



## ***KD's Kevin O'Donnell Wins Reversal and Dismissal in New York's Second Department: Court Erred In Deeming Transcript Inadmissible***

*Rosenblatt v. St. George Health & Racquetball Assoc., LLC, et al., 2011/10114*

*In a unanimous Opinion by the Supreme Court of the State of New York, Appellate Division, Second Department issued on April 30, 2014 and published in the New York Law Journal on May 7, 2014, the Court reversed denial of defendant's motion for summary judgment on two procedural grounds raised sua sponte by the motion court and, rather than remanding the case back to the Supreme Court for further proceedings, reached the merits and granted defendant's motion dismissing the case.*

*Plaintiff, Eleanor Rosenblatt, alleged personal injuries arising out of an accident while participating in a "Body Sculpting" class at defendant Eastern Athletic Club's health club in Brooklyn, New York. Specifically, plaintiff claimed that while attempting to perform exercises while seated on an exercise ball, the ball rolled causing her to fall to the ground and sustain compression fractures to her spine. Plaintiff alleged that the instructor failed to properly supervise her use of the ball and did not give her sufficient instruction before allowing her to use the ball.*

*Defendant moved for summary judgment on the grounds that plaintiff "voluntarily and knowingly assumed the obvious risk of injury inherent in attempting to balance while seated on an exercise ball while participating in the 'Body Sculpting'" class. In support of its motion, defendant submitted, among other things, pleadings and an unsigned, uncertified copy of plaintiff's deposition transcript. In opposition, plaintiff argued that defendant's motion should be denied because defendant failed to support the motion with evidence in inadmissible form as required by CPLR 3212(a). Specifically, plaintiff argued that the copy of plaintiff's deposition transcript submitted in support of the motion was "unverified" and, thus, inadmissible. In reply, defendant submitted a letter establishing that it complied with CPLR 3116 (a) by forwarding to plaintiff's attorney the original transcript and instructing plaintiff to sign it before a notary public and return it to defendant within 60 days, otherwise it would be deemed executed.*

*The motion court denied defendant's motion on two procedural grounds without ever reaching the merits. First, it held that defendant had failed to attach copies of all the pleadings as required by CPLR 3212(b). In doing so, the motion court noted that defendant had submitted a complaint and an answer to amended verified complaint but no amended complaint had been submitted. The motion court further held that the unsigned copy of plaintiff's deposition transcript submitted by defendant was not in admissible form. While the court acknowledged defendant on reply had submitted the letter establishing compliance with CPLR 3116(a), it nevertheless determined that the transcript was inadmissible pursuant to CPLR 3116 (b) because it was not certified by the court reporter. The motion court held that since defendant failed to point to any other evidence in support of its motion that it was not for the court to "review voluminous transcripts to find portions therein that may support a summary judgment movement's position."*

*On appeal, defendant argued that the motion court erred in holding it had failed to provide copies of all pleadings in support of the motion. Specifically defendant noted that while its answer was styled "answer to amended verified complaint" there was no amended verified complaint. Rather, defendant explained that its answer was so styled because the parties had stipulated to amend the caption after service of the complaint but before filing of defendant's answer.*

*The Appellate Division, Second Department held that the motion court improperly concluded that defendant's motion papers were deficient because of the purported failure to append all pleadings. In this regard, the Court held that while defendant's answer was technically not an "answer to amended complaint," the motion court should have disregarded this misnomer "as no substantial right of any party was prejudiced thereby" (citing CPLR 2001).*

*With respect to plaintiff's deposition transcript, the Court held that the lack of signature did not render it inadmissible because defendant established that it complied with CPLR 3116(a) by sending plaintiff the original, which she failed to return executed within 60 days. The Court further held that defendant's evidence establishing compliance with CPLR 3116(a) was properly considered on reply because submitted in direct response to arguments raised for the first time in plaintiff's opposition papers. The Court also held that plaintiff's argument with respect to "verification" of the deposition transcript was not equivalent to an objection that the deposition was "uncertified". Thus, Court held that it was an error on the part of the motion court to deny defendant's motion sua sponte on this basis*

without affording it opportunity to correct the defect. Thus, the Court held that the motion court had improperly denied defendant's motion for summary judgment on ground the parties did not litigate and therefore did not have an opportunity to address. The Court emphasized that the "lack of notice and opportunity to be heard implicates the fundamental issues of fairness that is the cornerstone of due process." The Court further observed "we are not in the business of blind siding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made" (citing *Misicki v. Caradonna*, 12 N.Y.3d 511, 519 (2009)). In this regard, the Court noted that had plaintiff raised the argument with respect to the transcript's lack of certification by a court reporter in opposition to defendant's motion, defendant could have corrected it on reply. Thus, the Court held that this was an "irregularity" that the motion court should have ignored.

Having found that it was error to deny defendant's motion on the two procedural grounds not raised by plaintiff, the Court decided "in the interest of judicial economy" that it was "appropriate, under the circumstances, to address [defendant's] motion on the merits rather than remitting it to the Supreme Court to do so." The Court held that defendant had established entitlement to summary judgment on the issue of primary assumption of the risk, specifically, by submitting testimony establishing: (a) that plaintiff voluntarily participated in the "Body Sculpting" class; (b) that she acknowledged that she was responsible for her own safety and deciding what types of activities she could safely perform within her own abilities and skill level; and (c) that she did not express any reservation about using the ball when first present to her by the instructor. Finally, the court held that plaintiff failed to raise a triable issue of fact in opposition and, thus, summary judgment was appropriate.