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ARBITRATION, CONTRACT LAW, NEGLIGENCE.

THE FEDERAL “ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (EFAA)” PRECLUDED THE ENFORCEMENT OF A MANDATORY ARBITRATION CLAUSE IN A CONTRACT BETWEEN PLAINTIFF COLLEGE STUDENT AND HER SORORITY; THEREFORE PLAINTIFF COULD SUE THE SORORITY IN NEGLIGENCE FOR COMPELLING HER TO ATTEND A MIXER WHERE SHE WAS SEXUALLY ASSAULTED (SECOND DEPT).

The Second Department, reversing Supreme Court in a matter of first impression, in a full-fledged opinion by Justice Landicino, determined that the federal “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” (EFAA) precluded arbitration in a negligence suit by a college student against her sorority. Plaintiff-student alleged she was compelled by her sorority to attend a mixer with a fraternity where she was sexually assaulted. The contract between plaintiff and the sorority included a mandatory arbitration clause:

This case presents an issue of first impression for this Court: whether the EFAA ... can serve to prevent arbitration, notwithstanding an arbitration clause in a contract between the parties, of an action sounding in negligence against a party

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that did not commit the alleged sexual assault. We hold that it can, under the circumstances presented here.

... According to the complaint, the plaintiff attended SUNY Cortland and was a member of the [defendant] sorority ... [A] fraternity chapter, Pi Kappa Phi ... , allegedly held a mixer event off campus ... According to the complaint, the plaintiff, as a member of the sorority, was “expected and obligated by [the] sorority to attend the mandatory mixer event to be hosted by the fraternity.” The fraternity purportedly provided alcohol and other intoxicating substances to the attendees at the mixer event, which caused the plaintiff to become impaired. Allegedly, while attending the mixer event, the plaintiff met a member of the fraternity (hereinafter the alleged abuser) who took the plaintiff to a nearby premises where he sexually assaulted her. * * *

The issue raised on this appeal is whether the plaintiff may invoke the EFAA to prevent arbitration of her claims where the sorority did not commit the alleged sexual assault. The plaintiff’s cause of action in this matter does not sound in sexual assault. Rather, the cause of action sounds in negligence based on the alleged failure of the sorority to supervise and protect its members at a function that the members were required to attend, which exposed the plaintiff to the sexual assault. The question is whether the EFAA can bar arbitration of a complaint sounding in negligence only. * * *

... [A]lthough the sorority contends that the plaintiff’s cause of action sounds in negligence as opposed to sexual assault, that distinction is immaterial here. The negligence cause of action is “related” to the sexual assault dispute alleged in the complaint, which is all that is required under the EFAA ... While the sorority is a third party that was not directly involved in the sexual assault, the negligence claim is nonetheless “related” to the sexual assault dispute inasmuch as the plaintiff contends that the sorority placed her in a dangerous circumstance that led to the sexual assault. There is a clear logical nexus between the cause of action alleged in the complaint and the alleged sexual assault, which places this matter squarely within the ambit of the EFAA. [C.N. v Sigma Delta Tau Socy., 2026 NY Slip Op 05405, Second Dept 9-23-26](#)

Practice Point: Here plaintiff student sued her sorority in negligence for compelling her to attend a mixer with a fraternity where she was sexually assaulted. Plaintiff’s

contract with the sorority included a mandatory arbitration clause. The federal “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” (EFAA) applied to these facts to preclude enforcement of the arbitration clause.

September 23, 2026

CIVIL PROCEDURE, CONTRACT LAW, CORPORATION LAW, DEBTOR-CREDITOR, FRAUD.

PETITIONER OBTAINED JUDGMENTS EXCEEDING \$1 BILLION AGAINST RESPONDENTS STEMMING FROM THE 2008 FINANCIAL CRISES WHICH HAVE YET TO BE SATISFIED; PETITIONER BROUGHT THIS TURNOVER PROCEEDING IN 2023; THE CORPORATE VEIL-PIERCING CLAIM AND THE FRAUDULENT CONVEYANCE AND VOIDABLE TRANSACTIONS CAUSES OF ACTION PROPERLY SURVIVED THE MOTION TO DISMISS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, affirmed the denial of the motion to dismiss the corporate veil-piercing claim and the fraudulent conveyance and voidable transactions causes of action: The respondents have not satisfied a pair of judgments totaling more than \$1 billion stemming from the 2008 financial crisis. The petitioner, UBS, commenced this turnover proceeding pursuant to CPLR 5225 in 2023:

... UBS alleged that, after it secured the first judgment, it discovered that [respondents] had conspired to frustrate UBS’s ability to recover against the judgment debtors. UBS alleged that [respondents], exercising complete domination over the judgment debtors and other related entities, transferred the debtors’ assets to themselves or other entities that they controlled in an effort to avoid paying UBS any of the obligations stemming from ... the judgments. * * *

For pleading purposes, a party seeking to pierce the corporate veil does not have to satisfy the heightened pleading requirement imposed on one interposing a cause of action for fraud (see CPLR 3016); rather, the party must plead facts that would establish that the individual defendant’s domination of the corporation was used to

perpetrate a wrong or injustice against the party, and the allegations of domination must be adorned with particularized allegations of consequent wrongs [Matter of UBS Sec. LLC v Dondero, 2026 NY Slip Op 05460, First Dept 9-24-26](#)

Practice Point: Consult this opinion for insight into the pleading requirements for piercing the corporate veil and fraudulent conveyance and voidable transactions causes of action in the context of a (post-judgment) turnover proceeding pursuant to CPLR 5225.

September 24, 2026

CIVIL PROCEDURE, CRIMINAL LAW, MENTAL HYGIENE LAW.

IN DENYING THE STATE POLICE’S REQUEST FOR AN EXTREME RISK PROTECTION ORDER (ERPO) AGAINST THE 18-YEAR-OLD RESPONDENT, THE JUDGE FOCUSED ON THE ABSENCE OF EVIDENCE RESPONDENT HAD ACCESS TO FIREARMS TO THE EXCLUSION OF EVIDENCE RESPONDENT POSED A RISK OF SERIOUS HARM TO HIMSELF OR OTHERS; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, reversing Supreme Court and remitting the matter for a new hearing, determined the judge hearing the State Police’s application for an “extreme risk protection order (ERPO) against the 18-year-old respondent did not apply the correct criteria in denying the request. Supreme Court erroneously focused on the lack of evidence the respondent had access to a firearm to the exclusion of evidence respondent posed a risk of serious harm to himself or others:

... CPLR article 63-A establishes a procedure by which a court may temporarily restrict a person’s access to firearms where that person has been judicially determined to pose a risk of serious harm to themselves or others (see CPLR 6340 [1]; 6342, 6343). The purpose of the statutory scheme is “to prevent individuals from accessing firearms, rifles, and shotguns who have been deemed, through judicial process, likely to engage in conduct that would result in serious harm to themselves or others” Upon application, the court may first issue a temporary ERPO upon a finding of probable cause to believe that “the respondent is likely to

engage in conduct that would result in serious harm to himself, herself or others” (CPLR 6342 [1]). Where, as here, a temporary ERPO is denied, the court must nevertheless conduct a hearing on the application for a final ERPO (see CPLR 6342 [5]). At that hearing, the petitioner bears the burden to establish, by clear and convincing evidence, “that the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others,” as defined in Mental Hygiene Law § 9.39 (a) (CPLR 6343 [2]).

In making that determination, the court must consider the eight factors enumerated in CPLR 6342 (2), together with any other relevant circumstances (see CPLR 6343 [2] ...). The statutory factors include, among other things, acts of the respondent involving “a threat or act of violence or use of physical force directed toward self, the petitioner, or another person” (CPLR 6342 [2] [a]). Significantly, only three of the eight enumerated factors expressly concern a weapon or firearm (see CPLR 6342 [2] [c], [d], [g]). Thus, nothing in the statutory framework requires proof that the threatened or anticipated physical harm will be accomplished with a firearm, nor does it make a respondent’s existing possession of or access to a firearm a prerequisite to issuance of an ERPO. Indeed, the Legislature’s express reference to firearms in certain statutory factors, while omitting any such limitation from the governing likelihood-of-serious-harm standard and the general threat-of-violence factor, demonstrates that no such additional requirement may properly be engrafted onto the statute

The record reflects that Supreme Court nevertheless imposed such a requirement. [Matter of New York State Police v Owen WW., 2026 NY Slip Op 05452, Third Dept 9-24-26](#)

Practice Point: Consult this decision for insight into the procedure and criteria for determining an application for an extreme risk protection order (ERPO).

September 24, 2026

CIVIL PROCEDURE, EVIDENCE, FORECLOSURE.

IN THIS FORECLOSURE ACTION DEFENDANT’S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN DENIED; THE MOTION WAS UNTIMELY AND DID NOT DEMONSTRATE ANY UNANTICIPATED CIRCUMSTANCES SINCE THE FILING OF THE NOTE OF ISSUE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant’s motion to vacate the note of issue in this foreclosure action should have been dismissed as untimely:

... [S]upreme Court also should have denied the defendant’s ... motion pursuant to CPLR 5015(a)(3) to vacate the note of issue filed by the plaintiff. A motion to vacate a note of issue is governed by 22 NYCRR 202.21, pursuant to which any party to an action may, within 20 days of service of the note of issue and certificate of readiness, move to vacate the note of issue upon an affidavit demonstrating that the case is not ready for trial Where a party’s motion to vacate a note of issue is timely, “the party is ‘required only to demonstrate why the case [is] not ready for trial’” However, where the motion is not timely, the party seeking relief must meet the “‘more difficult standard’” of 22 NYCRR 202.21(d) which “‘requires the movant to demonstrate unusual or unanticipated circumstances and substantial prejudice’”

Here, the defendant’s motion to vacate the note of issue was untimely as it was made ... more than 20 days after the note of issue was filed Moreover, the defendant failed to demonstrate the existence of unusual or unanticipated circumstances since the filing of the note of issue warranting its vacatur ...

. [Federal Natl. Mtge. Assn. v Cassis, 2026 NY Slip Op 05381, Second Dept 9-23-26](#)

Practice Point: Where a motion to vacate the note of issue is made more than 20 days after the note of issue was filed it must demonstrate “the existence of unusual or unanticipated circumstances since the filing of the note of issue warranting its vacatur.” If the motion to vacate is timely made it must demonstrate only that the case is not ready for trial.

September 23, 2026

CONTRACT LAW, ATTORNEYS.

THIS OPINION DEMONSTRATES HOW COURTS DEAL WITH INTERPRETING THE LANGUAGE OF A CONTRACT WHERE DICTIONARY DEFINITIONS OF A KEY WORD, HERE THE WORD “COMMIT,” SUPPORT THE OPPOSING POSITIONS OF THE PARTIES (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over a detailed dissent, affirmed the lower court’s interpretation of the contract language and the related denial of plaintiff’s demand for prevailing-party attorney’s fees. The opinion turned on the definition of “commit” and is too detailed to fairly summarize here. The opinion should be consulted for insight into the interpretation of contract language where dictionary definitions support the opposing positions of the parties. [Aurelius Capital Master Ltd. v Hertz Intl. Ltd., 2026 NY Slip Op 05369, First Dept 9-22-26](#)

September 22, 2026

CRIMINAL LAW, CONSTITUTIONAL LAW, JUDGES.

WHERE A COURT’S DETERMINATION TO ENHANCE A DEFENDANT’S SENTENCE IS BASED SOLELY ON CALCULATIONS DRAWN FROM CERTIFIED PUBLIC RECORDS OF DEFENDANT’S PRIOR INCARCERATION, SENTENCE ENHANCEMENT CAN BE IMPOSED BY A JUDGE (AS OPPOSED TO A JURY) (FIRST DEPT).

The First Department, reversing Supreme Court, determined the question whether periods of incarceration which tolled the look-back period for enhancement of defendant’s sentence can be determined by a judge, as opposed to a jury:

The court granted defendant’s CPL 440.20 motion and concluded that the initial predicate statement was facially insufficient and that, pursuant to Erlinger [602 US

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821], tolling determinations must be made by a jury. The court held that it could “neither determine, nor convene a jury to determine[,] that defendant was previously incarcerated at a particular time and place in an effort to enhance his sentencing.” * * *

Defendant moved under CPL 440.20 to set aside the persistent violent felony offender sentence, arguing that the predicate felony statement was facially insufficient because it omitted periods of incarceration necessary to toll the statutory ten-year lookback period. Defendant contended that, under Erlinger, a jury was required to make the factual determination of whether any tolling finding would bring his prior conviction within the lookback window. * * *

As this Court found in *People v Young* (...2026 NY Slip Op 02883 [...2026]), Erlinger does not apply to the tolling protocol contained in New York’s predicate felony sentencing statutes. These involve a “rote arithmetic calculation to be made based on certified public records” Such objective determinations fall within the narrow Almendarez-Torres exception permitting judicial determination of “the fact of a prior conviction” and associated ministerial facts such as dates.

... [T]he sentencing court erred in holding that tolling findings must be made by a jury and that it therefore could not sentence defendant as a persistent violent felony offender. As in *Young*, the tolling determination at issue required the court to review official admission and release records as well as calculate the periods during which defendant was confined. This administrative determination does not implicate the Sixth Amendment under Erlinger but rather falls within the Almendarez-Torres exception. [People v Sabater, 2026 NY Slip Op 05459, First Dept 9-24-26](#)

Practice Point: Where sentence enhancement is based solely on certified public records of prior incarceration, there is no requirement that a jury, as opposed to the judge, make the enhancement determination.

September 24, 2026

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE POLICE HAD PROBABLE CAUSE TO ARREST AFTER WITNESSING HAND-TO-HAND EXCHANGES, THEY DID NOT INTEND TO ARREST DEFENDANT BECAUSE THE BUYERS WERE NOT APPREHENDED; THEREFORE THE SEARCHES OF DEFENDANT'S PERSON WERE NOT VALID SEARCHES INCIDENT TO ARREST; SUPPRESSION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to suppress the firearm, knife and phone found in a search of defendant's person should have been granted. The police witnessed defendant make "hand-to-hand" exchanges of a small object for money. At the street stop, the officers did not intend to arrest the defendant because the buyers were not apprehended. The officers intended to issue a disorderly conduct summons. But when defendant said he had no identification, the officers decided to take him to the precinct. The searches of defendant's person took place before and after transport to the precinct:

... [T]he officers had an established intention not to arrest for potential drug charges. With this intention not to arrest for potential drug charges established, such a basis for the arrest is properly considered in the manner of the potential driving while intoxicated charge in *People v Reid* ([24 NY3d 615](#), 618-619 [2014])—that is, a charge for which facts known to the arresting officers would have supported a lawful arrest and search incident thereto but for record-demonstrated affirmative lack of intent to arrest on such a basis at the time of the search ... * * * [I]n the absence of the alleged disorderly conduct violation, the officers' search would have been unlawful for reasoning identical to that in *Reid*

... [T]he motion court denied defendant's suppression motion on the ground that defendant was properly arrested for disorderly conduct (Penal Law § 240.20) based on evidence that he was making "unreasonable noise" with the portable speaker he wore around his neck. On appeal, the People do not contend that the arrest was lawful on this basis, nor do they argue that defendant's arrest was permitted based

on any failure of defendant to identify himself under CPL 150.20(1)(b)(iii). [People v Fulladosa, 2026 NY Slip Op 05458, First Dept 9-24-26](#)

Practice Point: If the police do not intend to arrest a defendant despite the existence of probable cause, any search of the defendant's person cannot be justified as a search incident to arrest.

September 24, 2026

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE CHARGES STEMMED FROM AN ARMED CONFRONTATION WITH POLICE OFFICERS; A PROSPECTIVE JUROR INDICATED SHE “WOULD PROBABLY RELATE TO THE POLICE OFFICERS;” THE DENIAL OF THE DEFENSE CHALLENGE TO THE JUROR REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Third Department, reversing the judgment of conviction and ordering a new trial, determined the defense challenge to a prospective juror should have been granted:

The trial evidence established that officers with the Hudson Police Department responded to a residence regarding a possible domestic incident. Upon their arrival, the officers announced themselves and knocked on the door for approximately five minutes before the door was eventually opened and they were permitted entry. Two officers entered the single-bedroom apartment while two others remained outside. One of the officers inside the apartment then came upon the bedroom where defendant was wielding a knife, which he had raised above his head in the direction of that officer. The officer, who was in uniform and visible to defendant, drew his service weapon and directed defendant to drop the knife multiple times before defendant ultimately did so. Defendant was then placed into custody with extreme difficulty. This chain of events was echoed by the three other officers present during the underlying events. * * *

After acknowledging close relationships with several individuals in law enforcement, the prospective juror expressed that, although she “would like to

think [she] can be fair,” she “would probably relate to the [law enforcement] victims.” While “words like ‘think’ or ‘try’ are not talismanic words that automatically make a statement equivocal” ... , the prospective juror continued that she “hope[d] that [she] could still be fair.” Altogether, these equivocal statements raised a clear question as to her ability to remain impartial and, therefore, could only be remedied by an unequivocal statement of impartiality However, when pressed by defense counsel as to whether she could be fair, the prospective juror failed to directly address the issue and, in fact, seemed to further express her own bias. County Court did not then attempt to rehabilitate the prospective juror ... and, as a result, her prior statements of partiality were not remedied Under these circumstances we find disqualification to have been required. Thus, because defendant exhausted his peremptory challenges before jury selection was complete, a new trial is necessary [People v Edmunds, 2026 NY Slip Op 05442, Third Dept 9-23-26](#)

Practice Point: Consult this decision for insight into the inquiry required when a prospective juror indicates a bias in favor of law enforcement.

September 23, 2026

FORECLOSURE, CIVIL PROCEDURE.

HERE THE FORECLOSURE SALE TOOK PLACE ABOUT AN HOUR BEFORE DEFENDANTS CLOSED WITH ANOTHER BUYER; THE FORECLOSURE SALE EXTINGUISHED DEFENDANTS’ RIGHT TO REDEEM THE MORTGAGE; THE SUCCESSFUL BIDDER AT THE FORECLOSURE SALE THEREFORE PREVAILED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure sale to the successful bidder, Pekich, took place before the purported sale of the same property by defendants to Ore on the same day. Therefore defendants’ right to redeem the property was extinguished by the foreclosure sale:

““A mortgagor or other owner of the equity of redemption of a property subject to a judgment of foreclosure and sale may redeem the mortgage at any time prior to the

foreclosure sale” However, “[t]he right to redeem is extinguished as a matter of law upon the foreclosure sale, whether or not the deed has been delivered, and once the right to redeem is lost, it cannot be revived, even by court order”

Here, the record demonstrates that the foreclosure sale of the property at which Pekich was the successful bidder concluded at 3:15 p.m. on June 21, 2024, and that the payoff sum was wired to the plaintiff during Ore and the [defendants’] closing more than one hour later, at 4:23 p.m. on June 21, 2024. Under these circumstances, Pekich became the equitable owner of the property upon the completion of the foreclosure sale, and any right to redeem the mortgage had already been extinguished by the time Ore and the [defendants] purported to close on the property [JPMorgan Chase Bank, N.A. v Gezlev, 2026 NY Slip Op 05387, Second Dept 9-23-26](#)

Practice Point: A foreclosure sale to a successful bidder extinguishes a mortgagor’s right to redeem the mortgage. Here the foreclosure sale took place one hour before defendants attempted to redeem the mortgage with proceeds from another purported sale of the property. The successful bidder prevailed.

September 23, 2026

FREEDOM OF INFORMATION LAW (FOIL), CIVIL PROCEDURE.

WHEN THE COUNTY FAILED TO RESPOND TO PETITIONER’S APPEAL OF THE DENIAL OF A FOIL REQUEST WITHIN TEN DAYS, THE COUNTY WAS DEEMED TO HAVE “CONSTRUCTIVELY DENIED” THE APPEAL; AT THAT POINT PETITIONER HAD EXHAUSTED ADMINISTRATIVE REMEDIES AND WAS FREE TO COMMENCE A CPLR ARTICLE 78 PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the county’s failure to respond to a FOIL request within five days and the county’s failure to respond to a FOIL administrative appeal within ten days constitute constructive denials of the FOIL request. Therefore, after the county’s failure to timely respond to the

administrative appeal, the petitioner had exhausted administrative remedies and was free to bring a CPLR article 78 proceeding:

“Any administrative appeal of a denial [must] be undertaken within 30 days of the denial” Within 10 business days of such an appeal, the agency must “‘fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought’” (... Public Officers Law § 89[4][a]; see 21 NYCRR 1401.5[c]; 1401.7[f]). “[A] FOIL request is deemed denied if there is no response to the request within five business days” This is known as a “constructive denial” ..., and an agency’s failure to respond to an administrative appeal within the 10-day limit also constitutes a constructive denial (see 21 NYCRR 1401.7[f]). As there is no dispute that the County did not respond within the 10-day limit, its failure to respond acted as a constructive denial of the petitioner’s appeal, and therefore, the respondents’ argument that the petitioner failed to exhaust the available administrative remedies before commencing a CPLR article 78 proceeding is without merit [Matter of Landa v Rockland County, 2026 NY Slip Op 05398, Second Dept 9-23-26](#)

Practice Point: The failure of a government agency to respond to a FOIL request within five days and to a FOIL administrative appeal within ten days are deemed “constructive denials.”

September 23, 2026

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS IN A TRENCH AND WAS STRUCK BY CONCRETE WHICH SLID INTO THE TRENCH; THE MAJORITY CONCLUDED CONFLICTING ACCOUNTS OF THE ACCIDENT AND PLAINTIFF'S FAILURE TO USE AVAILABLE LUMBER TO BRACE THE SIDES OF THE TRENCH RAISED QUESTIONS OF FACT; THE DISSENT ARGUED THAT NO MATTER HOW THE ACCIDENT HAPPENED LABOR LAW 240(1) LIABILITY WAS DEMONSTRATED (FALLING OBJECT; ABSENT SAFETY DEVICE) (FIRST DEPT).

The First Department, reversing Supreme Court, over a comprehensive dissent, determined questions of fact precluded summary judgment on plaintiff's Labor Law 240(1) cause of action. Apparently plaintiff was in a trench when he was struck by a piece of cement. Plaintiff alleged the concrete slid off a backhoe. An eyewitness stated the concrete was dislodged during excavation. The majority concluded there was also a question of fact about whether plaintiff was the sole proximate cause of the accident because lumber to brace the sides of the trench were available and plaintiff was instructed to use it. The dissenter argued that, no matter how the accident happened, plaintiff was injured by a falling object for which Labor Law 240(1) liability attached:

The conflicting accounts raise a credibility determination which is the province of the factfinder

... [T]here are also issues of fact as to whether plaintiff was the sole proximate cause of the accident because he knew or should have known to use an available safety device — namely, lumber braces to brace the sides of the trench

From the dissent:

The conflicting accounts of the accident from plaintiff and defendant do not present a triable issue of fact because both versions include a violation of Labor Law § 240(1) as a proximate cause of plaintiff's injuries Plaintiff's account, for its part, is a basic statutory violation resulting from failure to properly secure a hoisted object

Likewise, [the eyewitness'] version involves a statutory violation as a proximate cause. ... Labor Law § 240(1) may apply to a falling object due to a trench collapse caused by absent or improper bracing [Velu v Verizon N.Y. Inc., 2026 NY Slip Op 05374, First Dept 9-22-26](#)

September 22, 2026

NEGLIGENCE, EVIDENCE.

PLAINTIFF STRUCK HER HEAD ON A WINDOW AIR CONDITIONING UNIT WHICH PROTRUDED FROM A SCHOOL BUILDING INTO A COURTYARD; THE PROTRUDING AIR CONDITIONER WAS DEEMED “OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS,” PRECLUDING LIABILITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the window air conditioner on which plaintiff struck her head was “open and obvious and not inherently dangerous:”

... [T]he plaintiff ... allegedly was injured when she struck her head on an air conditioning unit protruding from a window in a courtyard of a school. * * *

A property owner has a duty to maintain its premises in a reasonably safe condition “In a premises liability case, a defendant property owner . . . who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence” However, a property owner has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident [Hoefler v Shoreham-Wading Riv. Cent. Sch. Dist., 2026 NY Slip Op 05384, Second Dept 9-23-26](#)

Practice Point: Consult this decision for an example of a condition deemed “open and obvious and not inherently dangerous” as a matter of law.

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NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

PETITIONER’S “PREOCCUPATION WITH HIS INJURIES, TREATMENT AND RECOVERY” WAS DEEMED A REASONABLE EXCUSE FOR FAILURE TO TIMELY FILE A NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner’s request for leave to file a late notice of claim should have been granted. Petitioner fell onto the tracks at a subway station and was struck by a train. Evidence petitioner was “preoccupied with his injuries, treatment and recovery” constituted a reasonable excuse for the delay in filing the notice:

... [P]etitioner demonstrated that the respondents acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident based on the respondents’ prompt and thorough investigation of the accident, which included interviews of the train operator and analysis regarding the speed of the train and when the train’s emergency brake was engaged Moreover, since the respondents acquired timely knowledge of the essential facts constituting the claim, the petitioner met his initial burden of showing that the respondents would not be prejudiced by the late notice of claim In response to the petitioner’s initial showing, the respondents failed to come forward with particularized evidence showing that the late notice substantially prejudiced their ability to defend the claim on the merits

Further, contrary to the respondents’ contention, the petitioner demonstrated a reasonable excuse for his delay in serving the notice of claim. “A petitioner may be able to establish a reasonable excuse for not timely serving a notice of claim based on an injury or medical condition, but only ‘through admissible medical evidence that he [or she] was incapacitated to such an extent that he [or she] could not have complied with the statutory requirement’” However, “even absent incapacitation, a reasonable excuse may be established by an allegation that a petitioner was more concerned and preoccupied with his or her alleged injuries ... than with retaining counsel to pursue a legal claim, but only when such an

allegation is supported by medical evidence” Here, the petitioner sufficiently established a reasonable excuse for his delay in serving a notice of claim based on his preoccupation with his injuries, treatment, and recovery, including the required amputation of his lower right leg, and his extended stay at a rehabilitation center as he relearned how to walk [Matter of Nash v New York City Tr. Auth., 2026 NY Slip Op 05399, Second Dept 9-23-26](#)

Practice Point: Here petitioner was struck by a subway train and his treatment included amputation of his lower right leg. Petitioner’s “preoccupation with his injuries, treatment and recovery” was deemed a reasonable excuse for failing to timely file a notice of claim.

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