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Memorandum of Law in the Record on Appeal, Letter Briefs

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By **Elliott Scheinberg** | March 01, 2021

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A memorandum of law has no evidentiary value and may only be included in the record on appeal as evidence of issue preservation. *DiLorenzo v. Windermere Owners*, 2020 NY Slip Op 06837 (2020) and *DiLorenzo v. Windermere Owners*, 189 A.D.3d 664 (1st Dept. 2020), bring up

that a memorandum of law may preserve an issue for appeal. By way of background, a line of cases from the Fourth Department has held that "a memorandum of law has no evidentiary value and, indeed, is properly included in a record on appeal for the sole purpose of establishing that an issue has been preserved for [appellate] review." *Brown v. Smith*, 85 A.D.3d 1648, 1649 (4th Dept. 2011). *Byrd v. Roneker*, 90 A.D.3d 1648, 1649 (4th Dept. 2011); *Lloyd v. Town of Greece Zoning Bd. of Appeals* (Appeal No. 2), 292 A.D.2d 818 (4th Dept. 2002). "Unsworn allegations of fact in a memorandum of law are without probative value and no issue of preservation of a legal issue is presented," for which reason "the court properly settled to exclude the plaintiff's memorandum of law." *Zawatski v. Cheektowaga-Maryvale Union Free School Dist.*, 261 A.D.2d 860 (4th Dept. 1999), lv. denied 94 N.Y.2d 754 (1999).

Recently, in *Town of W. Seneca v. Kideney Architects, P.C.*, 187 A.D.3d 1509 (4th Dept. 2020), the Fourth Department held that Supreme Court erred in denying that branch of the motion to settle the record on appeal in that the court excluded, inter alia, "the memoranda of law, which may be included *only for the limited purpose* of determining whether the contentions on appeal are preserved for [appellate] review."

In *Brown*, supra, the infant-plaintiff commenced an action for damages for injuries sustained due to her exposure to lead paint while residing in a house rented to her mother by the defendant. The Appellate Division affirmed the denial of defendant's motion for summary judgment to dismiss plaintiff's complaint because defendant failed to meet his initial burden of establishing that he did not have actual or constructive notice of the lead-paint condition. In support of his motion, he had submitted only the pleadings, an affirmation of his attorney who had no personal knowledge of the facts, and a memorandum of law.

In *Rivera v. Rochester Gen. Health Sys.*, 173 A.D.3d 1758 (4th Dept. 2019), the Appellate Division reversed an order granting defendant's motion for summary judgment and dismissing her complaint:

> Although plaintiff raised her contentions in a memorandum of law that is not included in the record on appeal, the record nonetheless establishes that plaintiff's submissions in the motion court contained those contentions inasmuch as defendant discussed them in its reply papers and the court, in its written decision, noted that plaintiff had raised those contentions in the memorandum of law.

In *Caminiti v. Extell W. 57th St.*, 166 A.D.3d 440 (1st Dept. 2018), the First Department unanimously modified an order of the Supreme Court, which modification denied plaintiff's motion for partial summary judgment on the Labor Law §240(1) claim, and further granted defendants' motion for summary judgment dismissing on the Labor Law §241(6) claim, holding, in pertinent part: "Defendants preserved their arguments about triable issues of fact by asserting them in their memorandum of law in opposition to plaintiff's partial summary judgment motion."

'DiLorenzo'

DiLorenzo v. Windermere Owners, 2020 NY Slip Op 07997 (1st Dept. 2020), on remittitur from the Court of Appeals, directed the First Department to consider the issue of willfulness, which had been raised but not determined on appeal to the Court of Appeals. Laura DiLorenzo had commenced an action in 2011 alleging that the defendants overcharged her by fraudulently representing that the apartment was not subject to rent stabilization. The plaintiff sought a judgment for rent overcharges, treble damages, a declaratory judgment that she was a rent-stabilized tenant and an injunction barring the defendants from evicting her. The defendants answer claimed that the premises qualified for permanent deregulation.

Following a nonjury trial in 2016, the Supreme Court found that the defendants failed to show that the work claimed in 2009 was not duplicative of the improvements performed in 1995 and 1998, or that the earlier work had outlasted its useful life. The Supreme Court determined that the legal rent was well below the $2,000 threshold necessary for rent destabilization on the ground of high rent vacancy decontrol. The court also found that the plaintiff was entitled to treble damages as the defendants failed to rebut the presumption of willfulness. Supreme Court directed entry of a judgment against the defendants and directed them to provide the plaintiff with a rent-stabilized lease.

The defendants appealed. In a split decision, *DiLorenzo v. Windermere Owners*, 174 A.D.3d 102, 116 (1st Dept. 2019), as pertinent here, the First Department, without deciding the issue of willfulness, dismissed the case, concluding that the plaintiff had waived the useful life issue, *having failed to plead it in her complaint, having only raised it in a pretrial memorandum of law*:

> *In her complaint, plaintiff made no mention of the IAIs* [individual apartment improvements] she now asserts were performed in 1995 and 1998. Moreover, *plaintiff failed to amend her complaint to include her factual averments and legal claims in this regard or to make a motion before the trial court based upon them.* Because this argument raises an issue that was "*not asserted in the complaint or in [the one motion included in the record that was made] before the motion court*, [it] is not properly before us in the context of this appeal.
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> The record indicates that *plaintiff did not raise the useful life issue until the filing of her pretrial memorandum of law* on December 9, 2015, approximately 3½ years after filing her complaint on August 31, 2011 and only one month prior to the commencement of the trial. Thus, in this case, it was defendants, not plaintiff, who were prejudiced by plaintiff's delay in raising this issue, although she could have done so by amending her complaint.

The Court of Appeals, 2020 NY Slip Op. 06837 (2020), reversed, underscoring that the issue had been preserved in the memorandum of law:

> *Because plaintiff expressly raised the useful life issue in her pretrial memorandum, it was not waived.* Supreme Court found that defendants failed to meet their burden to prove that the improvements in question satisfied the useful life requirement. To the extent the Appellate Division's contrary conclusion was based upon new factual findings, we conclude that the trial court's findings 'more nearly comport with the weight of the evidence.'

Although beyond the scope of the role of memoranda of law on appeal, it is noteworthy that that the Court of Appeals made its own factual determination following the Appellate Division's own finding of facts: CPLR 5501(b): "The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."

Failure To Include the Memorandum in the Record

In each of three cases, the Fourth Department held that the failure to include the memorandum of law precluded consideration of the arguments therein. Upon a grant of reargument, the Fourth Department, *In County of Jefferson v. Onondaga Dev.*, 162 A.D.3d 1602 (4th Dept. 2018), amended the prior order:

> To the extent that the County contends that the encroachment was permissible under the doctrine of lateral support, the County's submissions in support of its motion do not contain that contention, and thus that contention is not properly before us ... Although the County asserts that it raised that contention in the memoranda of law that it submitted in support of its motion, *we note that the memoranda of law are not part of the record on appeal,* and the County failed to object to defendant's submitted appendix and failed to submit its own appendix containing those memoranda.

In *Phelan v. State*, 238 A.D.2d 882 (4th Dept. 1997), the claimants commenced an action alleging violations of Labor Law §§240(1) and 241(6) and subsequently moved for partial summary judgment on the Labor Law §240(1) cause of action following which the State cross moved for summary judgment to dismiss the claim. The Court of Claims granted the motion and denied the cross motion. On appeal, the Fourth Department dismissed the claim in its entirety:

> Because claimants failed to allege the violation of a specific provision of the Industrial Code in either the claim or the bill of particulars, the Labor Law §241(6) cause of action should have been dismissed ... *Claimants argue that they included such allegations in their memorandum of law in opposition to the State's cross motion to dismiss the Labor Law §241(6) cause of action ... That memorandum of law, however, is outside the record and we cannot consider it.*

In *Lyndaker v. Bd. of Educ. of W. Can. Val. Cent. School Dist.*, 129 A.D.3d 1561 (4th Dept. 2015), defendants filed a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) (failure to state a cause of action). As to several contentions advanced by the defendants on appeal in support of their position that certain of the plaintiff's causes of action failed to state a cause of action, the Fourth Department held:

> [D]efendants' submissions in support of their motion do not contain those contentions and, thus, the contentions are not properly before us ... *To the extent that such contentions were included in defendants' memorandum of law submitted in support of the motion, we note that the memorandum of law is not part of the record on appeal,* and "no issue of preservation of a legal issue is presented."

Judicial Notice Could Have Been Taken

Decisional authority allowed the Fourth Department to take judicial notice of the absent memoranda. 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, *Peo. v. Davis*, 161 A.D.2d 787 (2d Dept. 1990). In granting a motion to set aside a jury verdict, the Appellate Division ruled 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).

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).

In *Anthony J. Demarco Jr., P.C. v. Bay Ridge Car World*, 169 A.D.2d 808 (2d Dept. 1991), the Second Department took judicial notice of an amended complaint, which added new parties and an additional cause of action, served subsequent to the filing of the notice of appeal.

In *Leary v. Bendow*, 161 A.D.3d 420, 421 (1st Dept. 2018), the First Department held that Supreme Court was permitted to take judicial notice of a so-ordered stipulation. In *Prop. Clerk, New York City Police Dept. v. Seroda*, 131 A.D.2d 289, 294, n. 2 (1st Dept. 1987), the First Department took judicial notice of a letter, which was part of the record before the court but of another proceeding.

Letter Briefs, CPLR 5701(a)(2)

In *Hogan v. Zibro*, 2021 NY Slip Op 00214 (3d Dept. 2021), plaintiff and defendant owned three parcels of real property. Plaintiff commenced an action under RPAPL article 9 seeking partition of the three parcels. Defendant asserted two counterclaims in his answers. A referee was appointed to determine the rights of the parties and whether partition was appropriate. Following a hearing, the referee issued a report concluding that partition could proceed and

granted each party a 50% interest for each parcel. Prior to examining the substantive arguments, the Appellate Division observed that Supreme Court improperly confirmed the referee's report because neither party had moved to confirm or reject the report:

> Supreme Court's recitation of the papers that it considered [] does not indicate that there was a motion by any party. [A]ccording to the [] order, the court considered [] a "[l]etter brief ... dated January 28, 2019" from plaintiff's counsel and a "[p]ost-[h]earing submission ... dated January 28, 2019" from defendant's counsel. Because the record reflects that the [] order was a product of letter briefs, it was not an order deciding a motion made upon notice. As such, the February 2019 order is not appealable as of right (CPLR 5701[a][2]; Sholes v. Meagher, 100 N.Y.2d 333, 335-336, 763 N.Y.S.2d 522, 794 N.E.2d 664 [2003]), and we decline to grant leave to appeal.

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