

NEW YORK APPELLATE DIGEST, INC.

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released February 2 – 6, 2026, and Posted on the New York Appellate Digest on Monday, February 9, 2026. 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. Copyright 2026 New York Appellate Digest, Inc.

Weekly Reversal
Report
February 2 – 6,
2026

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CIVIL PROCEDURE, EVIDENCE.

ONE DEFENDANT PROVED HE DID NOT RESIDE AT THE ADDRESS WHERE SERVICE OF PROCESS WAS MADE; AND PLAINTIFF FAILED TO PROVE THE PROCESS SERVER EXERCISED “DUE DILIGENCE” IN ATTEMPTING TO SERVE THE OTHER DEFENDANT BEFORE RESORTING TO NAIL AND MAIL; DEFAULT JUDGMENT VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the default judgments against De La Cruz-Ramos and Mosquea should have been vacated. De La Cruz-Ramos proved he did not reside at the address where service of process was made. And plaintiff did not prove the process server exercised due diligence in serving Mosquea before resorting to “nail and mail.” The attempts to serve Mosquea were all made during working hours:

De La Cruz-Ramos [submitted] his own affidavit averring that he had moved from the address where service was made, as well as a lease confirming that he had moved before the date of service * * *

Mosquea contends that the service was defective because the process server did not exercise “due diligence” in seeking to effectuate service on defendant before resorting to nail-and-mail service (CPLR 308[4]). Generally, a plaintiff can establish diligence by providing an affidavit of service indicating efforts to serve the defendant at her residence on three different occasions, at different times of day

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... . As Mosquea argues, however, all of the dates of attempted personal service upon him were during the work week and during normal business hours in the same afternoon window. Thus, plaintiff did not establish the due diligence necessary to resort to nail and mail service [Unitrin Safeguard Ins. Co. v Della-
Noce, 2026 NY Slip Op 00601, First Dept 2-5-26](#)

Practice Point: Here the process server made three attempts to serve a defendant at the same time of day, during work hours. The process server, therefore, did not exercise “due diligence” before resorting to nail and mail.

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CIVIL PROCEDURE.

THE E-MAIL SERVICE OF A NOTICE OF ENTRY BY THE NEW YORK STATE ELECTRONIC FILING SYSTEM (NYSCEF) “SHALL NOT CONSTITUTE SERVICE OF ENTRY BY ANY PARTY;” BECAUSE PLAINTIFF DID NOT SERVE THE NOTICE OF ENTRY ON DEFENDANTS AFTER REMAND BY THE APPELLATE COURT, THE DEFENDANTS’ TIME TO ANSWER NEVER STARTED RUNNING; THE DEFAULT JUDGMENT WAS VACATED (FIRST DEPT).

The First Department, reversing the default judgment, held that defendants’ time to answer after remand by the appellate court never started running because plaintiff never served the notice of entry. The New York State Courts Electronic Filing system’s (NYSCEF’s) transmission of notification of entry to e-mail service addresses “shall not constitute service of entry by any party:” [Adago v Sy, 2026 NY Slip Op 00571, First Dept 2-5-26](#)

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INSURANCE LAW, CONTRACT LAW.

IF THE UNDERLYING INSURANCE POLICY DOES NOT INDICATE THAT A WRITTEN AGREEMENT NAMING A PARTY AS AN ADDITIONAL INSURED MUST BE SIGNED, AN UNSIGNED DOCUMENT TO THAT EFFECT IS ENFORCEABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the fact the the change order, which required defendant (Arsenal) to name plaintiff as an additional insured, was unsigned, it was enforceable:

An unsigned document may qualify as a written agreement requiring a party to be named as an additional insured, provided that the additional insured provisions in the insurance policy itself do not explicitly require that the agreement be signed If such agreement is unsigned, it may still be enforceable, “provided there is objective evidence establishing that the parties intended to be bound” * * *

Since the change order qualifies as a written agreement requiring Arsenal to name plaintiff as an additional insured, Supreme Court should have granted plaintiff’s motion for partial summary judgment and found that defendant insurer is required to provide plaintiff a defense in the underlying litigation, as the duty to defend was triggered [A1 Specialized, Inc. v James Riv. Ins. Co., 2026 NY Slip Op 00570, First Dept 2-5-26](#)

Practice Point: An unsigned document requiring a party to be named as an additional insured is enforceable if the underlying policy does not require the agreement to be signed.

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LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

THE A-FRAME LADDER PLAINTIFF WAS USING WHEN HE FELL WAS DEFECTIVE AND LABOR LAW 240(1) APPLIED ON THAT GROUND ALONE; EVEN IF THE LADDER HAD NOT BEEN DEFECTIVE, LABOR LAW 240(1) WOULD STILL APPLY BECAUSE THE LADDER WOBBLLED AFTER PLAINTIFF RECEIVED AN ELECTRIC SHOCK; THERE IS NO EXCEPTION TO THE APPLICABILITY OF LABOR LAW 240(1) WHERE A LADDER-FALL IS PRECEDED BY AN ELECTRIC SHOCK (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Mendez, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action in this ladder-fall case. Plaintiff was standing on an A-frame ladder when he he was shocked by a live electric wire and fell. At the time he was shocked, he felt the ladder wobble. That evidence was sufficient for summary judgment. There is no exception under Labor Law 240(1) for a fall which follows an electric shock:

... [T]he statute applies here because the ladder was defective. Plaintiff's deposition testimony and the photographs provided clearly demonstrate that the ladder, which was the only one available for the work plaintiff was required to perform, had two bent and curved crossbeams and worn rubber feet. The general contractor's corporate safety manager confirmed that the ladder was defective when he stated at his deposition that if he had observed a ladder with the damage depicted in the photographs, he would have replaced the ladder and taken it out of service.

Even if the ladder had been stable, this would have been no impediment to a claim under section 240 Plaintiff submitted evidence that the ladder was an inadequate safety device because it failed to provide adequate protection against the gravity-related risk inherent in the work he was performing. Plaintiff testified that when he removed his hand from the wires that shocked him, the ladder immediately "moved, wobbled and shifted," establishing that it failed to adequately support and protect him from the gravity-related risk [Szczeniak v Ery Tenant LLC, 2026 NY Slip Op 00600, First Dept 2-5-26](#)

Practice Point: Plaintiff fell from a ladder which wobbled after he received an electric shock. The fact that the ladder wobbled was proof it was not an adequate safety device. The electric shock was not relevant to the applicability of Labor Law 240(1).

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NEGLIGENCE, EMPLOYMENT LAW, CONTRACT LAW.

PLAINTIFF WAS STRUCK BY A SHED WHICH WAS BEING TRANSPORTED AS AN OVERSIZED LOAD; AN EMPLOYER WHICH HIRES AN INDEPENDENT CONTRACTOR WILL GENERALLY NOT BE VICARIOUSLY LIABLE FOR THE CONTRACTOR'S NEGLIGENCE UNLESS THE CONTRACTOR IS TASKED WITH AN "INHERENTLY DANGEROUS ACTIVITY;" TRANSPORTING AN OVERSIZED LOAD BY TRUCK IS NOT AN "INHERENTLY DANGEROUS ACTIVITY;" THEREFORE THE EMPLOYER WAS NOT VICARIOUSLY LIABLE FOR THE TRUCK DRIVER'S NEGLIGENCE WHICH CAUSED PLAINTIFF'S INJURY (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Powers, over a dissent, determined defendant ACS, which hired defendant St. Mary as an independent contractor, was not vicariously liable for the negligence of a driver working for St. Mary. Plaintiff was struck by a shed which was being transported by truck as an oversized load. Although the employer is usually not vicariously liable for the negligence of an independent contractor, there is an exception where the employer assigns an "inherently dangerous" task to the independent contractor. The majority concluded that moving a shed on a truck as an oversized load did not meet the definition of "inherently dangerous:"

It is undisputed that St Mary was an independent contractor of ACS and, as a general rule, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" Certain exceptions exist to this general rule, however. These exceptions include, as is relevant here, " 'where the employer . . . has assigned work to an

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independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer’ ” * * *

... “[A]n actor who hires an independent contractor to do work that the actor knows or should know involves an abnormally dangerous activity is subject to vicarious liability for physical harm when the abnormally dangerous activity is a factual cause of any such harm within the scope of liability” (Restatement [Third] of Torts § 58). “[A]n activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage”

... [N]o view of the facts presented on this motion supports the conclusion that the trucking of the oversized load in question was an inherently dangerous activity because there was not a significant risk of harm if reasonable care were exercised by those involved — namely, Rousell [the driver]. Plaintiff alleges that his injuries resulted from Rousell failing to take notice of his surroundings on one side of the vehicle and crossing the line separating lanes of travel. This ordinary incident of negligence — i.e., failing to appropriately observe one’s surroundings — is not inherent in the trucking of oversized loads and could have been avoided with the exercise of reasonable care. “Demanding though it may be, the activity of transporting [oversized loads on public highways] — successfully accomplished countless times daily — does not involve that sort of inherent risk for the nonnegligent driver and is simply not an inherently dangerous activity so as to trigger vicarious liability” [Deitrich v Binghamton Rd. Elec., LLC, 2026 NY Slip Op 00557, Third Dept 2-5-26](#)

Practice Point: Consult this opinion for insight into what constitutes an “inherently dangerous activity” which can trigger an employer’s vicarious liability for the negligence of an independent contractor.

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TAX LAW.

PETITIONER LEASED COMMERCIAL TRUCKS; AT THE OUTSET OF THE LEASE PETITIONER PAID SALES TAX BASED ON THE ESTIMATED RENT; IF, AT THE END OF THE LEASE, THE ACTUAL RENT WAS LOWER THAN THE ESTIMATED RENT, PETITIONER REFUNDED THE EXCESS RENT AND SALES TAX; PETITIONER THEN TOOK CREDITS FOR THE REFUNDED SALES TAX; THE TAX TRIBUNAL FOUND PETITIONER COULD NOT TAKE THOSE CREDITS AND IMPOSED A SALES TAX ASSESSMENT OF NEARLY \$3 MILLION; THE THIRD DEPARTMENT ANNULLED THE ASSESSMENT FINDING THE CREDITS PROPER (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, annulled the Tax Appeals Tribunal's sustaining of a nearly \$3 million sales tax assessment imposed on petitioner. Petitioner leased commercial trucks. At the outset of the lease petitioner paid sales tax based on the estimated rent. At the end of the lease the actual rent was calculated based upon the value of the truck. If the actual rent was lower than the estimated rent paid at the outset, the excess rent and sales tax was refunded. Petitioner took tax credits for those refunds. The Third Department determined taking the credits was proper. [Matter of Gelco Corp. v State of N.Y. Tax Appeals Trib., 2026 NY Slip Op 00553, Third Dept 2-5-26](#)

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