," where plaintiff seeks a default judgment, an inquest to determine damages is required.

November 12, 2025

DEFAULT JUDGMENTS, FORECLOSURE ACTION ABANDONED, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), TRUSTS AND ESTATES.

IN THIS FORECLOSURE ACTION, THE REQUEST FOR A SETTLEMENT CONFERENCE PURSUANT TO CPLR 3408 WAS NOT APPROPRIATE BECAUSE THE BORROWER WAS DECEASED; BECAUSE, UNDER THE FACTS, A SETTLEMENT CONFERENCE WAS NOT A PREREQUISITE FOR FILING A DEFAULT JUDGMENT, THE REQUEST FOR A CONFERENCE DID NOT HOLD THE FORECLOSURE ACTION IN ABEYANCE AND IT SHOULD HAVE BEEN DISMISSED AS ABANDONED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the foreclosure action must be dismissed as abandoned. Plaintiff argued that its request for a settlement conference pursuant to CPLR 3408 constituted "the taking of proceedings" within one year of the default and therefore dismissal of the action as abandoned was precluded. The First Department agreed that, under the circumstances contemplated by CPLR 3408, requesting a settlement conference would demonstrate the action was not abandoned. Here, however, CPLR 3408 did not apply because the borrower was deceased and the action was brought by an executor. Because CPLR 3408 did not apply, the request for a settlement conference did not qualify as "the taking of proceedings:"

… [T]his foreclosure action must be dismissed as abandoned, because plaintiff's argument is premised on its mistaken assumption that it was required to file an RJI seeking a mandatory conference before it could move for a default judgment. …

… CPLR 3408(a)(1) requires a mandatory settlement conference in "a residential foreclosure action involving a home loan" where "the defendant is a resident of the property subject to foreclosure." A mandatory conference is not required where the defendant does not reside at the property when the foreclosure action is commenced … . Watkins, the borrower, was not a resident of the property when the foreclosure action was commenced because he died two years earlier.

Additionally, a mandatory conference is required for "a home loan" which is defined, among other things, to include a requirement that "[t]he borrower is a natural person" (RPAPL 1304[6][a][1][i]). Here, the borrower was deceased when plaintiff commenced this action against Thomas in her capacity of executrix of Watkins's estate. Thomas is neither a borrower, nor a natural person in this context … . Municipal Credit Union v Thomas, 2025 NY Slip Op 06260, First Dept 11-13-25

Practice Point: In a foreclosure action, where the criteria for a settlement conference pursuant to CPLR 3408 are met, a request for a conference within one year of a default will constitute "the taking of proceedings" and preclude dismissal of the action as abandoned. However where, as here, CPLR 3408 is inapplicable because the borrower is deceased, the request for a settlement conference did not constitute "the taking of proceedings" and did not preclude a finding of abandonment.

November 13, 2025

DISCOVERY, PRIVILEGE, RELIGION, EVIDENCE, NEGLIGENCE.

DOCUMENTS RELATING TO THE MENTAL-HEALTH TREATMENT OF A PEDOPHILE PRIEST WERE NOT PROTECTED BY PRIEST-PENITENT, PHYSICIAN-PATIENT OR PSYCHOLOGIST-PATIENT PRIVILEGES; THE NAMES OF OTHER CHILDREN ABUSED BY THE PRIEST ALLEGED TO HAVE ABUSED PLAINTIFF ARE DISCOVERABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined progress reports concerning the mental health treatment of a pedophile priest were discoverable without redaction in this Child Victims Act case against the Diocese. The Diocese claimed the redacted information was protected from disclosure by the priest-penitent, physician-patient and psychologist-patient privileges. The Second Department determined those privileges were waived by the (pedophile) priest who consented to forwarding the reports to a third-party, a Bishop overseeing the priest's progress. In addition, the priest-penitent privilege did not apply because the documents did not relate to spiritual guidance. The Second

Department further determined that the names of other victims allegedly abused by the same priest were discoverable:

This appeal permits us to address two principal sets of issues. The first is a rare two-step analysis regarding the potential disclosure of progress reports and letters generated at the request of a religious organization to determine whether an alleged pedophile priest could be safely returned to duties at a parish. Under the circumstances of this appeal, we hold that the progress reports of an alleged pedophile priest that are shared with his Bishop with accompanying letters, to assist the Bishop in determining whether the priest may return to parish duties, fall outside the scope of the clergy-penitent privilege of confidentiality under CPLR 4505. Further, we hold that the physician-patient and psychologist-patient privileges of confidentiality for progress reports and letters generated by a psychological treatment facility to assist the same Bishop's determination, and disclosed to the Bishop for that purpose, are waived under CPLR 4504 and 4507. Relatedly, we hold that the Appellate Division, Second Department, agrees with the reasoning of the Appellate Divisions, First and Third Departments, that in actions pursuant to the Child Victims Act (CVA) (see CPLR 214-g), courts may exercise discretion in favor of requiring the unredacted disclosure of the identities of alleged abuse victims other than the plaintiff, so long as those abuses were committed by the same alleged abuser rather than by any other alleged abuser. Maida v Diocese of Brooklyn, 2025 NY Slip Op 06314, Second Dept 11-19-25

Practice Point: Consult this opinion for discussions of the nature of the priest-penitent, physician-patient and psychologist-patient privileges in the context of the discovery of documents relating to the mental health treatment of a pedophile priest accused of abusing children.

Practice Point: Consult this opinion for a discussion of the discoverability of the names of other children abused by the priest who is alleged to have abused the plaintiff.

November 19, 2025

EXPUNGEMENT, CENTRAL REGISTER OF CHILD ABUSE, FAMILY LAW, ATTORNEYS, EVIDENCE.

PETITIONER NOT ENTITLED TO COUNSEL IN A STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT (SCR) PROCEEDING; THE STATUTE REQURING EXPUNGEMENT OF AN SCR CHILD MALTREATMENT REPORT IF THE RELATED FAMILY COURT CASE IS DISMISSED DOES NOT APPLY RETROACTIVELY; THE MALTREATMENT REPORT WAS SUPPORTED BY THE EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined (1) petitioner was not entitled to counsel at the Statewide Central Register of Child Abuse and Maltreatment (SCR) administrative hearing, (2) the amendment to the Social Services Law [Social Services Law § 422 [8] [a] [ii]] requiring expungement of a child maltreatment report after a related dismissal in Family Court did not apply retroactively, and (3) the report was supported by the evidence:

ACS [New York City Administration for Children's Services] commenced a Family Court article 10 neglect proceeding against petitioner and her husband, who had custody of T. and her younger sisters. Family Court authorized an adjournment in contemplation of dismissal (ACD), which allows the court to adjourn the proceedings for a period not exceeding one year "with a view to ultimate dismissal of the petition in furtherance of justice" (Family Court Act § 1039 [b]). In February of 2020, Family Court dismissed the article 10 proceeding upon the expiration of the adjournment period based on petitioner's satisfactory compliance with Family Court's conditions, including completion of parenting and anger management classes.

Meanwhile, the police officer who interviewed T. made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR). One of the SCR's primary purposes is to inform child care providers and agencies that a person has a substantiated report of child abuse or maltreatment "for the purpose of regulating their future employment or licensure" … . In July of 2019, ACS determined that the report against petitioner was indicated … and petitioner challenged that determination … . After an internal administrative review, the New York State

Office of Children and Family Services (OCFS) concluded that a fair preponderance of the evidence supported a determination that petitioner had maltreated T. and that the maltreatment was relevant and reasonably related to employment, licensure, or certification in the child care field … . Matter of Jeter v Poole, 2024 NY Slip Op 05868, CtApp 11-25-24

Practice Point: Petitioner was not entitled to counsel in a SCR child maltreatment proceeding.

Practice Point: The Social Services Law statute which requires expungement of a maltreatment report if the related Family Court proceeding is dismissed does not apply retroactively.

November 25, 2024

IMMUNITY, SOVEREIGN IMMUNITY, NEGLIGENCE.

NEW JERSEY TRANSIT CORPORATION CANNOT ASSERT THE SOVEREIGN IMMUNITY DEFENSE IN THIS TRAFFIC ACCIDENT CASE; THE ACCIDENT INVOLVED A NEW JERSEY TRANSIT CORPORATION BUS AND OCCURRED IN NEW YORK CITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over two concurrences and a dissent, determined the New Jersey Transit Corporation could not assert the sovereign immunity defense in this traffic-accident case:

In Franchise Tax Bd. of Cal. v Hyatt, the United States Supreme Court recognized that the text and structure of the Federal Constitution not only preserved States' pre-ratification sovereign immunity, but compelled absolute recognition of that immunity in other States' courts as a matter of "equal dignity and sovereignty" … . However, the Court did not address how to determine whether a state-created entity is entitled to this immunity. We glean from the Court's analysis that the relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign. We hold that, to answer this question, courts must analyze how the State defines the entity and its functions, its power to direct the entity's conduct, and the effect on the State of a judgment against the entity. Considering these factors, we conclude that maintaining this action against defendant New Jersey Transit Corporation (NJT) in our courts would not offend

New Jersey's sovereign dignity and accordingly hold that defendants are not entitled to invoke a sovereign immunity defense. On February 9, 2017, a bus owned and operated by NJT allegedly struck and injured plaintiff Jeffrey Colt as he traversed a crosswalk on 40th Street in Manhattan. The bus was driven by defendant Ana Hernandez, an employee of NJT. Colt and his wife, plaintiff Betsy Tsai, commenced this action on September 18, 2017, asserting causes of action for negligence, negligent hiring, and loss of consortium. Defendants answered the complaint and denied many of plaintiffs' factual allegations. Defendants asserted—as part of an exhaustive list including many boilerplate defenses—that plaintiffs' recovery was "barred by lack of jurisdiction over NJT" and "barred as this Court lacks jurisdiction," and that defendants were "immune from suit." Colt v New Jersey Tr. Corp., 2024 NY Slip Op 05867, CtApp 11-25-24

Practice Point: Here the New Jersey Transit Corporation could not invoke the sovereign immunity defense to a New York City traffic accident involving a New Jersey Transit Corporation bus.

November 25, 2024

"JOHN DOE" "JANE DOE" DEFENDANTS, CIVIL RIGHTS LAW, FALSE ARREST, MUNICIPAL LAW.

THE MOTION TO AMEND THE COMPLAINT TO IDENTIFY "JOHN DOE" "JANE DOE" DEFENDANTS AS POLICE OFFICERS IN THIS CIVIL RIGHTS CASE SHOULD NOT HAVE BEEN GRANTED; THE STATUTE OF LIMITATIONS HAD EXPIRED AND THE RELATION-BACK DOCTRINE DOES NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to amend the complaint to identify police officers as the "John Doe, Jane Doe" defendants in this 18 USC 1983 false arrest and unlawful search case should not have been granted. The statute of limitations had expired and the relation-back doctrine did not apply—police officers are not united in interest with the city:

CPLR 1024 provides that a "party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity

as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." "Yet, 'parties are not to resort to the "Jane Doe" procedure unless they exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, are unable to do so. Any failure to exercise due diligence to ascertain the "Jane Doe's" name subjects the complaint to dismissal as to that party'" … .

Here, the statute of limitations had expired by the time the defendants were identified in the second amended complaint. Contrary to the plaintiff's contention, the relation-back doctrine does not apply, because the defendants are not united in interest with the City … . The City "cannot be held vicariously liable for its employees' violations of 42 USC § 1983, and there is no unity of interest in the absence of a relationship giving rise to such vicarious liability" … . Additionally, the plaintiff failed to demonstrate that he made diligent efforts to ascertain the defendants' identities prior to the expiration of the statute of limitations or that the City hindered any such efforts … . Contrary to the plaintiff's contentions, the Supreme Court's prior orders allowing the plaintiff to amend the complaint to add the then-unknown defendants by name within a certain time period are not binding on these issues. The doctrine of the law of the case does not bind an appellate court … . Agosto v Maria, 2024 NY Slip Op 05950, Second Dept 11-27-24

Practice Point: Here the motion to amend the complaint to identify "John Doe" and "Jane Doe" defendants as police officers should have been denied because the statute of limitations had expired and the relation-back doctrine did not apply because police officers are not united in interest with the city which employs them.

November 27, 2024

JUDGES, NO STATUTORY AUTHORITY FOR SUA SPONTE DISMISSAL, MENTAL HYGIENE LAW, 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

LEGAL MALPRACTICE, MOTION TO DISMISS, NO NEED TO SHOW ACTUAL DAMAGES.

IN THIS LEGAL MALPRACTICE ACTION, THE PLAINTIFF NEED NOT SHOW SHE ACTUALLY SUSTAINED DAMAGES TO SURVIVE A MOTION TO DISMISS (SECOND DEPT).

The Second Department, reversing Supreme Court's dismissal of a legal malpractice complaint, noted that the plaintiff need not show she actually sustained damages to survive a dismissal motion:

The plaintiffs alleged … that they retained the defendants to represent them in an action to recover damages for personal injuries the plaintiff … allegedly sustained in a motor vehicle accident (hereinafter the underlying action) and that due to the defendants' failures to pursue a theory based on a violation of Vehicle and Traffic Law § 509(3), the plaintiffs were not able to obtain a verdict in their favor in the underlying action. * * *

To state a cause of action to recover damages for legal malpractice, "a plaintiff must allege that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" … . "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" … . "A plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages … . "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" … . Kowalski v Gold Benes, LLP, 2024 NY Slip Op 05967, Second Dept 11-27-24

Practice Point: In this legal malpractice case, the court noted the plaintiff need not show she actually sustained damages to survive a motion to dismiss.

November 27, 2024

MINISTERIAL EXCEPTION, EMPLOYMENT LAW, RELIGION, CONSTITUTIONAL LAW, HUMAN RIGHTS LAW, ADMINISTRATIVE LAW.

THE "MINISTERIAL EXCEPTION" IS GROUNDED IN THE FIRST AMEMDMENT AND MAY RESTRICT A STATE AGENCY'S REVIEW OF EMPLOYMENT DECISIONS MADE BY RELIGIOUS INSTITUTIONS; THE EXCEPTION IS AN AFFIRMATIVE DEFENSE, NOT A JURISDICTIONAL BAR, TO A HOSTILE WORK ENVIRONMENT ACTION UNDER THE NYS HUMAN RIGHTS LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the New York State Division of Human Rights (DHR) and the Appellate Division,

determined the so-called "ministerial exception" was not a jurisdictional bar to the Nigerian priest's, Ibhawa's, hostile work environment claim under the NYS Human Rights Law. The "ministerial exception" is grounded in the First Amendment and may restrict state interference with employment decisions made by religious institutions.. The Court of Appeals clarified that the ministerial exception is an affirmative defense in an employment discrimination action against a religious institution, not a jurisdictional bar to bringing the case:

Ibhawa filed an employment complaint with the New York State Division of Human Rights (DHR) in November 2020, claiming that the Diocese had engaged in discriminatory employment practices in violation of the New York Human Rights Law (see Executive Law art 15). Ibhawa alleged that he had experienced racial discrimination at the Diocese, including from an employee who directed a racial slur at him and a parishioner who made xenophobic remarks to him. He further alleged that the Diocesan officials to whom he reported the incidents declined to investigate them, questioned his decision to terminate the employee who had used a racial slur, and made "highly insulting and offensive" remarks about "foreign priests." At a subsequent meeting, two Diocesan officials offered to buy Ibhawa a plane ticket to Nigeria and told him that the "Bishop could remove [his] faculties." Shortly afterwards, the Diocese informed Ibhawa that his employment had been terminated and his priestly faculties removed, which meant that that he could not apply for a position as a priest in the Diocese. The Diocese eventually hired a white priest to replace him. Based on these assertions, Ibhawa alleged claims of hostile work environment and unlawful termination on the basis of race and national origin. He sought, among other remedies, compensatory and punitive damages. * * *

DHR's order dismissing Ibhawa's hostile work environment claim was affected by an error of law. After noting the parties' agreement that Ibhawa was "a priest serving as the pastor (Parish Administrator) of a church," DHR found that his complaint "comes under the ministerial exception (relative to the first amendment of the U.S. Constitution)." On that basis, DHR concluded that it lacked jurisdiction over Ibhawa's claims. This determination was contrary to the U.S. Supreme Court's express holding that the "exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar" … . Matter of Ibhawa v New York State Div. of Human Rights, 2024 NY Slip Op 05872, CtApp 11-26-24

Practice Point: The "ministerial exception" is grounded in the First Amendment and may restrict a state agency's review of employment decisions made by religious institutions. The exception is an affirmative defense, not a jurisdictional bar, to a hostile work environment action brought by a priest against his employer.

November 26, 2024

NONPARTY'S RIGHT TO SUE, DEBTOR-CREDITOR.

A LIENHOLDER NONPARTY TO AN ACTION THAT RESULTED IN A FEE AWARD TO A DEBTOR MAY SUE TO RECOVER THOSE FEES WHERE THE LIENHOLDER WAS NEITHER JOINED NOR REQUIRED TO INTERVENE IN THAT ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined: "[a] lienholder nonparty to an action that resulted in a fee award against a debtor may challenge the legal basis of the judgment in a separate proceeding to recover those fees. We conclude that because the nonparty was neither joined nor required to intervene in the action against the debtor, it had no prior opportunity to challenge the award and thus is not barred from doing so in this proceeding … ". Matter of Kasowitz, Benson, Torres & Friedman, LLP v JPMorgan Chase Bank, N.A., 2024 NY Slip Op 05876, CtApp 11-26-24

November 26, 2024

NOTE OF ISSUE, FAILURE TO TIMELY FILE, ATTORNEYS, EVIDENCE, NEGLIGENCE.

ALTHOUGH PLAINTIFF'S COUNSEL IN THIS NEGLIGENCE ACTION DEMONSTRATED A JUSTIFIABLE EXCUSE FOR NOT TIMELY FILING A NOTE OF ISSUE AFTER A NINETY-DAY DEMAND, PLAINTIFF DID NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; PLAINTIFF SUBMITTED AN AFFIDAVIT WHICH RELIED ON HEARSAY PROVIDED BY TWO SOURCES, BUT DID NOT SUBMIT AFFIDAVITS FROM THOSE SOURCES (FIRST DEPT).

The First Department, reversing Supreme Court, determined, although plaintiff offered a justifiable excuse for failing to timely file a note of issue, plaintiff did not demonstrate a meritorious cause of action. Therefore the complaint should have been dismissed. The complaint alleged the defendants negligently failed to provide adequate mental health and substance abuse treatment to the decedent, who died of a drug overdose in a shelter owned and operated by defendants:

Following a period of over one year during which plaintiff failed to respond to their discovery demands, defendants served plaintiff with a written demand to serve and file a note of issue within 90 days (see CPLR 3216[b]). Plaintiff failed to respond within the 90-day period, resulting in defendants' motions to dismiss for failure to prosecute.

Although plaintiff's counsel offered a justifiable excuse for the failure to file a note of issue following defendants' service of 90-day notices, plaintiff failed to submit an adequate affidavit of merit demonstrating a meritorious cause of action in opposition to defendants' motions … . In her affidavit, plaintiff, who had no personal knowledge of the events in question, relied on two unnamed hearsay sources … . Plaintiff offered no excuse for failing to provide affidavits from the shelter residents who supplied her with the information upon which her affidavit was based … , and, in any event, she did not show that defendants' negligence was "a substantial cause of the events" resulting in her son's death … . Felipe v Volunteers of Am.-Greater N.Y., 2025 NY Slip Op 06252, First Dept 11-13-25

Practice Point: In seeking to avoid dismissal of a complaint for failing to timely file a note of issue after a 90-day demand, a plaintiff must offer a justifiable excuse and demonstrate a meritorious cause of action. Here plaintiff's counsel provided a justifiable excuse. But to demonstrate a meritorious cause of action plaintiff submitted an affidavit which relied on hearsay. Without affidavits from the sources of the hearsay, a meritorious cause of action was not demonstrated and the complaint should have been dismissed.

November 13, 2025

NOTICE OF CLAIM, ERRORS IN, MUNICIPAL LAW, NEGLIGENCE.

THE ERRORS MADE IN THE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE WERE NOT MADE IN BAD FAITH AND DID NOT PREJUDICE THE MUNICIPAL DEFENDANT; THEREFORE AMENDMENT OF THE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the erroneous incident-date in the notice of claim did not justify dismissal of the action in this sidewalk slip and fall case. The error was not made in bad faith and did not prejudice the municipal defendant:

The Transit defendants … moved … pursuant to CPLR 3211(a) to dismiss the complaint … on the ground that the notice of claim did not comply with General Municipal Law § 50-e(2), as it incorrectly listed the date of the accident as March 5, 2016, instead of April 5, 2016, and identified the plaintiff as "Maria Hernandez," instead of "Maria Hernandez-Panell." …

General Municipal Law § 50-e(2) requires that a notice of claim set forth … "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 that the date originally listed in the notice of claim as the accident date was set forth in bad faith, and the Transit defendants did not demonstrate any prejudice as a result of the error … . Moreover, the plaintiff supplied the correct date of the accident at the hearing pursuant to General Municipal Law § 50-h and Public Authorities Law § 1212(5) … . Hernandez-Panell v City of New York, 2024 NY Slip Op 05962, Second Dept 11-27-24

Practice Point: Errors in a notice of claim against a municipality should not result in dismissal of the action if the errors were not made in bad faith and did not prejudice the municipal defendant.

November 27, 2024

PROTECTIVE ORDER REQUIRING COUNSEL TO RESCIND IMPROPER CORRESPONDENCE, ATTORNEYS, MEDICAL MALPRACTICE, JUDGES.

THE MOTION COURT PROPERLY ISSUED A PROTECTIVE ORDER REQUIRING PLAINTIFF'S COUNSEL IN THIS MED MAL CASE TO RESCIND THE CORRESPONDENCE SENT TO PLAINTIFF'S TREATMENT PROVIDERS WHICH DISCOURAGED THEM FROM SPEAKING WITH DEFENSE COUNSEL; THE DISSENT ARGUED THE MAJORITY WAS IMPROPERLY ISSUING AN ADVISORY OPINION (FOURTH DEPT).

The Fourth Department, over a dissent which argued the majority was improperly issuing an advisory opinion, determined the trial judge in this medical malpractice action properly ordered plaintiff's counsel rescind correspondence sent to treatment providers which discouraged the treatment providers from speaking with defense counsel. The correspondence accompanied the "Arons" speaking authorizations executed by the plaintiff:

… [A] plaintiff who signs an authorization allowing a treating physician to speak to defense counsel about the plaintiff's medical condition at issue should not be allowed to send a letter separately to the same physician requesting that the physician not speak to defense counsel. Permitting plaintiffs to make such a request would undermine the purpose of the Arons authorization and, at the very least, be confusing to the physician … .

Adding to the confusion is the statement "I value and wish to protect the confidentiality of our physician-patient relationship," which may lead the physician to conclude that, notwithstanding plaintiff's execution of the speaking authorization, plaintiff was not actually waiving the physician-patient privilege or the privacy protections afforded by HIPAA. …

… [T]he letter … might lead the physician to believe, wrongly, that plaintiff has a right to attend any informal interview with defense counsel. … [A] defendant's attorney may ask treating physicians to participate in ex parte interviews, which by definition do not involve the plaintiff. While a physician may insist that the plaintiff be present for such an interview, that is a decision for the physician alone to make. Just as a defendant's attorney has no right to interview the physician informally … , a plaintiff has no right to attend the interview (the plaintiff has only the right to ask the physician for permission to attend an interview).

Based on the above, we cannot conclude that the court abused its discretion in directing plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating." Murphy v Kaleida Health, 2025 NY Slip Op 06421, Fourth Dept 11-21-25

Practice Point: Here the letters sent to treatment providers by plaintiff's counsel, which accompanied the "Arons" speaking authorizations, improperly discouraged the treatment providers from speaking with defense counsel. Plaintiff's counsel was properly ordered to rescind the correspondence.

November 21, 2025

SERVICE OF PROCESS, NO JURISDICTION OVER DEFENDANT, FORECLOSURE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANT WAS PROPERLY SERVED OR EVEN NOTIFIED OF THE FORECLOSURE ACTION; THE COURT NEVER HAD JURISDICTION OVER DEFENDANT AND THE MOTION TO EXTEND THE TIME TO SERVE HER SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not demonstrate defendant was properly served with the summons and complaint. Therefore the court never had jurisdiction over the defendant:

… [T]he plaintiff was on notice in December 2018 that service upon the defendant allegedly was defective when the defendant moved to dismiss the complaint for lack of personal jurisdiction. The plaintiff nonetheless waited nearly 10 months thereafter to move for an extension of time to serve the defendant. Moreover, the plaintiff's motion was made more than two months after the hearing before the special referee concluded, even though the evidence at the hearing demonstrated that the defendant had been residing in Canada for decades … . Although the statute of limitations had already expired by the time the plaintiff moved for an extension of time, the plaintiff failed to demonstrate that it diligently prosecuted this action … . "Moreover, . . . the plaintiff submitted no evidence that [the defendant] had actual notice of the action against her within the 120-day service period" … . Further, the plaintiff failed to rebut the inference [*3]of substantial prejudice to the defendant that arose from the protracted delay in obtaining such notice … . Accordingly, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant.

Since the defendant was not properly served with the summons and complaint and the plaintiff failed to demonstrate entitlement to an extension of time to effectuate service, the Supreme Court should have granted the defendant's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her. "The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process. In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and

void" … . HSBC Bank USA, N.A. v Labin, 2024 NY Slip Op 05963, Second Dept 11-27-24

Practice Point: Consult this decision for the analytical criteria for determining whether a motion to extend the time to serve a defendant with the summons and complaint should be granted.

November 27, 2024

RENEW AND REARGUE, COMBINED MOTION, JUDGES.

A COMBINED MOTION TO REARGUE AND MOTION TO RENEW IS PROPER; HERE SUPREME COURT CORRECTLY DENIED THE MOTION TO REARGUE BUT SHOULD HAVE CONSIDERED THE MOTION TO RENEW; MATTER REMANDED (FIRST DEPT).

The First Department, remanding the matter to Supreme Court, determined the combined motion to reargue and motion to renew was properly brought. The motion to reargue was properly denied, but the motion could should have considered the motion to renew:

A combined motion for leave to reargue and renew is permitted so long as each branch of the motion is separately identified and supported (CPLR 2221 [f]). Here, the motion court considered plaintiff's combined motion to be "couched" as one for reargument and improvidently failed to address or analyze plaintiff's application for renewal.

Plaintiff in this case submitted a medical expert's affidavit as new or additional facts not included on the motion to vacate, which this Court in the past has deemed to be sufficient to support a motion to renew … . As plaintiff properly submitted a combined motion for reargument and renewal, CPLR 2221 (f) required the court to "decide each part of the motion as if it were separately made." Pellerano v New York City Health & Hosps. Corp., 2024 NY Slip Op 05899, First Department 11-26-24

Practice Point: It is proper to combine a motion to reargue and a motion to renew. The motions should be considered separately. Here the denial of the motion to reargue was proper but the motion to renew should also have been considered. The matter was remanded.

November 26, 2024

SANCTIONS FOR SPOLIATION, CONTRACT LAW, EVIDENCE, JUDGES.

DEFENDANTS IN THIS BREACH OF CONTRACT ACTION SHOULD HAVE BEEN SANCTIONED FOR SPOLIATION OF EVIDENCE, I.E., THE DESTRUCTION OR LOSS OF EMAILS; PLAINTIFFS' MOTION TO STRIKE THE ANSWER WAS PROPERLY DENIED; HOWEVER, PLAINTIFFS WERE ENTITLED TO AN ADVERSE INFERENCE JURY INSTRUCTION AT TRIAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendants should have been sanctioned for spoliation of evidence, i.e., the failure to preserve relevant emails. The plaintiffs alleged defendants performed faulty renovation-work and thereby breached the renovation contract:

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" … . "The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" … . "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" … . "'A culpable state of mind for [the] purposes of a spoliation sanction includes ordinary negligence'" … . Further, "[s]triking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court 'will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" … . "In contrast, where the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate" … . "[A]dverse inference charges have been found to be appropriate even in

situations where the evidence has been found to have been negligently destroyed" … .

… [P]laintiffs demonstrated that the defendants were on notice that they had an obligation to preserve their email accounts and emails prior to the time that they were lost or destroyed. The plaintiffs also demonstrated that the emails were lost or destroyed with a culpable state of mind and that the emails were sufficiently relevant to the litigation … . Nonetheless, contrary to the plaintiffs' contention, the drastic remedy of striking the defendants' answer was not warranted … . Under the circumstances, the Supreme Court should have granted that branch of the plaintiffs' motion which was pursuant to CPLR 3126 to strike the defendants' answer to the extent of directing that an adverse inference charge be issued at trial against the defendants with respect to the loss or destruction of their email accounts and emails … . Dorman v Luva of NY, LLC, 2025 NY Slip Op 06155, Second Dept 11-12-25

Practice Point: Consult this decision for a concise explanation of the criteria for finding spoliation of evidence and the appropriate sanctions. In this breach of contract action, plaintiffs demonstrated defendants destroyed or lost relevant emails with a "culpable state of mind."

November 12, 2025

STANDING, DISGORGEMENT, TRUSTS AND ESTATES, FIDUCIARY DUTY, APPEALS.

THE PETITION ALLEGED THE DECEASED CO-TRUSTEE CONCEALED THE TRUST AND DISTRIBUTIONS TO THE TRUST BENEFICIARIES; PETITIONERS HAD STANDING TO SEEK DISGORGEMENT OF THE COMMISSIONS PAID TO THE DECEASED CO-TRUSTEE UNDER "BREACH OF FIDUCIARY DUTY" AND "FAITHLESS SERVANT" THEORIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the petition alleging Kendall Chen, the deceased co-trustee of his father's trust, breached his fiduciary

duty to the trust and to the trust beneficiaries, and alleging a "faithless servant" claim, should not have been dismissed. Kendall allegedly concealed the existence of the trust from the beneficiaries (his children). Petitioners had standing to seek disgorgement of the commissions paid to Kendall:

The petition alleged that Kendall actively subverted the trust's stated purpose insofar as, from 2000 until 2016, he concealed from his children the existence of the trust and the joint bank accounts into which distributions from the trust were made for each grandchild, and converted a significant portion of those funds for his personal financial benefit. If proven, Kendall's conduct constituted a breach of his fiduciary duty to the trust (as well as to his children), and the trust may recover the commissions paid to him at a time when he was a faithless servant, even if the trust suffered no damages … .

Indeed, the trust was damaged by Kendall's receipt of commissions at a time when he allegedly breached his fiduciary duty to the trust, and it is for that reason that petitioners have standing to seek disgorgement of the commissions paid to Kendall from 2000 to 2015. The corpus of the trust was diminished by the payment of the commissions when Kendall was diverting to himself the distributions intended for his children. …

We reject the estate's argument that the faithless servant claim is unpreserved. The doctrine has a "close relationship and overlap" with breach of fiduciary duty, which petitioners did raise before the motion court … . Matter of Chen, 2025 NY Slip Op 06255, First Dept 11-13-25

Practice Point: Here it was alleged the co-trustee concealed the existence of the trust and distributions from the trust from his children, the beneficiaries of the trust. The petitioners had standing to seek disgorgement of the commissions paid to the co-trustee under "breach of fiduciary duty" and "faithless servant" theories.

November 13, 2025

STATUTE OF LIMITATIONS, CONTRACT LAW, INSURANCE LAW.

IN THIS FIRE-DAMAGE CASE, THE INSURANCE POLICY IMPOSED A TWO-YEAR LIMITATION PERIOD; THE ACTION WAS NOT BROUGHT UNTIL SIX YEARS AFTER THE FIRE; PLAINTIFF'S FAILURE TO PROVIDE ANY DETAILS DEMONSTRATING WHY THE RESTORATION COULD NOT BE COMPLETED WITHIN THE TWO-YEAR LIMITATION PERIOD REQUIRED DISMISSAL OF THE COMPLAINT; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over an extensive three-judge dissent, determined plaintiff's complaint in this fire-damage case was properly dismissed because the contractual two-year limitation period was exceeded and plaintiff made only conclusory allegations that the repairs could not be made within that two-year period:

On this motion to dismiss, the Tower/AmTrust defendants met their burden of establishing, by reference to the contract's two-year suit limitation provision, that the action was time-barred because plaintiff did not commence it within two years of the fire, utterly refuting plaintiff's factual allegations … . Nothing in plaintiff's response raised any issue as to whether the provision should bar her claims. Plaintiff's allegation that "[g]iven the massive structural damage wrought by the fire, the restoration of [plaintiff's] property would have been [a] multi-year process under even the best of circumstances" is a conclusory statement that the suit limitation provision was unreasonable and is not logically inconsistent with the replacement of the property within the two-year limitation period. Here, plaintiff failed to allege actions that she took to complete the repairs within two years; she did not provide any details regarding the extent of the damage, other than that the damage was "massive" and the fire set off four alarms, or why complete restoration within two years was an impossibility. This bare-bones allegation stands in stark contrast to the plaintiff's factual assertions in [Executive Plaza, LLC v Peerless Ins. Co. (22 NY3d 511)]. There, the plaintiff pleaded the specific remedial actions taken to restore the property, including retaining an architect and construction company, submitting a variance application, and seeking and obtaining building permits, which were not issued until 20 months after the property damage … . Most importantly, that plaintiff provided that these remedial actions were taken within the limitation period. All of this information is notably absent from

plaintiff's pleadings and motion response here. Farage v Associated Ins. Mgt. Corp., 2024 NY Slip Op 05875, CtApp 11-26-24

Practice Point: Here the insurance contract imposed a two-year limitation on claims for the cost of fire-damage repair. Plaintiff did not bring the action until six years after the fire. The complaint was properly dismissed because it did not provide any details explaining why the repairs could not have been made during the two-year limitation period.

November 26, 2024

STATUTE OF LIMITATIONS, RELATION-BACK DOCTRINE, NEGLIGENCE.

IN THIS "BAR FIGHT" "INADEQUATE SECURITY" ACTION, THE DEFENDANT BAR HAD TIMELY SUED ITS SECURITY COMPANY AS A THIRD-PARTY DEFENDANT; AFTER THE STATUTE OF LIMITATIONS EXPIRED, PLAINTIFF SOUGHT TO SUE THE SECURITY COMPANY DIRECTLY UNDER A "RELATION BACK" THEORY; PLAINTIFF'S MOTION TO SERVE AND FILE AN AMENDED COMPLAINT AGAINST THE SECURITY COMPANY DIRECTLY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to serve and file an amended complaint adding defendant security company, MAS, after the statute of limitations had expired, should have been granted. Plaintiff was punched in a bar owned by defendant B&M. Plaintiff sued the bar alleging inadequate security, The bar then sued MAS, which provided security for the bar. MAS, therefore, was involved in the litigation as a third-party defendant before the statute of limitations expired:

Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant. "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently

devoid of merit" … . "Delay alone is insufficient to bar an amendment to the pleading; [i]t must be lateness coupled with significant prejudice to the other side" … .

Here, … the three-year statute of limitations applicable to the plaintiff's cause of action alleging negligence (see CPLR 214[5]) had expired by the time that the plaintiff moved … for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant, whether the amendment may be allowed depends upon whether the relation-back doctrine applies (see CPLR 203[f] …), with the burden being on the plaintiff to establish that the doctrine applies … . B & M's third-party complaint and the plaintiff's proposed amended complaint arise out of the same conduct, transaction, or occurrence … . Also, there is no dispute that MAS was "a participant in the litigation" … . Moreover, "[t]he proposed amendment was not palpably insufficient or devoid of merit, and there was no prejudice to [MAS] in allowing the plaintiff to amend the complaint to add it as a direct defendant" … .

Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate that MAS and B & M were united in interest since the record demonstrates that MAS had actual notice of the plaintiff's potential cause of action against it within the applicable limitations period and was a third-party defendant in the action … . Egelandsdal v Massaro, 2025 NY Slip Op 06156, Second Dept 11-12-25

Practice Point: Consult this decision for insight into the criteria for the application of the "relation back" theory which allows suit after the statute of limitations has run. Here in this bar-fight "inadequate security" action against defendant bar, the bar had timely sued its security company as a third-party defendant. Because the security company was already involved in the litigation, and because the complaint against the bar and the security company arose out of the same conduct, the "relation back" criteria of CPLR 203(f) were met and plaintiff should have been allowed to sue the security company directly after the statute of limitations had expired.

November 12, 2025

SUMMARY JUDGMENT, SEARCH THE RECORD, JUDGES.

A COURT'S POWER TO SEARCH THE RECORD AND AWARD SUMMARY JUDGMENT TO A NONMOVING POWER IS LIMITED TO THE CAUSES OF ACTION OR ISSUES IN THE MOTIONS BEFORE IT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that a court's power to search the record and award summary judgment to a nonmoving party is constrained by the causes of action or issues raised in the motions before it:

Although the court has the authority to search the record and grant summary judgment to a nonmoving party (see CPLR 3212[b] …), the "power to search the record and afford a nonmoving party summary relief is not . . . boundless" … . Thus, "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" … . Here, the court improperly considered an issue that was not the subject of the motion before it … . Mejia v 69 Mamaroneck Rd. Corp., 2024 NY Slip Op 05974, Second Dept 11-27-24

Practice Point: A court cannot search the record and award summary judgment to a nonmoving party on a cause of action or an issue not raised in the motions before it.

November 27, 2024

VENUE, CONTRACT LAW, EVIDENCE, FRAUD.

THE PARTY SEEKING TO ENFORCE A VENUE CONTRACT PROVISION HAS THE BURDEN OF DEMONSTRATING THE AUTHENTICITY OF THE SIGNATURE IN THE FACE OF AN ALLEGATION OF FORGERY; HERE DEFENDANT DEMONSTRATED THE SIGNATURE WAS AUTHENTIC AND PLAINTIFF FAILED TO RAISE A QUESTION OF FACT RE: THE FORGERY ALLEGATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the defendant demonstrated the contract which included a venue provision was signed by the decedent and the plaintiff failed to raise a triable question of fact about whether the signature was forged. The court

noted that contractual choice of venue provisions are generally enforceable and provided some insight into how a forgery question-of-fact can be raised:

Forum selection clauses may designate a jurisdiction, such as the federal or state court system, or the clause may designate a venue within the State, as was done here by specifying Nassau County as the proper venue … .* * *

… [T]he party moving for a change of venue under CPLR 501 is in effect seeking to enforce a contractual provision. For that reason, … the proponent of the motion bears the initial burden to establish the authenticity of the writing for purposes of a motion to enforce a contractual venue provision … . This may be done through any of the recognized methods of authentication, including, but not limited to, the testimony of a witness who was present at the time of the signing, an admission of authenticity, proof of handwriting, and, as particularly relevant here, through circumstantial evidence … . * * *

Although an expert opinion is not required to raise an issue of fact as to forgery , the movant must nevertheless offer "[s]omething more than a bald assertion," and in this regard conclusory or self-serving affidavits are inadequate … . Plaintiff offered only an affidavit in which he claimed to be "familiar" with decedent's handwriting. Based on a summary of certain perceived inconsistencies in the signatures and initials on the agreements, plaintiff asserted that "whoever the person or people who signed and initialed these pages may have been, it was not my mother." Attached to the affirmation is an undated "exemplar" of what is purportedly decedent's signature, but no effort is made to establish that the exemplar represents decedent's signature at the relevant time. Furthermore, the exemplar is purportedly decedent's handwritten signature, and … electronic signatures may naturally differ from handwritten one … . Knight v New York & Presbyt. Hosp, 2024 NY Slip Op 05870, CtApp

Practice Point: Contractual provisions designating venue are enforceable.

Practice Point: To enforce a contractual venue provision, in the face of a forgery allegation, the moving party must demonstrate the signature is authentic.

Practice Point: Bald assertions of forgery unsupported by any evidence will not raise a triable question of fact on the forgery issue.

November 25, 2024

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