

NEW YORK APPELLATE DIGEST, INC.

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts October 5 – 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
October 5 – 9,
2026

Contents

ADMINISTRATIVE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW, CRIMINAL LAW.	4
EQUIVOCAL AND CONTRADICTORY EVIDENCE DID NOT MEET THE “CLEAR AND CONVINCING” STANDARD FOR THE ISSUANCE OF AN “EXTREME RISK PROTECTION ORDER (ERPO)” (THIRD DEPT).	4
AGENCY, CONTRACT LAW, DEBTOR-CREDITOR.	6
THERE WAS NO PROOF PLAINTIFFS HAD NOTICE DEFENDANT WAS ACTING AS AN AGENT FOR A LIMITED LIABILITY COMPANY WHEN HE SIGNED THE CONSTRUCTION-LOAN CONTRACT; THE BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).	6
ARTS AND CULTURAL AFFAIRS LAW, CIVIL PROCEDURE.	7
A PUTATIVE CLASS ACTION SUIT ALLEGING MUSEUM ADMISSION TICKETS FAILED TO DISCLOSE THE FULL PRICE OF THE TICKET PROPERLY SURVIVED A MOTION TO DISMISS; THE “VOLUNTARY PAYMENT DOCTRINE” DID NOT APPLY (SECOND DEPT).	7
ATTORNEYS, CIVIL RIGHTS LAW, DEFAMATION.	8
PLAINTIFF ATTORNEY’S DEFAMATION SUIT AGAINST A FORMER CLIENT WHO POSTED A NEGATIVE REVIEW WAS A “STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP);” PLAINTIFF DID NOT DEMONSTRATE THE SUIT HAD A SUBSTANTIAL BASIS IN LAW; THE POST WAS NONACTIONABLE OPINION (SECOND DEPT).	8
CIVIL PROCEDURE, FORECLOSURE.	9
PLAINTIFF DID NOT DEMONSTRATE THE PROCESS SERVER ACTED WITH “DUE DILIGENCE” BEFORE RESORTING TO “NAIL AND MAIL” SERVICE; THE COURT THEREFORE DID NOT ACQUIRE PERSONAL JURISDICTION OVER DEFENDANT; CRITERIA EXPLAINED (SECOND DEPT).	9
CIVIL PROCEDURE, NEGLIGENCE, IMMUNITY, MUNICIPAL LAW, EVIDENCE.	10
A PRECLUSION ORDER DOES NOT HAVE THE SAME EFFECT AS STRIKING THE ANSWER; THE DEFENDANT CAN STILL PRESENT LEGAL ARGUMENTS SUPPORTING A MOTION TO DISMISS; HERE THE DEFENDANT CITY AMBULANCE SERVICE WAS PERFORMING A GOVERNMENTAL FUNCTION WHEN DECEDENT WAS INJURED AND WAS ENTITLED TO IMMUNITY IN THE NEGLIGENCE ACTION (SECOND DEPT).	10
CONSTITUTIONAL LAW, CRIMINAL LAW, JUDGES.	12
THE LIMITED INQUIRY CONDUCTED BY THE JUDGE BEFORE HOLDING THE TRIAL IN DEFENDANT’S ABSENCE WAS INSUFFICIENT TO DEMONSTRATE DEFENDANT FORFEITED HIS RIGHT TO BE PRESENT AT THE TRIAL (SECOND DEPT).	12

Table of Contents

CONSTITUTIONAL LAW, CRIMINAL LAW, JUDGES.	13
THE SUPREME COURT’S RULING IN ERLINGER V US DOES NOT ALTER THE LANDSCAPE OF NEW YORK’S PREDICATE OFFENDER STATUTES; A JUDGE, AS OPPOSED TO A JURY, CAN MAKE THE CALCULATIONS NECESSARY TO DETERMINE THE BOUNDS OF THE 10-YEAR LOOKBACK PERIOD, INCLUDING THE TOLLING OF THE LOOKBACK BY INCARCERATION (SECOND DEPT).	13
CONSUMER LAW, CONTRACT LAW, FRAUD, INSURANCE LAW.	14
GENERAL BUSINESS LAW 349 RENDERS UNFAIR, DECEPTIVE OR ABUSIVE BUSINESS PRACTICES UNLAWFUL; THE STATUTE APPLIES ONLY TO CONSUMER ORIENTED CONDUCT; HERE THE DISPUTE OVER A PRIVATE INSURANCE CONTRACT FOR A RACING YACHT WAS NOT WITHIN THE AMBIT OF THE STATUTE (SECOND DEPT).	14
CONSUMER LAW, ENVIRONMENTAL LAW, MUNICIPAL LAW, FRAUD, ADMINISTRATIVE LAW.	15
CAUSES OF ACTION AGAINST “BIG OIL” ALLEGING “GREENWASHING” IN VIOLATION OF NYC’S CONSUMER PROTECTION LAW PROPERLY DISMISSED (FIRST DEPT).	15
CRIMINAL LAW, EVIDENCE, ATTORNEYS.	17
PRESENTING A VIDEOTAPED INTERVIEW OF THE 17-YEAR-OLD VICTIM TO THE GRAND JURY IN THE ABSENCE OF A COURT ORDER VIOLATED THE CRIMINAL PROCEDURE LAW AND IMPAIRED THE INTEGRITY OF THE PROCEEDINGS; INDICTMENT DISMISSED WITHOUT PREJUDICE (FOURTH DEPT).	17
CRIMINAL LAW, EVIDENCE, JUDGES.	18
DEFENDANT PRESENTED SUFFICIENT EVIDENCE THAT HE WAS THE VICTIM OF ABUSE BY HIS GIRLFRIEND AT THE TIME OF THE OFFENSE TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS SENTENCE AND FOR RESENTENCING PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) (SECOND DEPT).	18
CRIMINAL LAW, EVIDENCE, JUDGES.	19
THE JURY SHOULD HAVE BEEN CHARGED WITH THE “DEFENSE OF A GOOD CLAIM OF RIGHT” IN THIS PETIT LARCENY CASE; DEFENDANT HAD REMOVED A MEMORIAL TO A MURDER VICTIM WHICH HAD BEEN SET UP ON THE SIDEWALK IN FRONT OF DEFENDANT’S MOTHER’S HOUSE (SECOND DEPT).	19

Table of Contents

CRIMINAL LAW, FAMILY LAW, ATTORNEYS.	21
THE PEOPLE’S AFFIRMATION IN SUPPORT OF THEIR MOTION TO PREVENT REMOVAL OF THE 17-YEAR-OLD’S CASE TO FAMILY COURT WAS NOT BASED ON THE PROSECUTOR’S PERSONAL KNOWLEDGE AND FAILED TO ALLEGE DEFENDANT’S SPECIFIC CONDUCT; THE MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).	21
CRIMINAL LAW, JUDGES, EVIDENCE.....	22
NOTHING IN THE RECORD SUPPORTED THE PROSECUTOR’S REASON FOR STRIKING A JUROR, I.E., THAT THE JUROR “SPOKE BROKEN ENGLISH;” DEFENDANT’S BATSON CHALLENGE TO THE STRIKING OF THE JUROR SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (THIRD DEPT).	22
FAMILY LAW, CONTRACT LAW.	24
IT WAS NOT CLEAR WHICH EMBRYOS, CREATED BY IN VITRO FERTILIZATION DURING THE PARTIES’ MARRIAGE, WERE ENCOMPASSED BY THE PARTIES’ STIPULATION THAT PLAINTIFF SHOULD HAVE EXCLUSIVE POSSESSION AND CONTROL OF THEM; THEREFORE, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED; THERE WAS A COMPREHENSIVE DISSENT (SECOND DEPT).	24
FAMILY LAW, JUDGES.....	25
THE JUDGE SHOULD NOT HAVE DELEGATED HER AUTHORITY TO DETERMINE PARENTAL ACCESS TO ONE OF THE CHILDREN IN THIS ABUSE/NEGLECT PROCEEDING (SECOND DEPT).....	25
FAMILY LAW, TRUSTS AND ESTATES.	25
THE ASSETS TRANSFERRED TO IRREVOCABLE TRUSTS FOR THIRD PARTY BENEFICIARIES ARE NOT SUBJECT TO EQUITABLE DISTRIBUTION, TRIAL COURT REVERSED OVER AN EXTENSIVE DISSENT (FIRST DEPT).	25
FORECLOSURE, CIVIL PROCEDURE.	26
IN A FORECLOSURE PROCEEDING, IT IS AN AFFIRMATIVE DEFENSE THAT PLAINTIFF BANK FAILED TO COMPLY WITH 24 CFR 203.604 BY HOLDING A MEETING BEFORE ACCELERATING THE DEBT (SECOND DEPT).....	26
NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.	27
DEFENDANT REAR DRIVER PROVIDED A NONNEGLIGENT EXPLANATION FOR THE REAR-END COLLISION PRECLUDING SUMMARY JUDGMENT (SECOND DEPT).	27

Table of Contents

TRUSTS AND ESTATES, EVIDENCE.	28
THE WORDING OF THE WILL RAISED QUESTIONS ABOUT THE INTENT OF THE TESTATOR BECAUSE SEVERAL CHILDREN WERE MISIDENTIFIED AND ONE WAS OMITTED; THE PETITION FOR CONSTRUCTION OF THE WILL SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).	28

ADMINISTRATIVE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW, CRIMINAL LAW.

EQUIVOCAL AND CONTRADICTORY EVIDENCE DID NOT MEET THE “CLEAR AND CONVINCING” STANDARD FOR THE ISSUANCE OF AN “EXTREME RISK PROTECTION ORDER (ERPO)” (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Corcoran, determined the equivocal evidence submitted by the state police was not sufficient to warrant an Extreme Risk Protection Order (ERPO).

Respondent, a Department of Motor Vehicles (DMV) employee, had expressed animosity toward his supervisor. During a videoconference meeting with DMV personnel and respondent, a rifle and a handgun were visible near the respondent. Respondent’s vague statements, which were interpreted as threats of violence, were equivocal, and may have referred to respondent’s intent to sue the DMV:

At the hearing, the DMV labor relations representative who conducted the first videoconference meeting testified that respondent appeared intense and aggravated and repeatedly expressed animosity toward his supervisor. The agency director who conducted the second meeting the next day described how respondent sat to the side of the video frame while a rifle, mounted on a stand, and a handgun were prominently displayed on a table behind him. A screenshot of the participants and the firearms display was received in evidence. According to the director, the placement of the firearms “felt very intentional.” He nevertheless completed the hearing without commenting on the firearms, explaining that he wanted to address respondent’s grievance without creating any unnecessary distraction. The following day, respondent called the labor relations representative, asserted that his

Table of Contents

supervisor had engaged in unlawful discrimination and suggested that he should be supervised by someone else during the investigation. The investigator's report annexed to the petition reflected that respondent had acknowledged animosity in his "chain of command" and stated that "be[ing] under something that condescending is not going to go well. It's not a good idea to work under someone in that matter [sic] and you're going to see later that it's not a good idea." ... The labor relations representative told the investigator that respondent may have been referring to his stated plan to sue DMV for defamation or discrimination. * * *

... [P]etitioner's proof of respondent's alleged threat was equivocal or contradictory, such that petitioner failed to satisfy the requisite burden of proof. Petitioner's documentary evidence and the testimony adduced at the hearing suggest that respondent's statement about things "not going to go well" connoted future litigation. ... To be sure, Supreme Court acted well within its discretion in finding that respondent testified untruthfully about his knowing display of firearms and that petitioner's witnesses were more credible. Nonetheless, based upon the equivocal characterizations of respondent's implied threat contained within petitioner's own documentary proof and the testimony adduced at the hearing, we are constrained to conclude that petitioner did not establish by clear and convincing evidence that respondent was likely to engage in conduct that would result in serious harm to others. [Matter of New York State Police v Brian LL., 2026 NY Slip Op 05832, Third Dept 10-8-26](#)

Practice Point: Consult this opinion for insight into the "clear and convincing" standard of proof in the context of a petition for an "Extreme Risk Protection Order (ERPO)." The standard is not met by equivocal and contradictory proof.

October 8, 2026

AGENCY, CONTRACT LAW, DEBTOR-CREDITOR.

THERE WAS NO PROOF PLAINTIFFS HAD NOTICE DEFENDANT WAS ACTING AS AN AGENT FOR A LIMITED LIABILITY COMPANY WHEN HE SIGNED THE CONSTRUCTION-LOAN CONTRACT; THE BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant, the principal in a limited liability company (LLC), told plaintiffs he was the “owner of the property” at the time the construction-loan contract was signed and did not disclose the loan was for the company (the LLC). Therefore defendant’s argument he was acting as an agent for the LLPC when the contract was signed was rejected:

“An agent who enters into a contract on behalf of a disclosed principal is not personally liable unless there is clear and explicit evidence of the agent’s intention to be personally bound” However, “[t]he party claiming, as an affirmative defense to liability for breach of contract, that an agency relationship existed must demonstrate that the agency relationship and the identity of the principal were disclosed” “A principal is considered to be ‘disclosed’ if, at the time of a transaction conducted by an agent, the other party to the contract had notice that the agent was acting for the principal and of the principal’s identity”

... [T]here was no evidence that the existence of 1719 Hylan, LLC, was disclosed to the plaintiffs at the time of the loan. The plaintiffs’ principal testified that the defendant told her that he was the owner of the property, that there was no discussion that the construction project was on behalf of a company, and that the defendant never told her that the loan was for a company. The defendant presented no evidence to the contrary. Therefore, the defendant failed to meet his burden of demonstrating that the plaintiffs knew that he was acting on behalf of 1719 Hylan, LLC. [710 E Elizabeth Ave, LLC v Jhong Kim, 2026 NY Slip Op 05756, Second Department 10-7-26](#)

Practice Point: In this breach of contract action, defendant argued he signed the contract as an agent for a limited liability company and was not personally liable.

But defendant did not submit any proof the plaintiff was given notice he was signing as an agent for a company. Therefore the agency defense was rejected.

October 7, 2026

ARTS AND CULTURAL AFFAIRS LAW, CIVIL PROCEDURE.

A PUTATIVE CLASS ACTION SUIT ALLEGING MUSEUM ADMISSION TICKETS FAILED TO DISCLOSE THE FULL PRICE OF THE TICKET PROPERLY SURVIVED A MOTION TO DISMISS; THE “VOLUNTARY PAYMENT DOCTRINE” DID NOT APPLY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ottley, in a matter of first-impression, affirming the denial of the motion to dismiss, determined plaintiff stated a cause of action for a violation of the Arts and Cultural Affairs Law and had standing to bring a class action suit. The essence of the violation was the purported failure to disclose the full price of a ticket for admission to a museum, which included taxes and fees, prior to the ticket purchase. The cause of action is statutory. The “voluntary payment doctrine” was deemed inapplicable:

Arts and Cultural Affairs Law § 25.07(4) provides that the defendant shall disclose the total cost of the ticket, including ancillary fees, prior to the ticket being selected for purchase and that the “service charge, or any other fee or surcharge to the purchaser” be “disclosed in a clear and conspicuous manner” (id.). Arts and Cultural Affairs Law § 25.33 provides that “any person who has been injured by reason of a violation of this article may bring an action in his or her own name to enjoin such unlawful act, an action to recover his or her actual damages or fifty dollars, whichever is greater, or both such actions. The court may award reasonable attorney’s fees to a prevailing plaintiff.” * * *

The voluntary payment doctrine “bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law”

... [W]e conclude ... the voluntary payment doctrine does not bar the plaintiff’s claims alleging violations of Arts and Cultural Affairs Law § 25.07(4) because

such claims are predicated on a lack of full disclosure [Cammayo v 1AND8, Inc., 2026 NY Slip Op 05762, Second Dept 10-7-26](#)

October 7, 2026

ATTORNEYS, CIVIL RIGHTS LAW, DEFAMATION.

PLAINTIFF ATTORNEY'S DEFAMATION SUIT AGAINST A FORMER CLIENT WHO POSTED A NEGATIVE REVIEW WAS A "STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP);" PLAINTIFF DID NOT DEMONSTRATE THE SUIT HAD A SUBSTANTIAL BASIS IN LAW; THE POST WAS NONACTIONABLE OPINION (SECOND DEPT).

The Second Department, reversing Supreme Court, determines plaintiff-attorney's defamation action against a former client who posted a negative review on the attorney's website was a Strategic Lawsuit Against Public Participation (SLAPP). Plaintiff did not demonstrate the defamation action had a substantial basis in law because the posted review was nonactionable opinion:

... [T]he defendant satisfied her initial burden of establishing that this is an action involving public petition and participation, since it involves a claim based upon a communication in a public forum in connection with an issue of public interest [see Civil Rights Law 76-a]. * * *

The elements of a cause of action alleging defamation are (1) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (2) published without privilege or authorization to a third party, (3) amounting to fault as judged by, at a minimum, a negligence standard, and (4) either causing special harm or constituting defamation per se "Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action" Thus, an expression of pure opinion is not actionable, no matter how vituperative or unreasonable it may be [Shapiro v Kushnick-Carr, 2026 NY Slip Op 05822, Second Dept 10-7-26](#)

Practice Point: Here an attorney’s defamation action against a former client who posted a negative review was deemed a Strategic Lawsuit Against Public Participation (SLAPP) which was dismissed because it did not have a “substantial basis in law” (the post was nonactionable opinion).

October 7, 2026

CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF DID NOT DEMONSTRATE THE PROCESS SERVER ACTED WITH “DUE DILIGENCE” BEFORE RESORTING TO “NAIL AND MAIL” SERVICE; THE COURT THEREFORE DID NOT ACQUIRE PERSONAL JURISDICTION OVER DEFENDANT; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate the process server acted with “due diligence” before resorting to “nail and mail” service:

“Service of process upon a natural person must be made in strict compliance with the statutory methods of service set forth in CPLR 308” “Service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence” “To satisfy the ‘due diligence’ requirement, the plaintiff must demonstrate that the process server made genuine inquiries about the defendant’s whereabouts and place of employment” “The failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void”

Here, the plaintiff failed to demonstrate that the process server acted with due diligence before relying on affix and mail service pursuant to CPLR 308(4) The process server resorted to service pursuant to CPLR 308(4) after only twice attempting personal service at the defendant’s residence during weekday hours when it could reasonably have been expected that the defendant was either working or in transit to or from work Moreover, there was no evidence that the

process server made any genuine inquiries about the defendant's whereabouts and place of business [Citibank, N.A. v Sagastume, 2026 NY Slip Op 05765, Second Dept 10-7-26](#)

Practice Point: Consult this decision for a clear explanation of the criteria for the exercise of due diligence by a process server. Here the process server made no inquiries about the defendant's whereabouts or place of business before resorting to "nail and mail."

October 7, 2026

CIVIL PROCEDURE, NEGLIGENCE, IMMUNITY, MUNICIPAL LAW, EVIDENCE.

A PRECLUSION ORDER DOES NOT HAVE THE SAME EFFECT AS STRIKING THE ANSWER; THE DEFENDANT CAN STILL PRESENT LEGAL ARGUMENTS SUPPORTING A MOTION TO DISMISS; HERE THE DEFENDANT CITY AMBULANCE SERVICE WAS PERFORMING A GOVERNMENTAL FUNCTION WHEN DECEDENT WAS INJURED AND WAS ENTITLED TO IMMUNITY IN THE NEGLIGENCE ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the city was entitled to dismissal of the negligence action because the ambulance service was performing a governmental function and no special duty was owed by the city to the decedent. Here the city had failed to meet its discovery obligations and Supreme Court precluded the city from offering evidence. However the city was entitled to make legal arguments in an attorney affirmation to support its motion to dismiss the complaint:

... [A]n order precluding the submission of evidence, unlike the striking of an answer, does not relieve the plaintiff of his or her obligation to establish a prima facie case in the first instance The purpose of a preclusion order is to make the demanding party whole To further preclude the defendants from asserting defenses which require only general denials, despite the existence of a genuine

factual dispute, deprives the defendants of their day in court and gives the plaintiff more relief than is warranted by the defendants' failure to comply with their disclosure obligations Thus, contrary to the plaintiff's contention, the order ... precluding the defendants "from offering any evidence . . . and/or affidavits in support of or in opposition to any dispositive motion," did not preclude the defendants from submitting legal arguments in an attorney affirmation or from referring to the parties' pleadings.

When a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a governmental function and cannot be held liable unless it owed a special duty to the injured party As relevant here, a municipality will be held to have voluntarily assumed a duty or special relationship with the plaintiff where there is (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because the duty is an essential element of the negligence claim itself [Davis v City of New York, 2026 NY Slip Op 05766, Second Dept 10-7-26](#)

Practice Point: Here the city defendant failed to meet its discovery obligations and the court issued an order precluding the city from presenting evidence. However the city was not precluded from making legal arguments in support of its successful motion to dismiss.

Practice Point: The city was entitled to immunity because the city ambulance service was performing a governmental function and there was no special relationship between the city and the decedent.

October 7, 2026

CONSTITUTIONAL LAW, CRIMINAL LAW, JUDGES.

THE LIMITED INQUIRY CONDUCTED BY THE JUDGE BEFORE HOLDING THE TRIAL IN DEFENDANT’S ABSENCE WAS INSUFFICIENT TO DEMONSTRATE DEFENDANT FORFEITED HIS RIGHT TO BE PRESENT AT THE TRIAL (SECOND DEPT).

The Second Department, reversing the judgment of conviction, determined the inquiry conducted by the judge when the defendant did not show up for trial was insufficient. The record did not establish defendant had deliberately forfeited his right to be present:

... [T]he court held a colloquy on the record, during which the court and defense counsel stated that the defendant had previously assured them of his intention to be present at trial. Defense counsel further informed the court that he did not know where the defendant was, and had looked for him in the courthouse. Defense counsel stated that he had been unable to reach the defendant that morning, but had received a message from the defendant’s mother indicating that the defendant was “on the way.” ... Following limited inquiry, the court commenced the trial in the defendant’s absence shortly after 12:00 p.m.

“A defendant’s right to be present at a criminal trial is encompassed within the confrontation clauses of the State and Federal Constitutions” A defendant may “forfeit that right by deliberately absenting himself [or herself] from the proceedings” However, “before proceeding in the defendant’s absence, the court has an obligation to inquire into the surrounding circumstances to determine if the defendant’s absence is deliberate and to recite on the record the reasons for its finding,” and “[t]he failure to conduct such an inquiry constitutes reversible error” Furthermore, “[w]hile the right to be present may, under some circumstances, be waived by a defendant’s conduct, trial in absentia is not thereby automatically authorized” “Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that [the] defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear”

Here, the Supreme Court erred in conducting the trial in the defendant's absence without sufficient inquiry into the circumstances surrounding the defendant's absence, and the record is therefore insufficient to establish that the defendant deliberately absented himself from the proceedings and thereby forfeited his right to be present Furthermore, the record does not reflect that the court considered all of the appropriate factors before proceeding in the defendant's absence

[People v Jorge, 2026 NY Slip Op 05811, Second Dept 10-7-26](#)

Practice Point: Consult this decision for insight into the inquiry a judge must make before proceeding with a trial in the defendant's absence.

October 7, 2026

CONSTITUTIONAL LAW, CRIMINAL LAW, JUDGES.

THE SUPREME COURT'S RULING IN ERLINGER V US DOES NOT ALTER THE LANDSCAPE OF NEW YORK'S PREDICATE OFFENDER STATUTES; A JUDGE, AS OPPOSED TO A JURY, CAN MAKE THE CALCULATIONS NECESSARY TO DETERMINE THE BOUNDS OF THE 10-YEAR LOOKBACK PERIOD, INCLUDING THE TOLLING OF THE LOOKBACK BY INCARCERATION (SECOND DEPT).

The Second Department, reversing the resentencing, in a full-fledged opinion by Justice Landicino, determined the US Supreme Court decision in *Erlinger v US* "does not alter the landscape of New York's predicate offender statutes, the constitutionality of which is well-settled." Therefore a judge, as opposed to a jury, can make the ministerial calculations required for any tolling of the 10-year lookback period for predicate offenses:

... [T]he tolling calculation under the subject predicate felony offender statutes does not involve an inquiry into the underlying facts that led to the predicate convictions. Rather, the court is required to determine the dates that a defendant entered and was discharged from a correctional facility upon serving a prior sentence These ministerial calculations do not implicate any factual determination as to the defendant's actions during a prior crime of conviction and

are akin to the “fact of prior conviction” To the extent that a sentencing court must divine the date of the commission of the present offense in order to determine the bounds of the 10-year lookback period, it is constitutionally permitted to use Shepard documents [judicial records, plea agreements, and colloquies between a judge and the defendant] to ascertain “the jurisdiction in which the defendant’s crime occurred and its date” Such an inquiry certainly does not impermissibly invite the sentencing court to “try to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct” A jury is not required to resolve an inquiry that “does not relate to the commission of the offense itself” To protect the rights of a defendant during sentencing as a predicate felony offender, New York’s procedural rules provide for a hearing before the judge when the defendant “controverts an allegation” in the predicate felony statement (CPL 400.21). That is all that is required—the Constitution does not entitle a defendant to a jury determination on the issue of whether a predicate offense was committed within 10 years of the commission of the instant offense, including any calculation regarding the periods during which the defendant was incarcerated. [People v Gardner, 2026 NY Slip Op 05809, Second Dept 10-7-26](#)

Practice Point: In New York, a judge, as opposed to a jury, may make the lookback calculations associated with the application of the predicate offender sentencing statutes.

October 7, 2026

CONSUMER LAW, CONTRACT LAW, FRAUD, INSURANCE LAW.

GENERAL BUSINESS LAW 349 RENDERS UNFAIR, DECEPTIVE OR ABUSIVE BUSINESS PRACTICES UNLAWFUL; THE STATUTE APPLIES ONLY TO CONSUMER ORIENTED CONDUCT; HERE THE DISPUTE OVER A PRIVATE INSURANCE CONTRACT FOR A RACING YACHT WAS NOT WITHIN THE AMBIT OF THE STATUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dispute about insurance coverage for a racing yacht was not the type of consumer-related activity to which General Business Law 349 applies:

General Business Law § 349(a) declares unlawful all “[u]nfair, deceptive, or abusive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state” “To successfully assert a claim under General Business Law § 349(h), ‘a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice’” “[P]arties claiming the benefit of [General Business Law § 349(h)] must, at the threshold, charge conduct that is consumer oriented” “The conduct need not be repetitive or recurring but defendant’s acts or practices must have a broad impact on consumers at large” “Private contract disputes, unique to the parties, . . . [do] not fall within the ambit of the statute”

The plaintiff failed to allege that the defendant’s acts or practices had a broad impact on consumers at large, and the plaintiff did not assert any facts that would support such an allegation. The allegations in the complaint merely refer to a private contract dispute over the procurement of insurance coverage and the processing of a claim that is unique to these parties [USMMA Sailing Found., Inc. v Hilb Group of N.Y., LLC, 2026 NY Slip Op 05824, Second Dept 10-7-26](#)

Practice Point: Consult this decision for insight into the nature of “consumer oriented conduct” which is within the ambit of General Business Law 349.

October 7, 2026

CONSUMER LAW, ENVIRONMENTAL LAW, MUNICIPAL LAW, FRAUD,
ADMINISTRATIVE LAW.

CAUSES OF ACTION AGAINST “BIG OIL” ALLEGING “GREENWASHING”
IN VIOLATION OF NYC’S CONSUMER PROTECTION LAW PROPERLY
DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Friedman, affirmed the dismissal of the “product greenwashing” and “corporate greenwashing” causes of action in a suit by the City of New York against Exxon Mobil, Royal Dutch Shell, Shell and BP. The opinion is a comprehensive discussion of the application of the City’s Consumer Protection Law (CPL) to the defendants’ claims re: the

environmental benefits of fossil fuel products and the role of renewable energy in defendants' businesses:

In this action, plaintiff City of New York alleges that defendant energy companies ... have engaged in “deceptive . . . trade practice[s]” proscribed by the City’s Consumer Protection Law (CPL) (Administrative Code of the City of NY § 20-700 et seq.). The City’s first cause of action alleges that defendants violated the CPL “by misrepresenting the purported environmental benefits of using their fossil fuel products” — a practice referred to as “product greenwashing.” The City’s second cause of action alleges that defendants also violated the CPL “by creating a misleading impression of the role of renewables [i.e., renewable energy] in their businesses” — a practice referred to as “corporate greenwashing.”

The City now appeals to this Court from Supreme Court’s order granting defendants’ motion to dismiss both causes of action. The court dismissed the first cause of action, for product greenwashing, as against all defendants, pursuant to CPLR 3211(a)(7), on the ground that the alleged “product greenwashing” statements did not, as a matter of law, have “the capacity, tendency or effect of . . . deceiving or misleading consumers” (Administrative Code § 20-701), as required to constitute a deceptive trade practice within the meaning of the CPL. ... The court also dismissed the second cause of action, for corporate greenwashing, as against all defendants, pursuant to CPLR 3211(a)(7), on the ground that the alleged “corporate greenwashing” statements were not “made in connection with the sale . . . or in connection with the offering for sale of consumer goods or services,” as also required to constitute a deceptive trade practice within the meaning of the CPL. ... [W]e affirm. [City of New York v Exxon Mobil Corp., 2026 NY Slip Op 05851, First Dept 10-8-26](#)

October 8, 2026

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

PRESENTING A VIDEOTAPED INTERVIEW OF THE 17-YEAR-OLD VICTIM TO THE GRAND JURY IN THE ABSENCE OF A COURT ORDER VIOLATED THE CRIMINAL PROCEDURE LAW AND IMPAIRED THE INTEGRITY OF THE PROCEEDINGS; INDICTMENT DISMISSED WITHOUT PREJUDICE (FOURTH DEPT).

The Fourth Department, dismissing the indictment without prejudice, determined presenting a videotaped interview of the 17-year-old victim without a court order violated the Criminal Procedure Law and impaired the integrity of the proceedings:

Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the first degree Defendant contends that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment on the ground that the grand jury proceeding failed “to conform to the requirements of [CPL] article [190] to such degree that the integrity thereof [was] impaired and prejudice to the defendant” resulted (CPL 210.35 [5]). We agree. The People correctly concede on appeal that the prosecutor improperly presented to the grand jury a videotaped interview of the approximately 17-year-old victim conducted by a social services caseworker in lieu of her live testimony without adhering to any of the requirements of CPL 190.32, including the obligation to seek a court order authorizing the videotaping of an examination of the victim as a “special witness” We agree with the parties that, under these circumstances, this error rendered the proceeding so irregular “that the integrity thereof [was] impaired and prejudice to . . . defendant may [have] result[ed]” (CPL 210.35 [5]; see CPL 210.20 [1] [c] . . .). [People v Thompson, 2026 NY Slip Op 05874, Fourth Dept 10-9-26](#)

Practice Point: Presenting a videotaped interview of a crime victim to a grand jury without a court order may impair the integrity of the proceedings requiring dismissal of the indictment.

October 9, 2026

CRIMINAL LAW, EVIDENCE, JUDGES.

DEFENDANT PRESENTED SUFFICIENT EVIDENCE THAT HE WAS THE VICTIM OF ABUSE BY HIS GIRLFRIEND AT THE TIME OF THE OFFENSE TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS SENTENCE AND FOR RESENTENCING PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his sentence and for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) should not have been denied without a hearing. The court explained what a defendant must demonstrate to warrant a hearing:

The Domestic Violence Survivors Justice Act (DVSJA) “permits courts to sentence defendants to an alternative, less severe sentence if the defendant was a victim of domestic violence and convicted of certain eligible offenses” (... see Penal Law § 60.12). The DVSJA sets forth a three-prong test for entitlement to resentencing: “(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character[,] and condition of the defendant, . . . a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06, 70.71(2), or (3)] would be unduly harsh”

A defendant's motion for resentencing under the DVSJA “must include at least two pieces of evidence corroborating the . . . claim,” and “[a]t least one piece of evidence must be either a court record, pre-sentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection” (CPL 440.47[2][c] ...).

Here, the defendant's evidence in support of his motion included affidavits of his cousin and friend, as well as hospital records. Collectively, this evidence corroborated the defendant's allegations that he was a victim of domestic violence

subjected to substantial abuse inflicted by his girlfriend R.W. at the time that he committed the subject offense [People v M.W., 2026 NY Slip Op 05815, Second Dept 10-7-26](#)

Practice Point: Consult this decision for an explanation of the evidence a defendant must present to warrant a hearing on a motion vacate a sentence and for resentencing pursuant to the DVSJA.

October 7, 2026

CRIMINAL LAW, EVIDENCE, JUDGES.

THE JURY SHOULD HAVE BEEN CHARGED WITH THE “DEFENSE OF A GOOD CLAIM OF RIGHT” IN THIS PETIT LARCENY CASE; DEFENDANT HAD REMOVED A MEMORIAL TO A MURDER VICTIM WHICH HAD BEEN SET UP ON THE SIDEWALK IN FRONT OF DEFENDANT’S MOTHER’S HOUSE (SECOND DEPT).

The Second Department, vacating defendant’s petit larceny conviction and ordering a new trial, over a dissent, determined the jury should have been charged with the “defense of good claim of right.” The defendant was tried for criminally negligent homicide and petit larceny. A mistrial was declared on the criminally negligent homicide charge and she was convicted of petit larceny. Defendant subsequently pled guilty to criminally negligent homicide and then appealed the petit larceny conviction. The petit larceny charge alleged defendant dismantled and took away parts of a memorial for a murder victim which had been set up on the sidewalk in front of defendant’s mother’s house by the murder victim’s mother. It was the murder victim’s mother who was killed when she was struck by a vehicle driven by the defendant (the subject of the criminally negligent homicide conviction):

... Supreme Court improperly denied the defendant’s request to charge the jury with the defense of a good faith claim of right. “In determining whether to instruct a jury on a claimed defense, the court must view the evidence adduced at trial in the light most favorable to the defendant” “The charge must be given if there

[Table of Contents](#)

is evidence reasonably supportive of the defense, even if there is other evidence which, if credited, would negate it” “Where evidence exists upon which the jury could reasonably find that a particular defense applies, questions as to the credibility of the defendant’s testimony or inconsistencies in the evidence presented do not disentitle the defendant to an instruction on the defense; those questions of fact are to be resolved by the jury” “If the evidence sufficiently supports a defense, a failure by the court to charge the jury constitutes reversible error”

... [W]e find that there was sufficient evidence to support the defendant’s good faith claim of right defense. * * * ... [A]t trial, the People read the defendant’s grand jury testimony demonstrating that she had previously removed memorial items, including, inter alia, balloons and flowers without incident. Furthermore, at trial, a witness testified that he and the defendant, among others, had previously removed memorial items and no one ever asked where said items were and no one was ever arrested for removing same. This evidence reasonably supports the defendant’s claim of right defense. While there may have been evidence that contradicts the defendant’s claim of right defense, those are questions of fact the jury should have resolved [People v Drago, 2026 NY Slip Op 05807, Second Dept 10-7-26](#)

Practice Point: Consult this decision for a rare discussion of the “defense of a good claim of right” in the context of a petit larceny charge.

October 7, 2026

CRIMINAL LAW, FAMILY LAW, ATTORNEYS.

THE PEOPLE’S AFFIRMATION IN SUPPORT OF THEIR MOTION TO PREVENT REMOVAL OF THE 17-YEAR-OLD’S CASE TO FAMILY COURT WAS NOT BASED ON THE PROSECUTOR’S PERSONAL KNOWLEDGE AND FAILED TO ALLEGE DEFENDANT’S SPECIFIC CONDUCT; THE MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the People’s motion to prevent removal of the 17-year-old defendant’s case to Family Court should have been denied:

The court was ... required to order removal of the action to Family Court unless the People successfully moved to prevent removal by establishing “that extraordinary circumstances exist that should prevent the transfer” Such a motion must “contain allegations of sworn fact based upon personal knowledge of the affiant, and shall indicate if the district attorney is requesting a hearing” Whether extraordinary circumstances exist to preclude removal to Family Court is a discretionary determination to be made by a court after consideration of “the totality of the facts and circumstances” A court exercising that discretion, however, should give consideration to the legislative intent that retention should be the exception and not the rule, i.e., that only “extremely rare and exceptional cases” involving “highly unusual and heinous facts” and “strong proof that the young person is not amenable [to] or would not benefit in any way from the heightened services in the family court” should be precluded from removal

Here, the People’s supporting affirmation relied heavily on the nature of the charges against defendant. ... [E]ach count on which defendant was indicted also named 17 codefendants with no factual allegations that would permit parsing out defendant’s specific conduct in, for example, possessing either a controlled substance or a weapon. Although defendant was also alleged to have committed conspiracy in the second degree, he was not alleged to have committed any overt act in furtherance of that conspiracy. The prosecutor also failed to state that the few factual allegations that were included in the People’s supporting affirmation were based on the prosecutor’s “personal knowledge” ... and that conclusion is not a reasonable inference from the affirmation as a whole Instead, there is no

indication from what specific sources any information was obtained, no supporting documentation was included with the motion, and no request for a hearing was made Although the People also argued that defendant’s previous arrests on similar charges weighed against removal, we note that “reoffense in and of itself” is not “extraordinary” (id. at 666 [internal quotation marks omitted]). The mere fact of a prior charge or charges does not provide evidence of defendant’s actual prior conduct, i.e., the specific “illegal or immoral acts,” if any, that might have led to those charges . . . , or whether defendant’s conduct constituted “escalating criminal behavior” The People’s motion therefore failed to contain sufficient “allegations of sworn fact based upon personal knowledge of [an] affiant” . . . on which the court could have relied in considering defendant’s actual role in the charged offenses in relation to his numerous codefendants, many of whom were adults [People v Quashawn C., 2026 NY Slip Op 05892, Fourth Dept 10-9-26](#)

Practice Point: Consult this decision for a detailed discussion of what a prosecutor must demonstrate to prevent removal of a 17-year-old defendant’s case to Family Court.

October 9, 2026

CRIMINAL LAW, JUDGES, EVIDENCE.

NOTHING IN THE RECORD SUPPORTED THE PROSECUTOR’S REASON FOR STRIKING A JUROR, I.E., THAT THE JUROR “SPOKE BROKEN ENGLISH;” DEFENDANT’S BATSON CHALLENGE TO THE STRIKING OF THE JUROR SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing the judgment of conviction and ordering a new trial, determined the defendant’s “Batson” challenge to the striking of a juror (juror No. 95] should have been granted. The record indicates the prosecutor’s reason for striking the juror, i.e., the juror’s “broken English,” was pretextual:

Evaluating the record . . . becomes problematic in instances where, like here, the nature of the race-neutral explanation given by a prosecutor pertains to a trait —

i.e., speech and the ability to communicate — which is not easily captured by the record. Indeed, traits such as accent, dialect, tone, cadence, fluency or manner of speech are not typically represented on a transcript, but nonetheless remain part of the overall calculus as to whether an individual is perceived by others as being able to communicate effectively. This is why it is essential for trial courts, which are in a “unique position to verify . . . [what] is not clearly established in the appellate record” . . . , to create meaningful records for a reviewing court to uphold its determinations

Consequently, we are constrained to agree with defendant that County Court erred in denying his Batson challenge at step three. . . . [T]he record reflects that neither County Court nor defense counsel indicated any trouble understanding juror No. 95. Rather, County Court and defense counsel expressly disagreed with that characterization during voir dire Thus, there is nothing in the record to otherwise suggest that juror No. 95 had difficulty understanding or answering the limited questions posed by County Court, and the trial prosecutor did not ask any questions of this juror. In view of the sparseness of the record at trial and on remittal, as well as the comments and conduct of the trial prosecutor, a determination at step three that juror No. 95 did have difficulty communicating would, at best, be speculative Accordingly, since County Court’s determination was unsupported by the voir dire transcript, not based on its recalled observations or the assessment of the prosecutor’s credibility, and is otherwise without a basis in the record, we must reverse and remit the matter for a new trial [People v Duplessis, 2026 NY Slip Op 05830, Third Dept 10-8-26](#)

Practice Point: The Third Department stressed the importance of creating a record during a Batson challenge to striking a juror, “particularly where innate traits such as language are at issue.” Here the prosecutor’s “race-neutral” reason for striking a juror, i.e., that the juror spoke “broken English,” had no support in the record. The appellate court, therefore, was “constrained” to find the reason “pretextual.”

October 8, 2026

FAMILY LAW, CONTRACT LAW.

IT WAS NOT CLEAR WHICH EMBRYOS, CREATED BY IN VITRO FERTILIZATION DURING THE PARTIES' MARRIAGE, WERE ENCOMPASSED BY THE PARTIES' STIPULATION THAT PLAINTIFF SHOULD HAVE EXCLUSIVE POSSESSION AND CONTROL OF THEM; THEREFORE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED; THERE WAS A COMPREHENSIVE DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court's grant of summary judgment to plaintiff, over an extensive and comprehensive dissent, determined there were questions of about which frozen embryos were the subject of a stipulation in which the parties agreed plaintiff should have exclusive possession and control of the embryos created by in vitro fertilization (IVF). The parties were married at the time of the in vitro fertilization and subsequently divorced:

Here, the parties' failure to establish from which IVF cycle the disputed embryos derived and to submit an agreement that provides for the cryopreservation and disposition of the embryos formed in the November 2021 IVF cycle precludes the award of judgment as a matter of law. Significantly, while the parties have relied upon the March 2023 agreement in fashioning their arguments, they did not stipulate that the March 2023 agreement controlled the dispute. Further, by its terms, the March 2023 agreement did not pertain to previously cryopreserved embryos, and the parties have stipulated that the embryos in dispute were formed in 2021. Thus, the evidence submitted on the defendant's motion and the plaintiff's cross-motion established that the March 2023 agreement did not control the disposition of the embryos in dispute. "On this record, we must decline the parties' invitation to award judgment as a matter of law" ... [.Millender-Rubin v Rubin, 2026 NY Slip Op 05780, Second Dept 10-7-26](#)

Practice Point: Consult this decision for insight into the issues raised in a divorce proceeding by embryos created by in vitro fertilization during the marriage.

October 7, 2026

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED HER AUTHORITY TO DETERMINE PARENTAL ACCESS TO ONE OF THE CHILDREN IN THIS ABUSE/NEGLECT PROCEEDING (SECOND DEPT).

The Second Department, reversing (modifying) Family Court in this abuse and neglect proceeding, held Family Court should not have delegated its authority to determine father's parental access to one of the children:

... Family Court ... found that the father sexually abused and neglected Alexander and derivatively abused and neglected Maximillian, and conditioned the father's parental access with Alexander and Maximillian upon the consent of Alexander. *

* *

... [A] court may not delegate its authority to determine parental access to either a parent or a child [W]e remit the matter ... for a new determination as to the father's parental access with Alexander and Maximillian in accordance with the best interests of those children [Matter of Alexander M.R. \(Manuel D. J. R.\), 2026 NY Slip Op 05790, Second Dept 10-7-26](#)

Practice Point: A judge cannot delegate the authority to determine parental access.

October 7, 2026

FAMILY LAW, TRUSTS AND ESTATES.

THE ASSETS TRANSFERRED TO IRREVOCABLE TRUSTS FOR THIRD PARTY BENEFICIARIES ARE NOT SUBJECT TO EQUITABLE DISTRIBUTION, TRIAL COURT REVERSED OVER AN EXTENSIVE DISSENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this divorce proceeding, over a comprehensive dissent, determined the assets transferred to irrevocable trusts were not subject to equitable distribution:

[Table of Contents](#)

While a trial court has broad discretion in fashioning an equitable distribution award, that discretion is not unlimited. Courts must respect the parties' economic decisions made during the marriage, and may not disregard the legal character of property based solely on equitable concerns. As the Court of Appeals has emphasized, courts should not second-guess how parties chose to structure and allocate their assets during the marriage (see *Mahoney-Buntzman v Buntzman*, [12 NY3d 415](#), 420-421 [2009]). Consistent with this principle, assets transferred to valid, irrevocable trusts for third-party beneficiaries are not subject to equitable distribution absent evidence that the trust is a sham or that a spouse retains revocation power or a beneficial interest [C.S. v R.H., 2026 NY Slip Op 05849, First Dept 10-8-26](#)

Practice Point: Assets transferred to Irrevocable trusts for third-party beneficiaries are not subject to equitable distribution.

October 8, 2026

FORECLOSURE, CIVIL PROCEDURE.

IN A FORECLOSURE PROCEEDING, IT IS AN AFFIRMATIVE DEFENSE THAT PLAINTIFF BANK FAILED TO COMPLY WITH 24 CFR 203.604 BY HOLDING A MEETING BEFORE ACCELERATING THE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the bank's motion for summary judgment should not have been granted because plaintiff did not demonstrate compliance with 24 CFR 203.604 which requires a meeting before acceleration of the debt:

... [T]he plaintiff moved, among other things, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference. In opposition, the defendant argued that the plaintiff was not entitled to accelerate the debt because it failed to comply with, inter alia, 24 CFR 203.604, a HUD regulation requiring a meeting prior to acceleration. * * *

... [T]he affirmative defense alleging a failure to comply with 24 CFR 203.604 was pleaded with the particularity required by CPLR 3015(a). Here, the plaintiff failed to establish that it complied with that regulation or that it was exempt from complying with it Accordingly, the court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint ...

. [U.S. Bank N.A. v Ali, 2026 NY Slip Op 05823, Second Dept 10-7-26](#)

Practice Point: Here the bank's failure to demonstrate it complied with 24 CFR 203.604 by holding a meeting before accelerating the debt precluded summary judgment in this foreclosure action.

October 7, 2026

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT REAR DRIVER PROVIDED A NONNEGLIGENT EXPLANATION FOR THE REAR-END COLLISION PRECLUDING SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this rear-end collision case raised a question of fact precluding summary judgment. Defendant alleged plaintiff abruptly changed lanes without signaling and came to a sudden stop in front of defendant's vehicle:

... [A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence" "A nonnegligent explanation may include that a vehicle made a sudden lane change in front of a defendant's vehicle, forcing the defendant to stop suddenly"

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting an affidavit wherein she averred that the rear of her stopped vehicle was struck by the front of the defendants' vehicle However, in opposition, the defendants raised triable issues of fact as to the existence of a nonnegligent explanation for striking the rear of the plaintiff's

vehicle. According to the defendant driver’s affidavit, the accident occurred when the plaintiff’s vehicle abruptly changed lanes, without signaling, and immediately came to a sudden stop in front of the defendants’ vehicle [Johnson v Payne, 2026 NY Slip Op 05775, Second Dept 10-7-26](#)

Practice Point: Consult this decision for an example of a “nonnegligent” explanation for a rear-end collision which precluded summary judgment.

October 7, 2026

TRUSTS AND ESTATES, EVIDENCE.

THE WORDING OF THE WILL RAISED QUESTIONS ABOUT THE INTENT OF THE TESTATOR BECAUSE SEVERAL CHILDREN WERE MISIDENTIFIED AND ONE WAS OMITTED; THE PETITION FOR CONSTRUCTION OF THE WILL SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing Surrogate’s Court, determined the wording of the will raised questions about the testator’s intent. Therefore the petition for construction of the will pursuant to SCPA (Surrogate’s Court Procedure Act) section 1420 should not have been denied without a hearing:

“The cardinal rule of construction of a will is to carry out the intent of the testator” “All rules of interpretation are subordinated to the requirement that the actual purpose of the testat[or] is sought and effectuated as far as is consonant with principles of law and public policy” “Intent is not to be gleaned by focusing upon any one particular word, sentence, or provision; rather, it must be ascertained from a perusal of the entire will by a reader mindful of the particular facts and circumstances under which the provisions of the instrument were framed” “The heirs of a testator are favored by the policy of the law and cannot be disinherited upon mere conjecture, and when the testator intends to disinherit them he must indicate that intention clearly”

Here, the Surrogate’s Court should not have, in effect, denied the petition and dismissed the proceeding without a hearing The allegations in the verified

petition, inter alia, that several of the decedent's children were misidentified in Article THIRD and that Article THIRD contained the word "children" but omitted the name of one of the decedent's children ... , were sufficient to indicate that the testator's intent was not clear and unambiguous.

Accordingly, the Surrogate's Court should have held a hearing to give the petitioner the opportunity to submit proof to establish the decedent's intent [Matter of Covington, 2026 NY Slip Op 05785, Second Dept 10-7-26](#)

Practice Point: Here the wording of the will raised questions about the testator's intent. The petition for construction of the will should not have been denied without a hearing at which petitioner could present evidence of the decedent's intent.

October 7, 2026

Copyright 2026 New York Appellate Digest, Inc.