

The Survey of New York Practice Table of Contents

Editorial Board

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this fourth issue of Volume 68, *The Survey* analyzes recent developments in New York law. In *DeWeerth v. Baldinger*, the

* *The Survey* uses the following abbreviations:

New York Civil Practice Law and Rules (McKinney)	CPLR
New York Civil Practice Act	CPA
New York Criminal Procedure Law (McKinney)	CPL
New York Code of Criminal Procedure	CCP
Real Property Actions and Proceedings Law (McKinney)	RPAPL
Domestic Relations Law (McKinney)	DRL
Estates, Powers and Trusts Law (McKinney)	EPTL
General Business Law (McKinney)	GBL

Court of Appeals for the Second Circuit failed to apply New York's long-standing demand and refusal rule to an art owner's cause of action to regain stolen artwork from a good-faith purchaser. As a result of the court's misapplication of the diligent search rule, it found the claim to be time barred by plaintiff's failure to conduct a timely, reasonable search for the stolen property. Plaintiff's later Federal Rule of Civil Procedure 60(b)(6) motion, granted by the district court, was reversed by the Second Circuit on the grounds that the court interpreted the New York Court of Appeals case which served as the motions basis to represent a subsequent change in the law rather than a restatement of the New York rule. As a result, this plaintiff was denied in federal court relief which would have been granted had she brought the same claim in state court.

In *Doe v. State*, the New York Court of Claims held that a judgment creditor who contracted AIDS as a result of the negligence of two State correction officers was not entitled to a lump sum judgment despite her claim that concerns over receiving a structured judgment were accelerating her disease. The court reasoned that the strong policy in favor of allowing judgment debtors the opportunity to pay large judgments over time was particularly compelling in cases in which the grant of a lump sum judgment would not substantially relieve the judgment creditor's stress. The writer submits that such inequitable result could be avoided by the enactment of proposed legislation providing for continued payments to the judgment creditor's heirs in cases in which the jury makes a finding that the plaintiff's injuries are likely to be fatal.

In *People v. Jones*, the New York Supreme Court, Kings County, held that an audiotape prepared by the Office of the City Medical Examiner ("OCME") during autopsy constituted *Rosario* material, even though the OCME is an independent agency and the audiotape was never actually in the possession of the district attorney. Many courts had previously understood the *Rosario* requirement that the prosecutor have "possession or control" to require that there be control over the *agency*. Here, the court broad-

General Municipal Law (McKinney)	GML
General Obligations Law (McKinney)	GOL
David Siegel, New York Practice (1991)	SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1989)	WK&M
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ened that definition and found control over the *material* to be sufficient for a finding of *Rosario* material and held that prosecutorial access to the audiotape was tantamount to constructive possession. As such, the court termed the holding a "new rule" with no retroactive application.

Lastly, in *In re Gregory M.*, the New York Court of Appeals upheld a school security officer's patdown search of the exterior of a public high school student's book bag. The court conceded that the "metallic thud" heard when the bag was dropped at the security desk did not satisfy the "reasonable suspicion" standard, but held that it did render the search reasonable and not arbitrary. It found such basis for the search constitutionally sufficient in light of the minimal expectation of privacy the student had at the time he left his book bag at the security desk.

The members of Volume 68 hope that this review of recent New York caselaw and legislative developments will be of interest to both bench and bar.

