

A Primer and Problems in Admitting Electronic Records in Evidence at Trial and in Support of Motions for Summary Judgment



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It has been almost 10 years since New York’s business records statute, CPLR § 4518, was amended in recognition of the widespread use of electronic records¹ and the admissibility of those records under the exception to the hearsay rule.² In further recognition of the widespread use of electronic records, state and federal statutes governing pre-trial disclosure have been amended to set forth rules governing electronic disclosure.³ This article sets forth and summarizes the fundamental tenets of law required to offer electronic records in evidence at trial and for use on summary judgment, and it discusses pitfalls and problems that practitioners have encountered in offering electronically generated evidence on motions and at trial.

A. THE ADMISSIBILITY OF ELECTRONIC RECORDS AT TRIAL

It is well established that electronic records may be admitted in evidence under the business record exception to the hearsay rule under CPLR § 4518. *See, e.g., Federal Express Corporation v. Federal Jeans, Inc.* (holding that “computer-generated invoices and billing records of the amounts due were properly admitted as business records ...”);⁴ *Brown v. SMR Gateway 1, LLC*. (holding that a web document maintained by a governmental agency on an official governmental website constituted a business record for purposes of hearsay exception);⁵ and *F.K. Gailey Company, Inc. v. Wahl* (holding that

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“...computer printout of outstanding amounts due plaintiff was properly admitted as a business record, because the data was stored in the regular course of business”).⁶

The statute codifies three foundational requirements necessary to overcome a hearsay objection and admit a business record for the truth of its contents:

1. It must be shown that the document was made in the regular course of a business;
2. that it was the regular course of such business to make the record; and
3. that the record was made at or about the time of the event or within a reasonable time thereafter.

Under *People v. Markowitz*,⁷ electronic records are properly admitted in evidence under CPLR § 4518 where the information contained therein is shown to be “... entered into the computer in the regular course of business,” *Federal Express Corp. v. Federal Jeans, Inc.*,⁸ or where the “...data [is] stored in the normal course of business.” *Markowitz, supra*.⁹ [(See also State Technology Law § 306 (providing for the admissibility of electronic records, the text of which is recited in Point A(3) of this article, *infra*)].

I. “Robo-Testimony” of the Foundational Elements of Electronic Records Will Not Suffice

Where a lawyer intends to offer electronic records in evidence at trial, it is imperative that the foundational evidence offered in support of the record’s admissibility not be a mere recitation of the foundational requirements under CPLR § 4518. A lesson can be learned from the court’s decision in *Chase Bank USA, N.A. v. Gergis*,¹⁰ in which the plaintiff failed to satisfy the foundational requirements for the admissibility of electronic records and lost the case.

In *Gergis*, the plaintiff bank commenced suit for breach of contract and for an account stated to recover the balances due on three of defendant’s credit card accounts. At trial, the plaintiff offered electronic records consisting of credit card account statements, and in attempt to satisfy the foundational requirements under CPLR § 4518, called an employee holding the title “Records Custodian.”¹¹ The records custodian testified that the electronic records were “...created in the ordinary course of [the bank’s] business, that it was the ‘regular course of [the bank’s] business to make’ the records, and the bank relied ‘upon these [records] in conducting its business.’”¹² Based upon that testimony, the bank’s counsel offered the electronic credit card statements in evidence, maintaining that the records constituted “business records” within the meaning of CPLR § 4518 and were not hearsay. The court refused to admit the electronic records into evidence on the ground that a proper foundation for their admission had not been laid.¹³

In support of its evidentiary ruling, the *Gergis* Court pointed out that the records custodian’s “...foundational testimony was essentially a verbatim recitation of the statutory elements set forth in CPLR § 4518(a).”¹⁴ The court noted that the records custodian “...gave absolutely no testimony as to how the electronic records concern-

ing defendant's account statements came into existence, nor did he indicate that he even knew how such information was collected.¹⁵ The *Gergis* Court also pointed out that the records custodian failed to "...demonstrate that the person or persons who inputted the electronic data had actual knowledge of the events inputted or that such person or persons obtained knowledge of those events from someone with actual knowledge of them and who had a business duty to relay that information regarding the events."¹⁶ The *Gergis* Court also found that the records custodian failed to demonstrate "...that the credit card statements were routine reflections of day-to-day operations of [the bank] or that [the bank] had an obligation to have the statements be truthful and accurate for the purposes of the conduct of the enterprise."¹⁷ For those and other reasons, the *Gergis* Court gave the records custodian's "'robo-testimony' and plaintiffs' no weight or credit."¹⁸

A similar lesson can be learned from the court's decision in *Palisades Collection, LLC v. Kredik*,¹⁹ in which the plaintiff failed to authenticate electronic records and, as a result, lost the case. In *Kredik*, the plaintiff, as alleged assignee of Discover Bank (Discover), commenced suit for breach of contract and account stated to recover the balance owed on a credit card issued to the defendant. The plaintiff unsuccessfully moved for partial summary judgment, and following its submissions the court *sua sponte* granted the defendant summary judgment dismissing the complaint, finding that the plaintiff failed to provide admissible evidence of its standing.

In support of its ruling, the *Kredik* Court explained that "[t]o establish standing to sue, plaintiff was required to submit admissible evidence that Discover assigned its interest in defendant's debt to plaintiff."²⁰ In an attempt to demonstrate standing, the *Kredik* plaintiff "... submitted an affidavit from its agent with exhibits, including a printed copy of several pages from an electronic spreadsheet listing defendant's Discover account as one of the accounts sold to plaintiff."²¹ However, the *Kredik* Court found that the "plaintiff failed to establish a proper foundation for the admission of the spreadsheet under the business record exception to the hearsay rule."²² The court explained that "[a]lthough plaintiff's agent averred that the spreadsheet was kept in the regular course of business and that the entries therein were made in the regular course of business, the agent did not establish that he was familiar with plaintiff's business practices or procedures, and he further failed to establish when, how, or by whom the electronic spreadsheet submitted in paper form was made."²³ The *Kredik* Court further noted that "although an electronic record 'shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record,' ... plaintiff's agent failed to establish that the printed electronic spreadsheet submitted to the court was a true and accurate representation of the electronic record kept by plaintiff."²⁴

2. The Admissibility of Electronic Records Received from an Entity Other Than the Proponent of the Documents

Where the electronic records sought to be offered are received from an entity other than the proponent of the documentary evidence, courts have been reluctant to admit the same in evidence in the absence of independent evidence showing that the records

“...are so patently trustworthy as to be self-authenticating.”²⁵

In *Standard Textile Co. v. National Equip. Rental*, the court stated that “... the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records.”²⁶ “The rationale for this holding is that employees from the receiving entity would be in no position to provide the necessary foundation testimony as to the regularity and timeliness of a document’s preparation.”²⁷

In *Education Resources Institute, Inc. v. Piazza*,²⁸ the court similarly refused to admit electronic records (*i.e.*, computer printouts) which were not authenticated by the party having personal knowledge to satisfy the foundational requirement as to the document’s preparation. The court explained that while “computer printouts are admissible as business records if the data [is] stored in the normal course of business,” the proponent of the evidence must also offer evidence “from an individual with personal knowledge as to the care and maintenance of the...” documents sought to be offered.²⁹

Conversely, a receiving entity’s employee may provide sufficient foundation testimony for the admission of a record from another entity, “even though the employee cannot relate the other entity’s specific record-making practices, if the employee is well familiar with the circumstances under which the record is prepared, if the record is prepared on behalf of the receiving entity and in accordance with its requirements, and if the receiver routinely relies on such records.”³⁰ “If these requirements are met, the fact that the entrant is not an employee of the receiving entity does not affect admission.”³¹

Further, where the electronic records sought to be offered are received from the opposing party in the litigation, they may be admissible as an admission by a party opponent. *See, e.g., Charter Oak Fire Insurance Co. v. Fleet Building Maintenance, Inc.* [defendant’s statement, recorded as electronic notes, admissible as an admission by a party opponent under Fed. R. Civ. P. 801(d)(2)];³² *Sea-land v. Lozen International, LLC* (admitting e-mail electronically signed by employee of defendant as an admission of a party opponent).³³

3. The Admissibility of Electronic Records Downloaded from a Governmental Website as a Public Record under CPLR § 4520 or the Broader Common-Law Public Documents Hearsay Exception

Where electronic records are downloaded from a governmental website, they may be admissible as a public record under CPLR § 4520, or the broader common-law public documents hearsay exception.

To admit an otherwise hearsay document as a public record under CPLR § 4520, it must satisfy the strict requirements of that statute. CPLR § 4520, entitled “Certificate or Affidavit of Public Officer,” states:

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is *prima facie* evidence of the facts stated.

In *Miriam Osborne Memorial Home Association v. Assessor of Rye*,³⁴ the petitioner brought a proceeding under Real Property Tax Law Article 7 and, at trial, attempted to offer in evidence an electronic print-out of data maintained by the New York State Office of Real Property Services (“ORPS”) on its website, ORPS SalesWeb (<http://orps.state.ny.us>). The electronic print-out, however, was not accompanied with a certificate or affidavit of a public officer, and the *Osborne* Court consequently found that the petitioner failed to establish a basis for admissibility under CPLR § 4520.³⁵ The *Osborne* Court, however, found that the computer document satisfied the criteria of the common law public documents hearsay exception, which is broader than the public record exception under CPLR § 4520. The *Osborne* Court explained:

The common law exception for public records is justified by the presumed reliability inherent in the recording of events by public employees acting in the regular course of public duty. Public employees make records pursuant to the ‘sanction of public duty’ and have no motive to falsify... As with the hearsay exception for business records, see CPLR § 4518(a), the reliability of public records is enhanced by the routine and repetitive circumstances under which such records are made. An additional justification is convenience: If government employees are continually required to testify in court with respect to matters they have witnessed or in which they have participated in the line of duty, the efficiency of public administration will suffer.³⁶

Having determined that the ORPS SalesWeb document was admissible under the common law hearsay exception for public records, the *Osborne* Court nevertheless emphasized that the document still had to be authenticated.³⁷ The *Osborne* Court explained, however, that because the ORPS SalesWeb document was an “electronic record” within the meaning of CPLR § 4518(a) and New York State Technology Law § 306, it could be, and was, properly authenticated under those statutes.³⁸

CPLR § 4518(a) provides, in relevant part:

An electronic record, as defined in section one hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible as a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including the lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not [affect] its admissibility.

New York State Technology Law § 306, entitled “Admissibility into Evidence,” creates an exception to the best evidence rule:

In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic reproduction or electronic signature may be admitted into evidence pursuant to article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules. [CPLR § 4539, entitled “Reproduction of Original”].

The *Osborne* Court explained that the petitioner at trial, through its foundation witness, Ms. Dillon, gave testimony showing the manner in which the electronic record was downloaded, printed, and copied.³⁹ In doing so, the court found that “it was taken from its electronic form and turned into a tangible exhibit,” and was therefore found to be “true and accurate representation of such electronic record,” and therefore admissible under CPLR § 4518(a) and New York State Technology Law § 306.⁴⁰

A. THE AUTHENTICITY OF E-MAIL AND TEXT MESSAGES

Courts have considered and found electronic records in the form of e-mails to be “...properly authenticated if its appearance, contents, substances, or other distinctive characteristics, taken in conjunction with circumstances, support a finding that the document is what its proponent claims.”⁴¹

Characteristics to consider in determining whether e-mail evidence has been properly authenticated include (1) consistency with the e-mail address in another e-mail sent by the alleged author; (2) the author’s awareness, shown through the e-mail, of the details of the alleged author’s conduct; (3) the e-mail’s inclusion of similar requests that the alleged author has made by phone during the time period; and (4) the e-mail’s reference to the author by the alleged author’s nickname.⁴²

The same factors have been held to apply to authentication of text messages.⁴³ Condoning the use of such documents at trial creates particular problems in marital cases where a couple may share a non-password protected computer.

B. THE USE OF ELECTRONIC RECORDS ON SUMMARY JUDGMENT

The Use of “Robo-Signed” Affidavits as a Means of Offering Electronic Evidence on Summary Judgment Should Be Avoided

Observance of the foundational requirements for the admissibility of electronic records are required not only at trial, but on motions for summary judgment. CPLR § 3212 requires that such motions be made on admissible evidence.⁴⁴ Plaintiff’s counsel failed to observe those requirements in *American Express Centurion Bank v. Badalamenti*,⁴⁵ and consequently failed to establish damages on summary judgment based upon electronic records.

In *Badalamenti*, the plaintiff-bank moved for summary judgment based upon credit card debt. On that motion, the plaintiff submitted an affidavit from a records custodian claiming to have “personal knowledge” of certain annexed “business records.”⁴⁶ The *Badalamenti* Court observed that the affidavit had the “...look and feel of a ‘robo-signed’ affidavit that was ‘prepared in blank in advance of knowing who would sign the affidavit.’”⁴⁷ The court further observed that the affidavit contained a “... ‘rubber stamped’ opening sentence identifying ...the affiant, followed by a general description of plaintiff’s business record practices and a ‘fill in the blanks’ state-

ment of facts respecting defendant's account."⁴⁸ The *Badalamenti* Court explained that "[w]hile the suspicion of robo-signing 'does not automatically indicate impropriety,'" "...upon closer examination, it appear[ed] that much of [the affiant's] 'knowledge' respecting the amount of defendant's indebtedness rest[ed] upon 'business records' that [were] merely 'reproductions' of parts of an 'electronic file.'"⁴⁹ The court observed that "the submission of such 'reproductions' from an 'electronic file,' when made as part of a summary judgment motion (CPLR § 3212), raises an interesting evidentiary issue under New York State law."

In determining whether the records custodian's affidavit satisfied the evidentiary foundation for the submission of "reproductions" of "electronic files" as business records on summary judgment, the *Badalamenti* Court noted, preliminarily, that "...summary judgment may not be granted unless the movant demonstrates its entitlement to judgment, as a matter of law, by tendering 'evidentiary proof in admissible form.'"⁵⁰ In determining whether the electronic records offered on summary judgment are in proper, admissible form, the *Badalamenti* Court explained that the following statutes are each pertinent, and when, "[r]ead together, ...set forth the foundations requirements for the submission of 'evidentiary proof in admissible form' in a case where the 'evidence' [relied upon by the moving party]...is maintained only in an electronic format": CPLR § 4518; State Technology Law § 302, State Technology Law § 306 and CPLR § 4539(b).⁵¹

As explained by the *Badalamenti* Court, CPLR § 4518 "...sets forth the basic requirements for the introduction of...electronic record[s] into evidence," as defined in Section 302 of the State Technology Law.⁵² As further explained by the *Badalamenti* Court, State Technology Law § 306, entitled "Admissibility into Evidence,...goes onto to add additional requirements..." for the admissibility of electronic records (the text of which statute is recited in Part A(3) of this article, *supra*).

As further pointed out by the *Badalamenti* Court, CPLR § 4539(b), which governs the admissibility of reproductions created by "...any process which stores an image...requires...authent[ic]at[ion] by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented..."

Stated another way, electronically stored images

"cannot qualify as a reproduction of any original made in the ordinary course of business unless the enterprise in question has incorporated measures sufficient to guarantee that any such alteration leaves an audit trail which at least indicates a change has been made."⁵³

Applying this statutory criteria to the affidavit submitted by the plaintiff in support of its motion for summary judgment, the *Badalamenti* Court concluded that the affidavit "...provide[d] only some of the information [required]...to lay a proper foundation for the introduction of the annexed 'reproductions' of plaintiff's electronic records respecting defendant's indebtedness."⁵⁴ Notwithstanding the statements in the affidavit indicating that the plaintiff recorded "...account transactions in the regular course of business, and that it was the regular course of plaintiff's business to

record such transactions at or about the time they occurred[,]” the court noted that the records custodian’s knowledge of “...plaintiff’s business practice [was] nonetheless limited.”⁵⁵ The *Badalamenti* Court further noted that while the records custodian swore in her affidavit that the copies annexed to her moving affidavit were “... ‘exact duplicates of the documents delivered to the card member;’...her affidavit fail[ed] to establish ‘when, how or by whom’ plaintiff’s exhibits were created[,]” and that “[s]uch proof is ordinarily required to lay a proper foundation for the submission of electronic records in paper form.”⁵⁶

“More importantly,” the *Badalamenti* Court explained, the records custodian’s affidavit did “...not describe whether plaintiff’s electronic records system permit[ted] ‘additions, deletions or changes without leaving a record of such additions, deletions or changes,’ and also failed to “...address ‘the manner or method (if any) by which ‘tampering or degradation’ of the reproduced records [was] prevented.”⁵⁷ The Court further explained that “[w]ithout an affidavit from an individual ‘with personal knowledge of the care and maintenance’ of plaintiff’s electronic business records, ... plaintiff cannot satisfy its burden, under State Technology Law § 306 and CPLR § 4539(b), of laying a proper foundation for submitting the subject reproductions.”⁵⁸ Consequently, the Court found that the plaintiff “...failed to set forth ‘evidentiary proof in admissible form’ respecting the business records that document the amount of defendant’s alleged indebtedness[,]” and denied its motion for summary judgment as to the issue of damages.⁵⁹

Conclusion

Based upon the everyday, common use of electronic records, it is imperative that practitioners be familiar with the various evidentiary rules of, and the pitfalls and problems in offering and admitting these documents in evidence at trial and on motions for summary judgment.

Endnotes

1. State Technology Law § 302 defines an “[e]lectronic record” as: information, evidencing any act, transaction, occurrence, event or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.

2. See 2002 amendment to CPLR § 4518(a), providing for the admissibility of “electronic record[s].”

3. As to state law, see New York’s Uniform Rules For the Trial Courts and particularly, Rule 202.12(c) (3), which specifically contemplates discovery of electronically stored information. As to federal law, see 2006 amendment to Fed. R. Civ. P. 34(a) and (b), providing for and making express reference to the disclosure of “electronically stored information, “and setting forth specific procedures for responding to requests for, and producing “electronically stored information.” See also 2006 amendment to Fed. R. Civ. P. 26(a), providing that initial disclosure shall include “electronically stored information.”

4. *Federal Express Corp. v. Federal Jeans, Inc.*, 14 A.D.3d 424, 424-25 (1st Dep’t 2005).

5. *Brown v. SMR Gateway I, LLC*, 22 Misc.3d 1139(A), 2009 WL 806792 at * 4 (Sup. Ct. Kings Co. 2009).

6. *F.K. Gailey Co., Inc. v. Wahl*, 262 A.D.2d 985, 985 (4th Dep’t 1999).

7. *People v. Markowitz*, 187 Misc.2d 266, 269, 721 N.Y.S.2d 758 (Sup. Ct. Richmond Co. 2001).

8. *Federal Express Corp.*, *supra*, 14 A.D.3d at 424-25.
9. *Markowitz*, *supra*, 187 Misc.2d at 269.
10. *Chase Bank USA, N.A. v. Gergis*, 31 Misc.3d 1241 (A), 932 N.Y.S.2d 759, 2011 WL 2409647 (Table) (N.Y. City Civ. Ct. 2011).
11. 2011 WL 2409647 at * 1.
12. *Id.* at * 2.
13. Despite this, some courts have found bank records as self-authenticating. See *Elkaim v. Elkaim*, 176 A.D.2d 116, 117 (1st Dep't 1991). See also *Thomas W. Rogers Auto Collision, Inc.*, 69 A.D.3d 608 (2d Dep't. 2010) (finding that "... the trial court did not err in allowing the admission of [a] bank statement into evidence inasmuch as it was a self-authenticating document").
14. *Id.* at * 3.
15. *Id.*
16. *Id.*
17. *Id.* at * 4.
18. *Id.*
19. 67 A.D.3d 1329 (4th Dep't 2009).
20. *Id.* at 1330.
21. *Id.*
22. *Id.*
23. *Id.* at 1331.
24. *Id.*
25. *Elkaim v. Elkaim*, 176 A.D.2d 116, 117 (1st Dep't 1991), quoting *People v. Kennedy*, 68 N.Y.2d 569, 574, n.4 (1986). Accord *Thomas v. Rogers Auto Collision, Inc.*, 69 A.D.3d 608, 609 (2d Dep't 2010).
26. *Standard Textile Co. v. National Equip. Rental*, 80 A.D.2d 911, 911 (2d Dep't 1981), citing *Burgess v. Leon's Auto Collision*, 87 Misc.2d 351 (N.Y. City Civ. Ct. 1976).
27. *Markowitz*, *supra*, 187 Misc.2d at 269-70, citing Alexander, *Practice Commentaries, McKinney's Cons. Laws of NY*, Book 7B, CPLR 4518:1 at 5 (McKinney 1992).
28. *Education Resources Ins., Inc. v. Piazza*, 17 A.D.3d 513, 515 (2d Dep't 2005).
29. *Id.*
30. *Markowitz*, *supra*, 187 Misc.2d at 270, citing *People v. Cratsley*, 86 N.Y.2d 81 (1995).
31. *Markowitz*, *supra*, 187 Misc.2d at 270.
32. 707 F Supp.2d 329, 333 (E.D.N.Y. 2009).
33. 285 F Supp.3d 808, 821 (9th Cir. 2002).
34. *Miriam Osborne Mem. Home Assn. v. Assessor of Rye*, 9 Misc.3d 1019 (Sup. Ct. Westchester Co. 2005).
35. *Id.* at 1026-27.
36. *Id.* at 1027, quoting Alexander, *Practice Commentaries, McKinney's Cons. Laws of NY*, Book 7B, 4520:2 (McKinney 1992).
37. *Id.* at 1028.
38. *Id.* at 1029-30.
39. *Id.* at 1030.
40. *Id.*

41. *Manuel v. State of Texas*, 357 S.W.3d 66, 2011 WL 3837561 at *6 (Tex.App. – Tyler 2011), citing *Shea v. State*, 167 S.W.3d 98, 105 (Tex.App. – Waco 2005); *Massimo v. State*, 144 S.W.3d 210, 215-16 (Tex.App. – Fort Worth 2004).
42. *Manuel*, *supra*, ___ S.W.3d ___, 2011 WL 3837561 at *6, citing *Massimo*, *supra*, 144 S.W.3d at 215-16 (citing *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000), cert. denied, 533 U.S. 940 (2001)).
43. *Manuel*, *supra*, ___ S.W.3d ___, 2011 WL 3837561 at *7, citing *Dickens v. State*, 175 Md.App. 231, 927 A.2d 32, 35-38 (Md.App. 2007) (“threatening text messages received by victim on cell phone contained details few people known and were sent from phone in defendant’s possession at the time”); *In re F.P.*, 878 A.2d 91, 95 (Pa.Super. 2005) (“threatening instant messages authenticated through circumstantial evidence including screen names, context of messages and surrounding circumstances”).
44. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).
45. 30 Misc.3d 1201(A), ___ N.Y.S.2d ___, 2010 WL 5186698 (Dist. Ct., Nassau Co. 2010).
46. *Id.*, 2010 WL 5186698 at *1.
47. *Id.*, citing *American Exp. Centurion Bank v. Bajek*, 29 Misc.3d 1226(A), 918 N.Y.S.3d 396, 2010 N.Y. Slip Op 52005 at fn. 2 (Sup. Ct., Orange Co. 2010).
48. *Id.*
49. *Id.*, citing *American Exp Centurion Bank v. Bajek*, 29 Misc.3d 1226(A), 918 N.Y.S.3d 396, 2010 N.Y. Slip Op 52005 at fn. 2 (Sup. Ct., Orange Co. 2010).
50. *Id.*, citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980), quoting *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-8 (1979)(remaining citations omitted).
51. *Id.*, 2010 WL 5186698 at *2.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*, 2010 WL 5186698 at **3-4.
56. *Id.*, 2010 WL 5186698 at *4.
57. *Id.*
58. *Id.*
59. *Id.*