

NEW YORK APPELLATE DIGEST, INC.

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Weekly Reversal
Report
March 23 – 27,
2026

Contents

CIVIL PROCEDURE, JUDGES, APPEALS.	3
ABSENT A MOTION BY A PARTY, SUPREME COURT SHOULD NOT HAVE DISMISSED THE ACTION BASED UPON DEFECTIVE SERVICE (THIRD DEPT).....	3
CIVIL PROCEDURE, JUDGES.	4
THE JUDGE DID NOT CONSIDER PLAINTIFF’S MOTION PAPERS TO THE EXTENT THE COURT-IMPOSED PAGE-LIMIT WAS EXCEEDED; REMITTED FOR A NEW DETERMINATION OF THE MOTIONS (SECOND DEPT).	4
CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.	5
THE MEDICAL MALPRACTICE COMPLAINT DID NOT ALLEGE A LACK OF INFORMED CONSENT; THEREFORE REFERENCES TO A LACK OF INFORMED CONSENT CAUSE OF ACTION IN PLAINTIFFS’ BILL OF PARTICULARS WERE STRICKEN (FOURTH DEPT).	5
CIVIL PROCEDURE.	6
NEW YORK IS A “PERMISSIVE COUNTERCLAIM” JURISDICTION; HERE COUNTERCLAIMS SHOULD NOT HAVE BEEN DISMISSED BECAUSE THEY COULD HAVE BEEN RAISED IN A PRIOR PROCEEDING (SECOND DEPT).	6
CONTEMPT, CIVIL PROCEDURE, JUDGES.	7
THE JUDGE DID NOT COMPLY WITH THE REQUIRED PROCEDURES FOR FINDING A PARTY IN CONTEMPT AND IMPOSING SANCTIONS (SECOND DEPT).	7
CRIMINAL LAW, EVIDENCE, APPEALS.	8
ALTHOUGH THE DEFENDANT WAS 33 YEARS OLD AND THE JURY OBSERVED HIM, THE PEOPLE’S FAILURE TO PROVE HE WAS OVER 18 AT THE TIME OF THE CRIMES REQUIRED REVERSAL AND DISMISSAL OF TWO COUNTS; THE ERROR WAS NOT PRESERVED; THE COURT CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE (FOURTH DEPT).....	8
CRIMINAL LAW, EVIDENCE, JUDGES.....	9
AN UNAVAILABLE WITNESS’S STATEMENT AGAINST PENAL INTEREST CONFESSING TO THE MURDER FOR WHICH DEFENDANT WAS CONVICTED SHOULD HAVE BEEN ADMITTED; NEW TRIAL ORDERED (FOURTH DEPT).....	9
CRIMINAL LAW, JUDGES, ATTORNEYS.....	10
THE JUDGE DID NOT MAKE EVEN A “MINIMAL INQUIRY” WHEN DEFENDANT STATED HE WANTED ANOTHER ATTORNEY; DEFENDANT DID NOT ABANDON THE ISSUE BY NOT RAISING IT AGAIN WHEN HE PLED GUILTY; PLEA VACATED (FIRST DEPT).....	10

Table of Contents

CRIMINAL LAW, JUDGES. 11

ALLOWING DEFENDANT AND CODEFENDANT TO EXERCISE THEIR SHARED PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS UNILATERALLY WAS REVERSIBLE ERROR (FOURTH DEPT). 11

CRIMINAL LAW. 12

PENAL LAW 220.39(1) AND 220.16(1) DO NOT REQUIRE KNOWLEDGE OF THE SPECIFIC DRUG INVOLVED; ONLY KNOWLEDGE THAT THE SUBSTANCE IS A “NARCOTIC DRUG” IS REQUIRED; THEREFORE PENAL LAW 220.16(1) AND 21 USC 841(1)(A) ARE “STRICTLY EQUIVALENT” OFFENSES FOR PURPOSES OF A SECOND FELONY OFFENDER ADJUDICATION (FIRST DEPT). 12

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE. 13

THE AFFIANT DID NOT SUBMIT THE BUSINESS RECORDS DEMONSTRATING THE NOTE WAS PHYSICALLY DELIVERED TO THE PLAINTIFF BEFORE THE FORECLOSURE ACTION WAS COMMENCED AND DID NOT DEMONSTRATE SHE HAD PERSONAL KNOWLEDGE THAT PLAINTIFF POSSESSED THE NOTE AT THE TIME THE ACTION WAS COMMENCED; THEREFORE PLAINTIFF DID NOT DEMONSTRATE STANDING TO FORECLOSE (SECOND DEPT). 13

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 14

PLAINTIFF WAS STANDING ON AN A-FRAME LADDER WHEN AN ELECTRICAL EXPLOSION CAUSED HIM AND THE LADDER TO FALL TO THE GROUND; THERE WAS NO EVIDENCE THE LADDER WAS DEFECTIVE; BECAUSE PLAINTIFF DID NOT PRESENT ANY EVIDENCE THAT A SAFETY DEVICE WOULD HAVE PREVENTED THE FALL, HE WAS NOT ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT). 14

LANDLORD-TENANT, BATTERY, NEGLIGENCE. 15

THE LANDLORD DID NOT OWE A DUTY TO A TENANT TO PREVENT AN ASSAULT BY ANOTHER TENANT; THE LANDLORD’S DUTY IS NOT TRIGGERED UNLESS THE LANDLORD HAS THE AUTHORITY, ABILITY AND OPPORTUNITY TO CONTROL THE ACTIONS OF A TENANT-ASSAILANT; THE ABILITY TO EVICT DOES NOT CONSTITUTE THE REQUISITE AUTHORITY (FIRST DEPT). 15

MENTAL HYGIENE LAW, JUDGES, TRUSTS AND ESTATES. 16

PURSUANT TO THE MENTAL HYGIENE LAW, THE JUDGE DID NOT HAVE THE AUTHORITY TO INVALIDATE THE INCAPACITATED PERSON’S WILL IN THIS GUARDIANSHIP PROCEEDING (SECOND DEPT). 16

[Table of Contents](#)

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE..... 17

THE DAY CARE PROVIDER TESTIFIED HER BACK WAS TURNED WHEN INFANT PLAINTIFF FELL OFF THE SLIDE; THE DAY CARE CENTER’S MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENT-SUPERVISION CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 17

NEGLIGENCE, EVIDENCE. 18

THE ICY CONDITION WAS CREATED BY “POCKETS OF FREEZING RAIN” FROM MIDNIGHT TO 3:45 AM; THERE WAS NO “STORM;” THE “STORM-IN-PROGRESS” DOCTRINE SHOULD NOT HAVE BEEN APPLIED IN THIS SLIP AND FALL CASE (THIRD DEPT). 18

NEGLIGENCE..... 20

DEFENDANT BUILDING OWNER AND MANAGER WERE ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE UNDER THE STORM-IN-PROGRESS DOCTRINE, 18 INCHES OF SNOW HAD FALLEN LESS THAN TWO HOURS BEFORE; PLAINTIFF SLIPPED AND FELL ON WATER ON STAIRS IN THE LOBBY; PLAINTIFF’S OWN TESTIMONY DEMONSTRATED DEFENDANTS DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT)..... 20

CIVIL PROCEDURE, JUDGES, APPEALS.

ABSENT A MOTION BY A PARTY, SUPREME COURT SHOULD NOT HAVE DISMISSED THE ACTION BASED UPON DEFECTIVE SERVICE (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff’s motion to vacate the order dismissing the action should have been granted. The court, sua sponte, dismissed the case because of defective service. However, a dismissal on this ground requires a motion by a party. The dissenters argued the order at issue is not appealable and would have dismissed the appeal:

... CPLR 306-b specifies that “[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service” (emphasis added). In consideration of this

[Table of Contents](#)

express language, other Departments of the Appellate Division have recognized that a court cannot dismiss a complaint on its own initiative for lack of personal jurisdiction based upon the failure to effect proper service of process As the July 2023 order dismissed the underlying action for lack of personal jurisdiction sua sponte, the court erred in doing so absent a motion by one of the parties. On account of that error, the court abused its discretion in denying plaintiff’s instant request that it exercise its discretionary power to vacate that order in the interest of substantial justice Plaintiff’s motion seeking to vacate the July 2023 order dismissing the action should therefore be granted and the complaint reinstated. [Briggs v Fresenius, 2026 NY Slip Op 01827, Third Dept 3-26-26](#)

Practice Point: A judge cannot, sua sponte, dismiss an action because of defective service. A party must move to dismiss on that ground.

March 26, 2026

CIVIL PROCEDURE, JUDGES.

THE JUDGE DID NOT CONSIDER PLAINTIFF’S MOTION PAPERS TO THE EXTENT THE COURT-IMPOSED PAGE-LIMIT WAS EXCEEDED; REMITTED FOR A NEW DETERMINATION OF THE MOTIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge’s refusal to read plaintiff’s motion papers to the extent the court-imposed page-limit was exceeded was unreasonable. Having accepted plaintiff’s papers, the court should have considered them in their entirety:

“It is appropriate for courts to set page or word limits on submissions, and to reject papers that fail to comply with those limits” However, “[i]t is not reasonable . . . for a court to accept papers that do not comply with the court’s page limitation and then refuse to read the noncompliant pages, denying, as a consequence, substantive relief that may be warranted” Having accepted the plaintiff’s papers, the Supreme Court should have considered the entirety of the plaintiff’s affirmation and memorandum of law submitted in support of the plaintiff’s opposition to the defendants’ motion and in support of the cross-motion.

Accordingly, we remit the matter to the Supreme Court ... for a new determination on the merits of the defendants' motion and the plaintiff's cross-motion. [Weingarten v Kopelowitz, 2026 NY Slip Op 01816, Second Dept 3-25-26](#)

Practice Point: If the court accepts motion papers which exceed the court-imposed page-limit, the court must consider the papers in their entirety.

March 25, 2026

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

THE MEDICAL MALPRACTICE COMPLAINT DID NOT ALLEGE A LACK OF INFORMED CONSENT; THEREFORE REFERENCES TO A LACK OF INFORMED CONSENT CAUSE OF ACTION IN PLAINTIFFS' BILL OF PARTICULARS WERE STRICKEN (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this medical malpractice action, determined the hospital's motion to strike allegations of lack of informed consent should have been granted. That cause of action was not identified in the complaint. Therefore plaintiffs could not use their bill of particulars to assert it:

We agree with the Hospital defendants that the court erred in denying that part of their motion seeking, in effect, to strike the allegations of lack of informed consent from plaintiffs' amended bill of particulars to the Hospital defendants, and we modify the order accordingly. "[A] bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial . . . Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized . . . A bill of particulars may not be used to allege a new theory not originally asserted in the complaint" For those purposes, "[l]ack of informed consent is a distinct theory of medical malpractice liability rooted in a specific professional duty to reasonably inform and obtain consent from the patient," and claims for traditional medical malpractice and lack of informed consent " 'comprise[] different elements' " Here, we conclude that "[t]he complaint is based solely on [traditional] medical malpractice and does not contain a separate cause of action for lack of informed

consent” ... and that a review of the allegations in the complaint does not support the conclusion that the distinct theory of lack of informed consent was ” ‘sufficiently pleaded to avoid surprise and prejudice to [the Hospital] defendants’ ” Inasmuch as plaintiffs’ complaint does not presently plead a cause of action for lack of informed consent, the allegations in plaintiffs’ amended bill of particulars relating to lack of informed consent must be stricken [Heather J. v Rochester Regional Health, 2026 NY Slip Op 01880, Fourth Dept 3-27-26](#)

Practice Point: Here the complaint did not allege a cause of action for lack of informed consent. Therefore references to lack of informed consent in the bill of particulars can be stricken.

March 27, 2026

CIVIL PROCEDURE.

NEW YORK IS A “PERMISSIVE COUNTERCLAIM” JURISDICTION; HERE COUNTERCLAIMS SHOULD NOT HAVE BEEN DISMISSED BECAUSE THEY COULD HAVE BEEN RAISED IN A PRIOR PROCEEDING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined counterclaims in the current proceeding should not have been dismissed because they could have been raised in a prior proceeding: New York is a “permissive counterclaim” state:

New York is a permissive counterclaim jurisdiction under CPLR 3011 and 3019, where, generally, a defendant has no obligation to assert counterclaims and can wait to assert them in separate litigation However, while “[o]ur permissive counterclaim rule may save from the bar of res judicata those claims for separate or different relief that could have been but were not interposed in the parties’ prior action,” the rule “does not . . . permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action”

Here, [the party’s] failure to assert the remaining causes of action as counterclaims in the prior action did not preclude him from asserting them in this action because, if [he] were successful on those causes of action, this would not impair the rights that were or could be established in the prior action with respect to him [Berry v Batash, 2026 NY Slip Op 01755, Second Dept 3-25-26](#)

Practice Point: Consult this decision for insight into when counterclaims which could have been raised in a prior proceedings should or should not be dismissed.

March 25, 2026

CONTEMPT, CIVIL PROCEDURE, JUDGES.

THE JUDGE DID NOT COMPLY WITH THE REQUIRED PROCEDURES FOR FINDING A PARTY IN CONTEMPT AND IMPOSING SANCTIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge did not comply with the rules for finding a party in contempt and imposing sanctions:

Pursuant to Judiciary Law § 756, a contempt application must be in writing, must be made upon at least 10 days’ notice, and must contain on its face the statutory warning that “FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT” Here, among other things, the defendants were never provided with the warning required by Judiciary Law § 756 Further, an order requiring the performance of an act may not include an additional clause stating that in default thereof, the party will be guilty of contempt of court

The Supreme Court also should have granted that branch of the defendants’ motion which was to vacate so much of the ... order as conditionally imposed sanctions upon the defendants and their counsel. “A court does not have the authority to impose a penalty or sanction absent enabling legislation or court rule authorizing the penalty or sanction” Here, the court cited to no legislation or court rule to support the imposition of sanctions. To the extent that the court relied upon 22 NYCRR 130-1.1, it should not have done so. Among other reasons, the ... order

did not set forth the conduct on which the imposition of sanctions was based and the reason why the court found the conduct to be frivolous [Yong Hong Xie v Lan Chen, 2026 NY Slip Op 01819, Second Dept 3-25-26](#)

Practice Point: Consult this decision for insight into the procedural rules a court must follow to find a party in contempt and impose sanctions.

March 25, 2026

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE DEFENDANT WAS 33 YEARS OLD AND THE JURY OBSERVED HIM, THE PEOPLE’S FAILURE TO PROVE HE WAS OVER 18 AT THE TIME OF THE CRIMES REQUIRED REVERSAL AND DISMISSAL OF TWO COUNTS; THE ERROR WAS NOT PRESERVED; THE COURT CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing defendant’s convictions of predatory sexual assault of a child and criminal sexual act first degree, determined that, although defendant was in fact 33 years old, the People failed to prove that he was over 18 at the time of the crimes. The errors was not preserved. The appellate court exercised its interest of justice jurisdiction to consider the issue:

Here, two counts in the indictment include an age element that required the People to establish that defendant was at least 18 years old at the time of the crimes in June 2020 Defendant was in fact 33 years old in June 2020, and the jury naturally had the opportunity to observe his appearance during the trial in 2021, but that opportunity “does not, by itself, satisfy the People’s obligation to prove defendant’s age” ... , and there was no evidence at trial bearing on his age We therefore modify the judgment by reversing those parts convicting defendant of predatory sexual assault against a child under count 1 of the indictment and criminal sexual act in the first degree under count 5 of the indictment and dismissing those counts of the indictment. [People v Jones, 2026 NY Slip Op 01882, Fourth Dept 3-27-26](#)

Practice Point: If being over 18 at the time of the crime is an element of the offense, the People must prove that element. Here the defendant was 33, but the failure to prove he was over 18 was reversible error. This error will be considered by an appellate court even where it has not been preserved for appeal.

March 27, 2026

CRIMINAL LAW, EVIDENCE, JUDGES.

AN UNAVAILABLE WITNESS'S STATEMENT AGAINST PENAL INTEREST CONFESSING TO THE MURDER FOR WHICH DEFENDANT WAS CONVICTED SHOULD HAVE BEEN ADMITTED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, over a two-justice dissent, determined that the statement against penal interest made by a witness in a post-trial CPL article 440 hearing should have been admitted at trial. The witness essentially confessed to the shooting for which defendant was convicted. At the time of the trial, the witness was unavailable because he asserted his Fifth Amendment privilege against self-incrimination. The trial judge excluded the statement against penal interest on the ground that circumstances independent of the statement itself did not support the statement's truthfulness and reliability :

... [W]e conclude, based on the circumstances of the witness's CPL article 440 testimony and the trial record, from which that testimony was absent, that "there is 'a reasonable possibility that the [testimony] might be true' " Initially, the witness's description of the third party shooting at the window from the backyard when the light went on is consistent with the female victim's testimony that she was shot immediately after she turned on the light and the physical evidence that the shots were fired through the rear window. The witness testified that the third party picked up a .38 firearm, which is consistent with the projectiles recovered from the shooting, from a nearby location just prior to the shooting. The witness's description of running down the driveway with the third party immediately following the shots, across the street, and then over a backyard fence coincides

[Table of Contents](#)

with a female neighbor’s description in her trial testimony of two men jumping over her back fence. The testimony of a law enforcement witness also corroborated the witness’s account of the two prior robberies described by the witness during his CPL article 440 testimony. Further, there is no evidence that the witness had a familial or close relationship with defendant or other “obvious motive for [the witness] to falsely implicate himself”

In light of the more lenient standard applied to exculpatory statements, we conclude that the initial threshold of reliability is met, i.e., that there is a “reasonable possibility that the statement might be true” [People v Williams, 2026 NY Slip Op 01881, Fourth Dept 3-27-26](#)

Practice Point: Consult this decision for the criteria for admission of a statement against penal interest.

March 27, 2026

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE DID NOT MAKE EVEN A “MINIMAL INQUIRY” WHEN DEFENDANT STATED HE WANTED ANOTHER ATTORNEY; DEFENDANT DID NOT ABANDON THE ISSUE BY NOT RAISING IT AGAIN WHEN HE PLED GUILTY; PLEA VACATED (FIRST DEPT).

The First Department, vacating defendant’s guilty plea, in a full-fledged opinion by Judge Rodriguez, over a dissenting opinion, determined defendant was not afforded an adequate opportunity to explain his request for a new attorney. Defendant attempted to raise the issue at an early court appearance, but the judge made no inquiry. Subsequently, without raising the issue again, defendant pled guilty while represented by the same attorney:

“Where a defendant makes a seemingly serious request for reassignment of counsel, the court must make at least a ‘minimal inquiry’ as to ‘the nature of the disagreement or its potential for resolution’ ” Generally, to trigger the “minimal inquiry” requirement, the defendant must provide specific factual allegations

[Table of Contents](#)

However, the “minimal inquiry” requirement presumes a fair opportunity to be heard. The law, in other words, does not permit the court to satisfy its obligations in this area by refusing the defendant an opportunity to record a potentially serious request. Thus, if the court denies the defendant’s “request for substitution of counsel without conducting any inquiry whatsoever, and without permitting defendant to explain, either orally or in writing, why such an inquiry might be necessary,” the defendant’s conviction should be vacated

Here, the court summarily denied defendant’s application without giving him a fair opportunity to be heard. Specifically, when defendant first asked to speak, the court ignored him altogether. When defendant made a second attempt, the court refused to permit him to address the issue and instead instructed him to “[t]alk to [his] lawyer.” As the People acknowledge, defendant had to interrupt the proceeding on his third attempt to communicate even his most elemental “need [for] a new attorney.” [People v Dinkins, 2026 NY Slip Op 01742, First Dept 3-24-26](#)

Practice Point: Consult this opinion for insight into the inquiry which must be made by a judge when a defendant requests a new attorney.

March 24, 2026

CRIMINAL LAW, JUDGES.

ALLOWING DEFENDANT AND CODEFENDANT TO EXERCISE THEIR SHARED PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS UNILATERALLY WAS REVERSIBLE ERROR (FOURTH DEPT).

The Fourth Department, reversing defendant’s conviction and ordering a new trial, determined the trial judge should not have allowed the defendant and the codefendant to exercise their shared peremptory challenges to jurors unilaterally:

... County Court erred in permitting the codefendant to unilaterally exercise peremptory challenges. ... The court’s process of allowing defendant and codefendant to each unilaterally exercise their shared peremptory challenges was in violation of CPL 270.25 former (3) and resulted in defendant and codefendant exhausting their shared peremptory challenges before all jurors were selected

A court’s mistaken denial of a defendant’s peremptory challenge “under New York law mandates automatic reversal” [People v Jones, 2026 NY Slip Op 01874, Fourth Dept 3-26-26](#)

Practice Point: The court should not have allowed defendant and codefendant to exercise their shared peremptory challenges unilaterally.

March 27, 2026

CRIMINAL LAW.

PENAL LAW 220.39(1) AND 220.16(1) DO NOT REQUIRE KNOWLEDGE OF THE SPECIFIC DRUG INVOLVED; ONLY KNOWLEDGE THAT THE SUBSTANCE IS A “NARCOTIC DRUG” IS REQUIRED; THEREFORE PENAL LAW 220.16(1) AND 21 USC 841(1)(A) ARE “STRICTLY EQUIVALENT” OFFENSES FOR PURPOSES OF A SECOND FELONY OFFENDER ADJUDICATION (FIRST DEPT).

The First Department, overruling precedent, determined that the knowledge element of Penal Law 220.16(1) (criminal possession of a controlled substance) requires only that a defendant know that the substance is a “narcotic drug” and does not require knowledge that the substance is a specific drug. Therefore Penal Law 220.16(1) is equivalent to 21 USC 841(1)(a) and defendant can be sentenced as a second felony offender based on the prior federal conviction:

... Penal Law § 220.39(1) ... [states that] a person is guilty of criminal sale of a controlled substance in the third degree “when he knowingly and unlawfully sells . . . a narcotic drug.” We now hold that the “nature” of the substance possessed under Penal Law § 220.39(1), and under Penal Law § 220.16(1), the statute at issue in the instance case, is, in accordance with the statutory language, “a narcotic drug.” Knowledge of the particular drug possessed is not required. This definition also aligns the knowledge requirement with other decisions of this Court. For example, in *People v Martin* (153 AD2d 807, 808 [1st Dept 1989], lv denied 74 NY2d 950 [1989]), we held, in a different context, that “Penal Law § 220.16(1)

does not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably.”

Under the correct definition of the nature of the substance possessed, defendant’s federal conviction and Penal Law § 220.16(1) are strictly equivalent. [People v Jones, 2026 NY Slip Op 01857, First Dept 3-26-26](#)

Practice Point: Here the First Department overruled precedent which held that the knowledge element of drug-possession charges required knowledge of the specific drug involved. Because the knowledge element requires only that a defendant know the possessed substance is a “narcotic drug,” Penal Law 220.16(1) is strictly equivalent to the federal statute 21 USC 841(1)(a) for purposes of a second felony offender adjudication.

March 26, 2026

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE AFFIANT DID NOT SUBMIT THE BUSINESS RECORDS DEMONSTRATING THE NOTE WAS PHYSICALLY DELIVERED TO THE PLAINTIFF BEFORE THE FORECLOSURE ACTION WAS COMMENCED AND DID NOT DEMONSTRATE SHE HAD PERSONAL KNOWLEDGE THAT PLAINTIFF POSSESSED THE NOTE AT THE TIME THE ACTION WAS COMMENCED; THEREFORE PLAINTIFF DID NOT DEMONSTRATE STANDING TO FORECLOSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the documentary evidence submitted by plaintiff mortgage company to demonstrate it had standing to foreclose was insufficient:

“A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note” “The plaintiff meets this burden with proof of either a written assignment of the underlying note or the physical delivery of the

[Table of Contents](#)

note endorsed in blank or specially to it prior to the commencement of the foreclosure action”

Here, an affidavit of Teresa Swayze, an assistant vice president of the plaintiff’s servicing agent, submitted in support of the plaintiff’s motion for leave to renew, was insufficient to establish that the plaintiff possessed the note at the time this action was commenced. Swayze averred that the note was physically delivered to the plaintiff prior to the commencement of this action and attached to her affidavit a copy of the note with an allonge endorsed in blank. However, Swayze failed to submit the business record on which she relied for her assertion that the note was physically delivered to the plaintiff prior to the commencement of this action Moreover, Swayze’s affidavit did not demonstrate that she had personal knowledge of whether the plaintiff possessed the note at the time of the commencement of this action [Federal Natl. Mtge. Assn. v Ayoola, 2026 NY Slip Op 01772, Second Dept 3-25-26](#)

March 25, 2026

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS STANDING ON AN A-FRAME LADDER WHEN AN ELECTRICAL EXPLOSION CAUSED HIM AND THE LADDER TO FALL TO THE GROUND; THERE WAS NO EVIDENCE THE LADDER WAS DEFECTIVE; BECAUSE PLAINTIFF DID NOT PRESENT ANY EVIDENCE THAT A SAFETY DEVICE WOULD HAVE PREVENTED THE FALL, HE WAS NOT ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, determined plaintiff in this ladder-fall case was not entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was standing on an A-frame ladder when a wire fed in by another worker struck and electric panel causing an explosion. Plaintiff and the ladder fell to the floor. The evidence did not demonstrate the ladder was defective. And plaintiff did not present any evidence that additional safety devices would have prevented the ladder from falling over:

Table of Contents

Nazario applies ... [T]here the plaintiff was not entitled to summary judgment due to the presence of several triable issues of fact (see Nazario, 28 NY3d at 1055). The record ... lacked evidence concerning whether the plaintiff “should have been provided with additional safety devices and [whether] the failure to do so was a contributing cause of the accident” ... Summary judgment was appropriately denied, ... even though the plaintiff “hung onto the ladder” and the ladder “fell to the ground” with the plaintiff “because it was not secured to something stable” ... As in Nazario, plaintiff here failed to submit any evidence—whether by his own testimony or through an expert opinion—addressing gravity-related safety devices or precautions that might have prevented his fall ... [Arias v Brooks Holdings Corp., 2026 NY Slip Op 01841, First Dept 3-26-26](#)

Practice Point: If a plaintiff in a ladder-fall case presents no evidence the ladder itself was defective, summary judgment on the Labor Law 240 (1) cause of action will not be granted unless the plaintiff presents evidence that an additional safety device (which was not provided) would have prevented the fall.

March 26, 2026

LANDLORD-TENANT, BATTERY, NEGLIGENCE.

THE LANDLORD DID NOT OWE A DUTY TO A TENANT TO PREVENT AN ASSAULT BY ANOTHER TENANT; THE LANDLORD’S DUTY IS NOT TRIGGERED UNLESS THE LANDLORD HAS THE AUTHORITY, ABILITY AND OPPORTUNITY TO CONTROL THE ACTIONS OF A TENANT-ASSAILANT; THE ABILITY TO EVICT DOES NOT CONSTITUTE THE REQUISITE AUTHORITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the landlord did not have a duty to prevent one tenant from attacking another:

... [The landlord] demonstrated prima facie that they were not liable for the third-party defendant’s alleged assault on plaintiff. A landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant ... Here, defendants had no

[Table of Contents](#)

authority or opportunity to remove Vasquez from the premises prior to the assault. Defendants' employee testified that defendants were unaware of prior complaints of [the tenant] engaging in violence, and plaintiff acknowledged that before the attack she never complained about [the tenant] being violent. Moreover, the assault upon the plaintiff was not reasonably foreseeable

Plaintiff failed to raise an issue of fact in opposition. Defendants' ability to evict [the tenant] did not constitute the requisite authority, ability, and opportunity to control him Plaintiff failed to identify any prior complaints about [the tenant] being violent or making explicit threats of violence. Plaintiff's generalized complaints about unsupervised children on the complex and about other children engaging in bullying were not sufficient to put defendants on notice that [the tenant] might be violent [Rodriguez v Madison Sec. Group, Inc., 2026 NY Slip Op 01869, First Dept 3-26-26](#)

Practice Point: Consult this decision for insight into the nature of a landlord's duty to prevent an assault by one tenant against another.

March 26, 2026

MENTAL HYGIENE LAW, JUDGES, TRUSTS AND ESTATES.

PURSUANT TO THE MENTAL HYGIENE LAW, THE JUDGE DID NOT HAVE THE AUTHORITY TO INVALIDATE THE INCAPACITATED PERSON'S WILL IN THIS GUARDIANSHIP PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this guardianship proceeding pursuant to the Mental Hygiene Law did not have the authority to invalidate the incapacitated person's will:

... [T]he court ,, adjudged Vincent V. L. to be an incapacitated person within the meaning of Mental Hygiene Law article 81 and appointed an independent guardian for his person and property. At issue on this appeal ... is whether the court properly directed, in the context of this Mental Hygiene Law article 81 proceeding, that the last will and testament of Vincent V. L. ... , was void ab initio.

[Table of Contents](#)

Mental Hygiene Law § 81.29(d) expressly provides, in relevant part, that “[t]he court shall not . . . invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person” in the context of a Mental Hygiene Law article 81 proceeding. The Supreme Court thus did not have the authority to invalidate Vincent V. L.’s last will and testament in the context of this Mental Hygiene Law article 81 proceeding. [Matter of Vincent V.L. \(Matthew L.–Tomasine E.\), 2026 NY Slip Op 01789, Second Dept 3-25-26](#)

Practice Point: The Mental Hygiene Law prohibits the invalidation of an incapacitated person’s will in a guardianship proceeding.

March 25, 2026

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

THE DAY CARE PROVIDER TESTIFIED HER BACK WAS TURNED WHEN INFANT PLAINTIFF FELL OFF THE SLIDE; THE DAY CARE CENTER’S MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENT-SUPERVISION CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the day-care-center defendants’ motion for summary judgment on the negligent-supervision cause of action should not have been granted. The complaint alleged infant plaintiff fell off a slide:

Day care providers are under a duty to adequately supervise the children in their charge and may be held liable for foreseeable injuries proximately related to a lack of adequate supervision “In general, the duty of a day care/preschool provider is to supervise the children in its care with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances” Generally, whether supervision was adequate and whether inadequate supervision was the proximate cause of a child’s injury are questions of fact

Here, the defendants failed to demonstrate, prima facie, that they provided adequate supervision to the plaintiff or that a lack of adequate supervision was not

[Table of Contents](#)

a proximate cause of the plaintiff's injuries The defendants submitted, among other things, an expert affidavit from a child supervision expert and a transcript of the deposition testimony of the care provider present at the time of the plaintiff's injury. The care provider testified that she was trained to always keep the children in her sight while they are in the gym. Moreover, the defendants' expert emphasized that a teacher's position should allow the teacher to clearly see the entire play area and the children. However, despite the care provider's admitted familiarity with these practices, she testified that she was occupied tying another child's shoe with her back turned when the plaintiff was on the playset with her brother and that she did not see the plaintiff until the plaintiff was on the ground. The defendants thereby failed to eliminate all triable issues of fact as to negligent supervision [D.O. v Economic Opportunity Council of Suffolk, Inc., 2026 NY Slip Op 01797, Second Dept 3-25-26](#)

Practice Point: A day-care provider is obligated to keep the play area and the children in sight at all times. Here the day-care provider had turned her back when infant plaintiff fell off the slide. That raised a question of fact precluding summary judgment in favor of defendant on the negligent-supervision cause of action.

March 25, 2026

NEGLIGENCE, EVIDENCE.

THE ICY CONDITION WAS CREATED BY "POCKETS OF FREEZING RAIN" FROM MIDNIGHT TO 3:45 AM; THERE WAS NO "STORM;" THE "STORM-IN-PROGRESS" DOCTRINE SHOULD NOT HAVE BEEN APPLIED IN THIS SLIP AND FALL CASE (THIRD DEPT).

The Third Department, reversing the nonjury verdict in the Court of Claims in this parking-lot slip and fall cause, over a dissent, determined the defendant state had actual and constructive knowledge of the icy condition and the storm-in-progress doctrine did not apply:

The evidence establishes that defendant had actual notice of the icy conditions caused by the pockets of freezing rain and called in an employee to take appropriate measures to correct the dangerous condition by implementing

Table of Contents

defendant's usual precautions of sanding/salting all paved areas accessible to the sander trucks. Even assuming that the record was insufficient to establish actual notice, we are satisfied that defendant had constructive notice of the dangerous condition in the location of claimant's slip and fall. Based on the expert's testimony of icy conditions forming through 3:45 a.m., defendant should have been aware of the slippery conditions on untreated surfaces between approximately 12:00 a.m. and 2:00 a.m., the time when defendant's employee was performing "multiple" salting and sanding passes on the facility's roads for "safety," approximately five to seven hours before claimant's fall, which is a sufficient time to establish constructive notice * * *

... [T]he event in question amounted to "pockets of freezing rain" that fell from approximately midnight until 3:45 a.m. and caused a glaze of ice measuring .05 to 0.1 inches. Defendant begs the question when it immediately argues that it is entitled to a "reasonable period of time" from 3:45 a.m. to address the condition. The threshold question is the applicability of the doctrine in the first instance. While it may be true that there is no need to establish the existence of a major winter event in order to apply the doctrine, it is equally true that there must be some sort of ongoing hazardous weather condition, i.e., a "storm" that amounts to more than an "appreciable accumulation" The storm in progress doctrine is not to be applied whenever any type of inclement weather exists and, given the unrefuted testimony of claimant's expert meteorologist, it has no place in this litigation. [Powers v State of New York, 2026 NY Slip Op 01833, Third Dept 3-26-26](#)

Practice Point: In order for the storm-in-progress doctrine to be applicable, there must have been a "storm." Here "pockets of freezing rain" did not constitute a "storm."

March 26, 2026

NEGLIGENCE.

DEFENDANT BUILDING OWNER AND MANAGER WERE ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE UNDER THE STORM-IN-PROGRESS DOCTRINE, 18 INCHES OF SNOW HAD FALLEN LESS THAN TWO HOURS BEFORE; PLAINTIFF SLIPPED AND FELL ON WATER ON STAIRS IN THE LOBBY; PLAINTIFF'S OWN TESTIMONY DEMONSTRATED DEFENDANTS DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants (the building owner and manager) were not liable for plaintiff's slip and fall on water on interior stairs because of the storm-in-progress doctrine:

Defendants, the owner and manager of the building in which plaintiff was injured, established their entitlement to summary judgment by submitting undisputed meteorological data establishing that plaintiff's accident occurred no more than 1 hour and 50 minutes after cessation of a major winter storm, which resulted in the accumulation of more than 18 inches of snow. Thus, under the storm-in-progress doctrine, defendants' duty to maintain the lobby in a safe condition was suspended at the time plaintiff slipped and fell on the stairs, as defendants did not have a reasonable amount of time to permit discovery and remediation of the storm-related wet condition

Defendants also demonstrated that there were no triable issues of fact as to whether they created the condition or had actual or constructive notice of it. Plaintiff does not maintain that defendants created the hazardous condition. As to notice, plaintiff himself testified that he saw no wet condition or puddles on the stairs when he ascended them approximately 45 minutes before he slipped and fell on the way down; he also testified that only after his fall did he see dirty water on the stairs and small puddles in the lobby Therefore, the wet condition could not have existed for more than 45 minutes, which is insufficient to discover and remedy a dangerous condition [Alvizurez v North State Realty Assoc. LLC, 2026 NY Slip Op 01839, First Dept 3-26-26](#)

[Table of Contents](#)

Practice Point: Consult this decision for insight into the application of the storm-in-progress doctrine in a slip and fall case.

Practice Point: Note that a plaintiff's own testimony can reveal that a defendant did not have constructive notice of the condition which caused plaintiff's slip and fall.

March 26, 2026

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