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The Breadth of Judicial Notice on Appeal, Dehors-the-Record Data

Judicial notice of adjudicative-type facts is a matter of decisional law. The test is whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven, such as calendar dates and geographical locations. Decisional authority has broadened the application of judicial notice to appeals.

By **Elliott Scheinberg** | March 30, 2018

CPLR 4511 addresses mandatory judicial notice of such things as the common law, constitutions, and federal and state statutes and codes. It also addresses specified categories of law if a request is properly made; "even in the absence of such request, the court has discretion to take judicial notice on its own motion." Practice Commentaries, Vincent Alexander, CPLR 4511.

Elliott Scheinberg

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Records in the Same Court. Appellate review is generally limited to the record made at nisi prius and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level. *Ghaffari v. N. Rockland Cent. School Dist.*, 23 A.D.3d 342 (2d Dept. 2005). Judicial notice is not limited to the trial court; it may be taken by any court at any stage of the litigation, even on appeal. *Caffrey v. N. Arrow Abstract & Settlement Services*, 2018 NY Slip Op. 01043 (2d Dept. 2018); *Cohen v. State*, 94 N.Y.2d 1 (1999).

Judicial notice may be taken of a record in the same court of either the pending matter or of some other action. *Chateau Rive v. Enclave Development Associates*, 22 A.D.3d 445 (2d Dept. 2005). In *Reed v. Wolff*, 242 A.D.2d 375 (2d Dept. 1997), the Appellate Division took judicial notice of the argument regarding standing that had been addressed by the parties in a companion case.

In *Sam & Mary Hous. v. Jo/Sal Mkt.*, 100 A.D.2d 901 (2d Dept. 1984), aff'd, 64 N.Y.2d 1107 (1985), the Appellate Division upheld the trial court's taking judicial notice of facts within its personal knowledge that affected the credibility of a witness, which knowledge had derived from an unrelated earlier case. The trial court also properly gave plaintiff the opportunity to clarify any factual inconsistencies.

The Second Department took judicial notice of the circumstances surrounding a subsequent evaluation of a child, foster parents, aunt, and uncle that had been arranged without a court order, to the extent that the information was revealed in the record of a companion appeal. *In re Wesley R.*, 307 A.D.2d 360 (2d Dept. 2003).

Judicial Notice of Papers in Other Courts. In *Samuels v. Montefiore Medical Center*, 49 A.D.3d 268 (1st Dept. 2008), plaintiffs did not dispute the contents of an order that defendants had inadvertently failed to submit on their summary judgment motion. Even though the order was dehors-the-record, it had been included in the motion court's files, and the court took judicial notice of it. Also, *People v. Davis*, 161 A.D.2d 787 (2d Dept. 1990).

In granting a motion to set aside a jury verdict, the Appellate Division stated that it was "entitled" to take judicial notice of the transcript that defendants did not submit to the motion court. *Santos v. National Retail Transp.*, 87 A.D.3d 418 (1st Dept. 2011).

Judicial Notice of 'Self Authenticating' Bank Records. Reliability is a fundamental tenet of the rules of evidence. The following cases notwithstanding, the scams that shook the investment world should cause trepidation before a court takes judicial notice of financial-institution grade statements as purportedly "inherently trustworthy" and "self-authenticating."

In *Elkaim v. Elkaim*, 176 A.D.2d 116 (1st Dept. 1991), lv. dismissed, 78 N.Y.2d 1072 (1991), the Appellate Division held that "a foundation for admissibility [of business records] may at times be predicated on judicial notice of the nature of the business and the nature of the records observed by the court, particularly in the case of bank and similar statements" "when the records are so patently trustworthy as to be self-authenticating."

With no more than a "supposition" that unchallenged European bank statements had actually been created by the named banks, the *Elkaim* court, nevertheless, upheld the trial court's judicial notice of the statements. Noting no more than the statements' "appear[ance] [are] regular on their face, and in a format conforming to the type of statements with which banks customarily supply their customers on a monthly basis," the Appellate Division surprisingly called them inherently trustworthy, self-

authenticating (citing *People v. Kennedy*, 68 N.Y.2d 569 (1986)), reliable and immune to "serious challenge."

As late as 2014, another court, citing *Elkin*, upheld the admission of bank records into evidence as self-authenticating documents. *MRI Enterprises v. Comprehensive Med. Care of New York, P.C.*, 122 A.D.3d 595 (2d Dept. 2014).

Judicial Notice of Government Websites. Courts may take judicial notice of information published on an official government website. *Maisto v. State*, 154 A.D.3d 1248, n.4 (3d Dept. 2017); *Matter of LaSonde v. Seabrook*, 89 A.D.3d 132, n.8 (1st Dept. 2011), lv. den., 18 N.Y.3d 911 (2012).

In *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 (2d Dept. 2009), the Second Department stated that judicial notice has never been strictly limited to constitutions, ordinances, and regulations of government rather it has also been applied by case law to other public documents that are generated in a manner which assures their reliability such as census data, corporate dissolution certificates maintained by the State, legislative journals, the consumer price index, undisputed court records and files, and material derived from official government websites.

Kingsbrook took judicial notice of diagnosis and procedure code keys available on the Health and Human Services (HHS) website, notwithstanding that the code numbers require deciphering, because it "rests upon sources widely accepted and unimpeachable," such as reliable, authentic and uncontested governmental records. That the code system is not readily understood by the lay public is of no significance because it was offered on the basis of its reliable source and its accuracy was not contested.

The government documents, in *Aristy-Farer, v. State of New York*, 143 A.D.3d 101 (1st Dept. 2016), compared annual education spending to demonstrate compliance with *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995). The First

Department declined to take judicial notice of the fiscal profile spreadsheets because each consisted of tens of thousands of cells of financial data and were not readily comprehensible without explanatory expert guidance, which had not been provided.

The Minute Book of the Clerk of the Court. The contents of a minute book of the Clerk of the Court are an appropriate subject of judicial notice. Based on the record, Supreme Court, in in *Deal v. Meenan Oil Co.*, 153 A.D.2d 665 (2d Dept. 1989), properly granted plaintiffs' motion to vacate the settlement, The ruling was reversed because, on appeal, defendant submitted documentary proof that the settlement was memorialized in the minute book of the Clerk of the Court.

Discovery Motions When Judicial Notice May Taken. In *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, n. 6 (1st Dept. 2007), the First Department disapproved of the way motion practice was conducted on the discovery issue because several of the documents were subject to judicial notice.

Dehors-the-Record Official Documents, Controverted and Incontrovertible. "However well intentioned, inclusion of non-record material in a record on appeal or references to such material in briefs, on the possibility that a pending motion for enlargement of the record might be granted, is improper." A party desirous of "enlarging the record on appeal is to make a motion to that effect." *Mount Lucas Assoc. v. MG Ref. and Mktg.*, 250 A.D.2d 245 (1st Dept. 1998).

The Appellate Division "severely condemns" the inclusion of documents in the record on appeal which are not properly part of the record. *Terner v. Terner*, 44 A.D.2d 702 (2d Dept. 1974); *Liebling v. Liebling*, 146 A.D.2d 673 (2d Dept. 1989). A court will grant a motion to strike such offending material. *Chimarios v. Duhl*, 152 A.D.2d 508 (1st Dept. 1989).

"It is well settled that an incontrovertible official document, [albeit] dehors-the-record, may be considered on appeal for the purposes of sustaining a judgment" *O'Neill v.*

Board of Zoning Appeals of Town of Harrison, 225 A.D.2d 782 (2d Dept. 1996) (deeds, building permits, tax records); *Brandes Meat v. Cromer,* 146 A.D.2d 666 (2d Dept. 1989). A failure to dispute the accuracy of such documents concedes their accuracy. *O'Neill,* 225 A.D.2d 782; *State v. Peerless Ins. Co.*, 117 A.D.2d 370 (3d Dept. 1986).

During argument of the appeal, in *Estate of Dwyer*, 57 A.D.2d 772 (1st Dept. 1977), respondent submitted an affidavit with official documents showing that the IRS had released any federal tax lien: "For the purpose of sustaining a judgment, incontrovertible, documentary evidence dehors-the-appeal record may be received by an appellate court ..."

Undisputed Documents. A court may take judicial notice of undisputed court records and files. *Matter of Khatibi v. Weill,* 8 A.D.3d 485 (2d Dept. 2004). In *Gustafson v. Dippert*, 68 A.D.3d 1678, 1680 (4th Dept. 2009), defendant-Stansberry appealed from an order denying his cross-motion to disqualify the law firm from representing plaintiff based upon conflict of interest. Held: The retainer agreement between Stansberry and the firm was properly included in the record on appeal because it was undisputed that it was accurately described for the court during oral argument, for which no stenographic record was made, and the order denying Stansberry's cross-motion listed the retainer as having been considered by the court.

The Court of Appeals has also recognized "a narrow exception," which allows the consideration on appeal of reliable documents, the existence and accuracy of which are not disputed, even to modify or reverse the order under review. *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666 (2d Dept. 1989), citing *Crawford v. Merrill Lynch, Pierce, Fenner & Smith*, 35 N.Y.2d 291 (1974).

While a court may take judicial notice of its records and files, it "may not take judicial notice of a 'fact' which is controverted." "The mere presence of a document in a court file does not mean that judicial notice can properly be taken of any factual material

asserted" therein." *Walker ex rel. Velilla v. City of New York*, 46 A.D.3d 278 (1st Dept. 2007). *Ptasznik v. Schultz*, 247 A.D.2d 197 (2d Dept. 1998) stated: "No authoritative case has ever held that an item may be considered and weighed by the finder of fact merely because the item, however unauthenticated and unreliable it may be, happened to repose in the [paperwork] of a court's file."

In *Skiff-Murray v. Murray*, 305 A.D.2d 751 (3d Dept. 2003), respondent moved to strike certain judicial documents placed in an addendum to petitioner's brief. The documents comprised subsequent findings and orders that respondent, inter alia, voluntarily departed the state and willfully disobeyed the child support order resulting in a bench warrant and order of commitment. The Appellate Division took judicial notice of those documents to the extent they established respondent's absence and default in Family Court proceedings involving the very order from which he was seeking appellate relief.

Post-judgment Changed Circumstances in Child Custody Cases. During the pendency of the appeal, in *Matter of Michael B.*, 80 N.Y.2d 299 (1992), appellant admitted neglecting other children in his custody (not Michael), which children were removed from his home. The Court of Appeals "took notice of the new facts and allegations to the extent they indicated that the record was no longer sufficient for determining appellant's fitness." These events constituted new circumstances that required remittal for a new hearing.

In other child custody cases, where substantial time has elapsed, coupled with the pace of the child's psychological development, courts, citing *Michael B.*, have found that the records were "no longer sufficient" and remitted them for new hearings. *Joseph F., Sr. v. Patricia F.*, 32 A.D.3d 938 (2d Dept. 2006); *In re Evelyse Luz S.*, 62 A.D.3d 595 (1st Dept. 2009).

Elliott Scheinberg is a member of NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of Contract Doctrine and Marital Agreements in New York,

NYSBA, (3d ed. 2016). He is also a Fellow of the American Academy of Matrimonial Lawyers.