NUTS & BOLTS OF COURT FILINGS

TABLE OF CONTENTS

Application for Index Number

Albany County Clerk

Application for INDEX NUMBER pursuant to CPLR §8018(a).
FEE $210.00

Index Number

Spaces below to be TYPED OR PRINTED by applicant.

NATURE OF ACTION: PERSONAL INJURY

TITLE OF ACTION OR PROCEEDING

CHARLOTTE PARKER,

Plaintiff(s)

vs.

CONOR R. BENNETT and MARY W. BENNETT,
Defendant(s)

Type below name and address of attorney(s) for Plaintiff(s).

Roemer Wallens & Mineaux, LLP
13 Columbia Circle
Albany, New York 12203

Type below name and address of attorney(s) for defendant(s)

Unknown at this time

Index and Entered

Index and Entered: _____
Do not write on line above

Title of Action or Proceeding to be TYPED or PRINTED by applicant.

SUPREME COURT COUNTY OF ALBANY

CHARLOTTE PARKER,

Plaintiff,

vs.

CONOR R. BENNETT and MARY W. BENNETT,

Defendants.

CLERK
DEC 19 2014
Albany County Clerk
BY:

Albany County Clerk
Document Number 11748964
Rcvd 12/18/2014 1:50:27 PM

Application for Index Number

Application for INDEX NUMBER pursuant to CPLR §8018(a).
FEE $210.00

Index Number
6427-14

Spaces below to be TYPED OR PRINTED by applicant.

NATURE OF ACTION:
PERSONAL INJURY

TITLE OF ACTION OR PROCEEDING

CHARLOTTE PARKER,

Plaintiff(s)

vs.

CONOR R. BENNETT and MARY W. BENNETT,
Defendant(s)

ALBANY COUNTY CLERK
210
PAID

Type below name and address of attorney(s) for Plaintiff(s).

Roemer Wallens & Mineaux, LLP
13 Columbia Circle
Albany, New York 12203

Type below name and address of attorney(s) for defendant(s)

Unknown at this time

Index and Entered

Index and Entered: _____
Do not write on line above

Title of Action or Proceeding to be TYPED or PRINTED by applicant.

SUPREME COURT COUNTY OF ALBANY

CHARLOTTE PARKER,

Plaintiff,

vs.

CONOR R. BENNETT and MARY W. BENNETT,

Defendants.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CHARLOTTE PARKER,

Plaintiff,

- against -

CONOR R. BENNETT and MARY W. BENNETT,

Defendants.

SUMMONS

Index No.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorney an Answer to the Complaint in this action within twenty (20) days after the service of this Summons, exclusive of the day of service, or within thirty (30) days after service is complete if this Summons is not personally delivered to you within the State of New York. In case of your failure to answer, Judgment will be taken against you by default for the relief demanded in the Complaint.

DATED: December 17, 2014

ROEMER WALLENS GOLD & MINEAUX LLP

BY: _____
Matthew J. Kelly, Esq.
Attorneys for Plaintiff
Charlotte Parker
OFFICE & P.O. ADDRESS:
13 Columbia Circle
Albany, New York 12203
Tel. No. (518) 464-1300

Trial is desired in the County of Albany. The basis of venue designated above is that the plaintiff resides within the County of Albany, State of New York.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CHARLOTTE PARKER,

Plaintiff,

- against -

CONOR R. BENNETT and MARY W. BENNETT,

Defendants.

COMPLAINT

Index No.

The plaintiff, by her attorneys, Roemer Wallens Gold & Mineux, LLP, as and for a Complaint against the defendant, sets forth as follows:

1. That all times hereinafter mentioned, the plaintiff was and still is a resident of the County of Albany, State of New York.

2. That at all times hereinafter mentioned, the defendants were and still are residents of the County of Nassau, State of New York.

3. That on or about January 5, 2013 the plaintiff was a passenger in a vehicle operated by one Kevin J. Ryan when that vehicle was struck by the vehicle operated by defendant, Conor R. Bennett and owned by defendant, Mary W. Bennett in the Town of North Hempstead, County of Nassau, State of New York.

4. That at that time, the plaintiff was utilizing the required seatbelt while a passenger in the vehicle operated by Mr. Ryan and the accident was caused by the negligence, recklessness and carelessness of the defendants, without any negligence of the plaintiff contributing thereto.

5. That as a result of the accident aforesaid, the plaintiff suffered a serious injury as defined by the Insurance Law of the State of New York.

6. That further, as a result of the happening of the accident, plaintiff was caused to become sick, sore, lame and disabled and to suffer pain and suffering, loss of enjoyment of life, medical expenses and lost wages, all to her damage.

WHEREFORE, plaintiff seeks judgment against the defendants in an amount in excess of the jurisdictional limits of any other court, together with costs and disbursements.

DATED: December 17, 2014

ROEMER WALLENS GOLD & MINEAUX LLP

BY:_____
Matthew J. Kelly, Esq.
Attorneys for Plaintiff - Charlotte Parker
OFFICE & P.O. ADDRESS:
13 Columbia Circle
Albany, New York 12203
Tel. No. (518) 464-1300

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CHARLOTTE PARKER,

Plaintiff,

- against -

CONOR R. BENNETT and MARY W. BENNETT,

Defendant.

STIPULATION OF DISCONTINUANCE

Index No. 6427-14

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all the parties to the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action by and between the parties be, and the same hereby are discontinued, with prejudice and without costs to any party as against the other. This stipulation may be filed without further notice with the Clerk of the Court.

DATED: October 20, 2016

Matthew J. Kelly, Esq.
Roemer Wallens Gold & Mineaux, LLP
Attorneys for Plaintiff
13 Columbia Circle
Albany, New York 12210
Tel. No. (518) 464-1300, Ext. 312

Thomas E. Kelly, Esq.
Kelly & Leonard, LLP
Attorneys for Defendants
OFFICE & P.O. ADDRESS:
199 Milton Avenue
Ballston Spa, New York 12020
Tel. No. (518) 884-0080

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

For Court Clerk Use Only:
IAS Entry Date
Judge Assigned
RJI Date

Supreme COURT, COUNTY OF Queens

Index No: 955/14 Date Index Issued: January 22, 2014

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

PRALHAD SHARMA and REBECCA SHARMA,

Plaintiff(s)/Petitioner(s)

-against-

OAK MOUNTAIN LLC,

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING: Check ONE box only and specify where indicated.

MATRIMONIAL

- ○ Contested

NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the **MATRIMONIAL RJI Addendum.**

For Uncontested Matrimonial actions, use RJI form UD-13.

TORTS

- ○ Asbestos
- ○ Breast Implant
- ○ Environmental: _____ (specify)
- ○ Medical, Dental, or Podiatric Malpractice
- ○ Motor Vehicle
- ○ Products Liability: _____ (specify)
- ◉ Other Negligence: Slip and Fall (specify)
- ○ Other Professional Malpractice: _____ (specify)
- ○ Other Tort: _____ (specify)

OTHER MATTERS

- ○ Certificate of Incorporation/Dissolution [see NOTE under Commercial]
- ○ Emergency Medical Treatment
- ○ Habeas Corpus
- ○ Local Court Appeal
- ○ Mechanic's Lien
- ○ Name Change
- ○ Pistol Permit Revocation Hearing
- ○ Sale or Finance of Religious/Not-for-Profit Property
- ○ Other: _____ (specify)

COMMERCIAL

- ○ Business Entity (including corporations, partnerships, LLCs, etc.)
- ○ Contract
- ○ Insurance (where insurer is a party, except arbitration)
- ○ UCC (including sales, negotiable instruments)
- ○ Other Commercial: _____ (specify)

NOTE: For Commercial Division assignment requests [22 NYCRR § 202.70(d)], complete and attach the **COMMERCIAL DIV RJI Addendum.**

REAL PROPERTY How many properties does the application include?

- ○ Condemnation
- ○ Mortgage Foreclosure (specify): ○ Residential ○ Commercial

Property Address: _____ Alabama
Street Address City State Zip

NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the **FORECLOSURE RJI Addendum.**

- ○ Tax Certiorari - Section: _____ Block: _____ Lot: _____
- ○ Tax Foreclosure
- ○ Other Real Property: _____ (specify)

SPECIAL PROCEEDINGS

- ○ CPLR Article 75 (Arbitration) [see NOTE under Commercial]
- ○ CPLR Article 78 (Body or Officer)
- ○ Election Law
- ○ MHL Article 9.60 (Kendra's Law)
- ○ MHL Article 10 (Sex Offender Confinement-Initial)
- ○ MHL Article 10 (Sex Offender Confinement-Review)
- ○ MHL Article 81 (Guardianship)
- ○ Other Mental Hygiene: _____ (specify)
- ○ Other Special Proceeding: _____ (specify)

STATUS OF ACTION OR PROCEEDING: Answer YES or NO for EVERY question AND enter additional information where indicated.

	YES	NO	
Has a summons and complaint or summons w/notice been filed?	◉	○	If yes, date filed: January 22, 2014
Has a summons and complaint or summons w/notice been served?	◉	○	If yes, date served: February 14, 2014
Is this action/proceeding being filed post-judgment?	○	◉	If yes, judgment date:

NATURE OF JUDICIAL INTERVENTION

Check ONE box only AND enter additional information where indicated.

- ○ Infant's Compromise
- ○ Note of Issue and/or Certificate of Readiness
- ○ Notice of Medical, Dental, or Podiatric Malpractice — Date Issue Joined: _____
- ○ Notice of Motion — Relief Sought: Alternate Service — Return Date: _____
- ○ Notice of Petition — Relief Sought: Alternate Service — Return Date: _____
- ○ Order to Show Cause — Relief Sought: Alternate Service — Return Date: _____
- ○ Other Ex Parte Application — Relief Sought: Alternate Service
- ○ Poor Person Application
- ◉ Request for Preliminary Conference
- ○ Residential Mortgage Foreclosure Settlement Conference
- ○ Writ of Habeas Corpus
- ○ Other (specify): _____

RELATED CASES

List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases. If additional space is required, complete and attach the RJI Addendum. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case

PARTIES

For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided. If additional space is required, complete and attach the RJI Addendum.

Un-Rep	Parties: List parties in caption order and indicate party role(s) (e.g. "defendant; 3rd-party plaintiff")	Attorneys and/or Unrepresented Litigants: Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	Issue Joined (Y/N)	Insurance Carrier(s)
☐	Sharma, Prahad and Sharma, Rebecca Last Name First Name Primary Role: Plaintiff Secondary Role (if any): Plaintiff	Last Name First Name Louis Grandelli, P.C. Firm Name 90 Broad Street, 15th Floor, New York — New York — 10004 Street Address — City — State — Zip 2126688400 — 2124830918 Phone — Fax — e-mail	○ YES ○ NO	
☐	Oak Mountain, LLC Last Name First Name Primary Role: Defendant Secondary Role (if any): Defendant	Last Name First Name Roemer Wallens Gold & Mineaux, LLP Firm Name 13 Columbia Circle, Albany — New York — 12203 Street Address — City — State — Zip Phone — Fax — e-mail	◉ YES ○ NO	
☐	Last Name First Name Primary Role: Plaintiff Secondary Role (if any): Plaintiff	Last Name First Name Firm Name Alabama Street Address — City — State — Zip Phone — Fax — e-mail	○ YES ○ NO	
☐	Last Name First Name Primary Role: Plaintiff Secondary Role (if any): Plaintiff	Last Name First Name Firm Name Alabama Street Address — City — State — Zip Phone — Fax — e-mail	○ YES ○ NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: 6/2/14

SIGNATURE

4802005

ATTORNEY REGISTRATION NUMBER

Ari Lieberman

PRINT OR TYPE NAME

Print Form

SUPREME COURTS OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PRALHAD SHARMA and REBECCA SHARMA, Plaintiffs, -against- OAK MOUNTAIN LLC, Defendant.	Index No.: 955/14 Calendar No.: _____ Name of Assigned Judge **REQUEST FOR PRELIMINARY CONFERENCE**

The undersigned requests a Preliminary Conference.

The nature of the action is personal injury.

The names, addresses and telephone numbers of all attorneys appearing in the action are as follows:

LOUIS GRANDELLI, P.C.
Attorneys for Plaintiffs
Post Office Address & Tel. No.
90 Broad Street, 15th Floor
New York, New York 10004
(212) 668-8400

ROEMER WALLENS GOLD & MINEAUX, LLP
Attorneys for Defendant
Post Office Address & Tel. No.
13 Columbia Circle
Albany, New York 12203
(518) 464-1300

Dated: June 2, 2014

LOUIS GRANDELLI, P.C.
Attorneys for Plaintiffs

Calendar Number 14

PC 6/19/14
CC 12/17/14
NI 5/29/15

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY: IAS PART

PRESENT: HON. ROBERT L. Nathan

Sharma Plaintiff(s),

- against -

Oak Mountain LLC Defendant(s).

Preliminary Conference Order

Index Number: 955/14

Date RJI Filed: 6/3/14

APPEARANCES
Plaintiff(s): Louis Grandelli PC by Ari Liebesman

Defendant(s): Reimer Walles Gold & Moreaux LLP by Matthew Kelly not telephone

Following a Preliminary Conference, it is hereby **ORDERED** that disclosure shall proceed as follows:

(1) **Insurance Coverage**: (a) If not yet done, defendant shall disclose in writing the existence and contents of any insurance agreement, including umbrella or excess coverage, as described in CPLR §3101(f) on or before 8/16/14 (b) plaintiff shall disclose any Uninsured Motorist/Supplemental Uninsured Motorist coverage on/or before N/A.

(2) **Bill of Particulars:**
Already done
(a) A demand for a Bill of Particulars or interrogatories shall be served by _____ on or before _____.
(b) A bill of particulars or interrogatories shall be served by _____ on or before _____.
(c) If an affirmative defense or counterclaim is asserted, a demand for a bill of particulars or interrogatories shall be served by TT on 7/14/14. A response to such demand shall be served on 8/19/14.
(d) A supplemental Bill of Particulars shall be served by TT on or before _____
as to items: In accordance w/ the CPLR as per Special damages and lost wages

(3) **Medical Report(s), Record(s) and Authorization(s):** On or before 7/16/14 a duly executed written authorization(s) shall be furnished by TT for the following: *(Check as apply)*

To extent not previously provided

- [X] Physician, and/or hospital, pharmacy and/or autopsy records;
- [X] Employment and/or attendance records for the period 2011 - present;
- [ ] No-fault file;
- [X] Diagnostic tests and films;
- [X] Collateral source authorizations / workers comp records;
- [ ] W2 and/or tax return records for self-employed individuals (if there is a loss of wages claim) for the period of _____
- [ ] Other (specify) _____

(4) **Physical Examinations:**

(a) Examination(s) of plaintiff shall be held on or before 11/15/14 (15)

(b) Pursuant to 22 NYCRR §202.17(b), at least 20 days before such examination, TP shall serve upon all other parties copies of the medical reports of those physicians who have previously treated or examined him/her.

(c) A copy of the examining physician's report shall be furnished to all parties by △ within 45 days of the examination.

(5) **Depositions**:

(a) Examinations before trial shall be conducted as follows:

Plaintiff(s) shall appear for examination before trial at TBD in Queens on 9/30/14 at TBD a.m./p.m. and shall produce all relevant books, papers, records, and other material for use at the deposition, including _____

Defendant(s) shall appear for examination before trial at TBD in Queens on 9/30/14 at TBD a.m./p.m. and shall produce all relevant books, papers, records, and other material for use at the deposition, including _____.

(b) Unless otherwise directed prior to the examinations before trial, attorneys seeking rulings on objections or making application for any other relief pertaining to the depositions shall promptly appear at Chambers of the assigned IAS Justice, with their reporter, or shall communicate with the Emergency Justice, for a determination.

(c) Once begun, a deposition shall continue until completed and shall not be adjourned without further order of the Court.

(d) The transcript of an examination before trial shall be delivered to the party deposed within thirty (30) days of the deposition, and shall be returned, duly executed, pursuant to CPLR § 3116.

(e) Subpoenas for the examination before trial of any non-party witness shall be served no later than 45 days after the completion of party depositions, provided such witness is known by completion of party depositions, and if not known at that time, within 45 days of first disclosure or identification of such witness or within the discretion of the Court.

(6) **Other Disclosure**:

(a) On or before 8/6/14, all parties shall exchange names and addresses of all witnesses, and shall exchange statements of opposing parties and photographs, or, if none, shall provide an affirmation to that effect.

(b) All parties shall exchange information relating to expert witnesses in compliance with CPLR §3101(d)(i).

TO defendant not previously done

(c) Medicare Liens: If plaintiff is a medicare recipient or eligible, plaintiff shall, within 30 days, provide defendant(s) with the details of said lien(s), or if unknown, copies of correspondence to Medicare, evidencing plaintiff's efforts to determine the outstanding claim against said plaintiff/beneficiary, should one exist.

(d) Additional Disclosure Issues: With respect to additional disclosure issues, the parties shall comply with the following agreement:

△ to provide a supplemental response to the following by 8/6/14:
- provide insurance limits
- provide name of "Ski Patrol" who provided first aid, and last known address if no longer employed by △
- provide photographs of the location of the accident site

(7) **Impleader**: All third-party actions shall be commenced on or before the Compliance Conference date. Joinder of a third-party action beyond this date without leave of Court may result in a severance.

(8) **Completion of Disclosure**: All disclosure shall be completed on or before the Compliance Conference date.

(9) **Compliance Conference**:

(a) Unless a Note of Issue/Certificate of Readiness shall have been filed prior thereto, counsel for all parties shall appear at a Compliance Conference which shall be held in the Compliance Conference/Settlement Part on 12/17/14.

(b) Filing of a Note of Issue prior to the Compliance Conference must include a written stipulation fully executed by all parties acknowledging that all discovery has been completed. Failure to comply with this provision will result in vacatur of the prematurely filed Note of Issue.

(c) Copies of medical reports and pleadings are to be brought to the Compliance Conference and attending attorneys must be knowledgeable about the case and be prepared to discuss settlement at that time.

(10) **Note of Issue**: Plaintiff shall file a Note of Issue/Certificate of Readiness on or before 5/29/14. only if all discovery is Complete

(11) **Motions for Summary Judgment**: Pursuant to CPLR Rule 3212(a), any motion for summary judgment shall be made no later than 120 days after the filing of the note of issue, but under no circumstances beyond 120 days of the filing of the Note of Issue absent further order of the court.

(12) **Stipulations of settlement or discontinuance** are to be filed by defendant, pursuant to 22 NYCRR 202.28, with the County Clerk and must also give a copy to the Part of Court to which the action has been assigned, within 20 days of such discontinuance.

SO ORDERED:

_____

J.S.C.

Dated:

I, the undersigned have read the preceding and fully understand the provisions contained herein shall constitute an Order of the Court. Failure to comply with any provision of this order may result in the imposition of costs, sanctions or other penalties provided by law.

Attorney for Plaintiff	Attorney for Defendant
Attorney for Plaintiff	Attorney for Defendant
Attorney for Plaintiff	Attorney for Defendant
Attorney for Plaintiff	Attorney for Defendant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
88-11 Sutphin Blvd.
Jamaica, New York 11435

Sharma

Plaintiff(s),

Index No.: 955/14

- against -

Oak Mountain LLC

Defendant(s).

NOTICE OF COMPLIANCE/SETTLEMENT CONFERENCE

A Compliance/Settlement Conference has been scheduled in the above-named case in which you appear as counsel. The Conference will be held before JUSTICE MARTIN RITHOLZ in the Compliance/Settlement Conference Part on 12/17/14 at 9:30 A.M.

Counsel appearing for the Conference MUST bring the Bill of Particulars and all previous orders in the case, including the Preliminary Conference Order.

At the conference, inquiry will be made regarding the following items of discovery as applicable; bills of particular; authorizations; medical reports; discovery and inspection; document production; insurance information; EBT's; physical examinations; interrogatories; and compliance with prior discovery orders of the Court.

Additionally, serious settlement discussions will be conducted.

Consequently, an attorney representing your client MUST appear at the conference and MUST be fully familiar with the case and the status of discovery. The attorney MUST bring to the Conference all available documentary evidence relating to injury and damages, and MUST be authorized to enter binding stipulations and to dispose of the case.

Failure to appear at the Conference may result in the imposition of sanctions or other appropriate judicial action.

#70

y DG

70

PC 6/11/14
CC 12/17/14
NI 5/29/15

This box for Court use only

Supreme Court of the State of New York
Queens County : Compliance Settlement and Conference Part
Present: Hon. Martin E. Ritholtz, Justice

Prahlad Sharma,
Rebecca Sharma **Plaintiff(s),**

-against-

Oak Mountain LLC
Wills **Defendant(s).**

Index Number: 955/14

Date RJI filed: 6/3/14

Compliance Conference Order

Appearances:
Plaintiff(s) Sharma : Louis Grandelli PC by Adi Lieberman

Defendant Oak Mountain : by Rosenberg Calderon et al

: none

:

:

Upon the Preliminary Conference Order dated 6/11/14, and following a Compliance Conference held on 12/17/14, and it appearing that disclosure previously ordered herein has not been completed, or that additional disclosure is warranted, it is hereby **ORDERED**, that disclosure shall proceed and be completed in accordance herewith, and it is further

ORDERED that plaintiff/_____ shall serve and file a note of issue and certificate of readiness on or before (Court use only) 5/29/15, **and shall furnish to the Compliance Settlement and Conference Part within ten (10) days thereafter a copy of the filed note of issue and certificate of readiness, together with an affidavit of service, and that the failure to do so shall be grounds for dismissal for failure to prosecute pursuant to CPLR 3216, as set forth in the Demand below**, and it is further

ORDERED that all proceedings directed herein shall be completed on or before the dates set forth. No adjournments are to be had without the court's written approval, and adjournments MAY NOT be had upon the stipulation of the parties alone, and it is further

ORDERED that any failure to comply strictly with the terms of this order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126, and it is further

ORDERED that disclosure demands now known to be necessary which are not raised at this conference are deemed to be waived, and it is further

DOCUMENTS, AUTHORIZATIONS and OTHER DISCOVERY AND INSPECTION:

ORDERED that, on or before twenty days from the date hereof, the following documents, authorizations and other items for discovery and inspection shall be produced:

(Any items left outstanding from those directed by prior orders must be **specifically** identified or are deemed waived)

by the Plaintiff(s): All medical reports and authorizations, as directed by 22 NYCRR § 202.17(b) and, where the cause of death is in issue, as directed by 22 NYCRR § 202.17(d).

by the Defendants and Third-Party Defendants:

DEPOSITIONS:

it is further **ORDERED** that all parties not yet deposed shall appear for deposition on: date 1/13/15 at time 10 o'clock at: place PI's counsel's office (cc PI Rebecca Shamie)

(The date set for depositions must be no more than 30 days from the date hereof. Insert any further provisions regarding depositions)

and it is further **ORDERED** that depositions shall continue from day to day until completed, and it is further

PHYSICAL EXAMINATIONS:

ORDERED that all defendants and other parties desiring to take the physical examination of any plaintiff shall designate, in writing, the physician(s) to make the examination within five days of the completion of the plaintiff's deposition, or within ten days of the date hereof, whichever is later. Failure to make such a designation shall be deemed a waiver of the right to take the examination. All physical examinations must be completed within thirty days of the completion of the plaintiff's deposition, or of the date hereof, whichever is later. Pursuant to 22 NYCRR § 202.17 (c), copies of the reports of the physicians making examinations pursuant to this order shall be served on all other parties within 45 days after completion of the examination, and it is further

ORDERED: (Insert any further provisions regarding physical examinations)

MISCELLANEOUS:

It is further **ORDERED** that any further third-party actions shall be commenced promptly upon discovery of the identity of the third-party defendants, but not more than thirty days after the completion of depositions, unless for good cause shown, and it is further

ORDERED that parties aggrieved by failures to disclose must move promptly for relief or be deemed to have waived the outstanding items, and it is further

ORDERED that any statutory stays of disclosure due to the pendency of motions pursuant to CPLR 3211, 3212 and 3213 are vacated, and all parties are stayed from moving for summary judgment pending the filing of a note of issue as directed herein, and it is further

ORDERED that if plaintiff is a Medicare recipient or Medicare eligible, he/she shall within 30 days provide defendant with copies of all correspondence to Medicare, as evidence of plaintiff's efforts to determine the outstanding claim against said plaintiff/beneficiary should one exist, e.g. final demand or conditional summary from CMS.

ORDERED that any parties failing to appear at this Conference shall be bound by the terms of this order, and it is further

ORDERED that plaintiff(s) shall provide fresh HIPAA-compliant authorizations for release of medical records, not later than 60 days prior to trial, and is further

ORDERED as follows:

(1) Π to provide any outstanding medical records or collateral source information, including but not limited to: @ CIGNA @ Hadlon PT; @ Con Ed of NY employment information.

(2) Π to respond to Δ's 10/24/14 letter requesting Con Ed info (lost in court) to respond to Δ's Nov. 18, 2014 letter pertaining to 1st testimony given. - Above to be provided w/in 45 days

(3) Δ to provide name of "ski patrol" who provided aid & last known address if no longer employed. Photos of accident site to extent not previously provided w/in 45 days.

(Any items left outstanding from those directed by prior orders must be **specifically** identified or are deemed waived)

SO ORDERED:

_____, **JSC**

DEMAND PURSUANT TO CPLR 3216

PLEASE TAKE NOTICE that demand is hereby made pursuant to CPLR 3216 that Plaintiff/_____ serve and file a note of issue and certificate of readiness on or before the date set forth above for doing so, and furnish to the Compliance Settlement and Conference Part, within ten (10) days thereafter, a copy of the filed note of issue and certificate of readiness, together with an affidavit of service.

PLEASE TAKE FURTHER NOTICE that a default in complying with the foregoing demand shall result in dismissal of the action for unreasonably neglecting to proceed, without further notice.

Dated: 12/17/14

_____, **JSC**

Should plaintiff/_____need more time to file a Note of issue, said party may contact chambers at (718) 298-1089, no later than 3 weeks before the Note of Issue is due.

Receipt of a copy of this order and demand is acknowledged:

Attorney for Plaintiff Sivin & Miller

Attorney for Defendant Roemer Wallens Gold

Attorney for Defendant _____

Attorney for Defendant Oak Mountain LLC

Attorney for Defendant _____

Attorney for Defendant _____

NOTE OF ISSUE

Calendar No. (if any) _____

Index No: 955/2014

Supreme Court, Queens County

For use of Clerk

PRALHAD SHARMA and REBECCA SHARMA,

Plaintiff,

-against-

OAK MOUNTAIN LLC,

Defendant.

Hon. Martin E. Ritholtz
Name of Judge assigned

NOTICE FOR TRIAL

[X] Trial by jury demanded
[] Of all issues
[X] Of issues specified below
[ ]Or attached hereto
[ ] Trial without jury- inquest

Filed by attorney for Plaintiff
Date summons served February 14, 2014
Date service completed February 21, 2014
Date issue joined April 23, 2014

NATURE OF ACTION OR SPECIAL PROCEEDING

[X] Tort
[] Motor vehicle negligence
[ ] Medical
[ ] Other tort
[ ] Contract
[ ] Contested matrimonial
[ ] Uncontested matrimonial
[ ] Tax certiorari
[ ] Condemnation
[ ] Other (not itemized above)specify_____
[ ]This action is brought as a class action

Special preference claimed under _____

on the ground that _____

Amount demanded: A sum which exceeds the jurisdictional limits of all lower courts

Other relief _____

Insurance carrier(s), if known: _____

LOUIS GRANDELLI, P.C.
Attorneys for Plaintiff
Office & P.O. Address:
90 Broad Street - 15th Floor
New York, New York 10004
Phone No.: (212) 668-8400

Roemer Wallens Gold & Mineaux
Attorneys for Defendants
13 Columbia Circle
Albany, New York 12203
Phone No.: (518) 464-1300

NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness.

CERTIFICATE OF READINESS FOR TRIAL

(Items 1-7 must be checked)

For Clerk's Use
N.I. served on

	Completed	Waived	Not required
1. All pleadings served	X		
2. Bill of Particulars served	X		
3. Physical examination completed		X	
4. Medical reports exchanged	X		
5. Appraisal reports exchanged			X
6. Compliance with Rules in matrimonial actions (22 NYCRR 202.16)			X
7. Discovery proceedings now known to be necessary completed	X		

8. There are no outstanding requests for discovery.

9. There has been a reasonable opportunity to complete the foregoing proceedings.

10. There has been compliance with any order issued pursuant to Precalendar Rules (22 NYCRR 202.12).

11. If a medical malpractice action, compliance with any order issued pursuant to 22 NYCRR 202.56.

12. The case is ready for inquest.

Dated: May 27, 2015

Signature - type name below.

Ari R. Lieberman
LOUIS GRANDELLI, P.C.
Attorneys for Plaintiff
90 Broad Street - 15th Floor
New York, New York 10004
(212) 668-8400

STATE OF NEW YORK
SUPREME COURT COUNTY OF QUEENS

PRALHAD SHARMA and REBECCA SHARMA,

Plaintiffs,

- against -

OAK MOUNTAIN, LLC

Defendant.

STIPULATION

Index No: 955-14

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for all parties that the matter scheduled in the Trial Scheduling Part should be adjourned from December 16, 2015 until March 29, 2016.

DATED: November 16, 2015

Ari Lieberman, Esq.
Louis Grandelli, P.C.
Attorneys for Plaintiffs
19 Broad Street, 15th Floor
New York, New York 10004
(212) 668-8400

Matthew J. Kelly, Esq.
Roemer Wallens Gold & Mineaux, LLP
Attorneys for Defendant
13 Columbia Circle
Albany, New York 12210
(518) 464-1300 Ext. 312

STATE OF NEW YORK
SUPREME COURT COUNTY OF QUEENS

PRALHAD SHARMA and REBECCA SHARMA, Plaintiffs, - against - OAK MOUNTAIN, LLC Defendant.	**NOTICE OF ENTRY** **Index No. 955-14**

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Hon. Robert L. Nahman dated February 5, 2016 and entered with the Clerk of the Court on February 8, 2016.

DATED: February 9, 2016

ROEMER WALLENS GOLD & MINEAUX LLP

BY: _____
Matthew J. Kelly, Esq.
Attorneys for Defendant
OFFICE & P.O. ADDRESS:
13 Columbia Circle
Albany, New York 12203
Tel. No. (518) 464-1300

TO: Ari Lieberman, Esq.
Louis Grandelli, P.C.
90 Broad Street, 15th Floor
New York, New York 10004

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. ROBERT L. NAHMAN**
Justice

IAS PART 19

PRALHAD SHARMA and REBECCA SHARMA,

Plaintiffs,

- against -

OAK MOUNTAIN, LLC.,

Defendant.

Index No.: 955-2014

Motion Date: January 5, 2016

Motion Cal. No.: 13

Motion Seq. No.: 1

Upon the following papers numbered 1 through 35 read on this motion by defendant for summary judgment dismissing plaintiff's complaint:

	PAPERS NUMBERED
Notice of Motion/Affirm./Affidavits-Exhibits/Memorandum..	1 - 22
Affirmation in Opposition-Exhibits.....	23 - 30
Reply.....	31 - 35

IT IS ORDERED, defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

This is an action is which plaintiff is seeking to recover for injuries sustained when plaintiff and his wife visited the ski center operated by the defendants. The plaintiffs had yet to begin skiing, and were on there way into ski rental lodge to rent equipment. The plaintiff testified that he fell on ice near the stairs to one of the entrances of the rental lodge. Plaintiff's wife testified that her husband fell on an icy covered object that she later identified in a photograph, which appears to be a wooden post of some kind that protrudes from the step that leads to the rental lodge.

Defendant contends that plaintiff assumed the risks inherent to skiing, including slipping on snow and ice when he decided to participate in the recreational activity of

skiing, even though the accident occurred prior to him actually skiing.

The defendant submitted testimony and affidavits that the area where plaintiff fell was skiable terrain used by skiers and was routinely groomed to allow skiers to move from place to place.

The doctrine of primary assumption of risk provides that a voluntary participant engaging in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation, *Morgan v State of New York*, 90 NY2d 471 (1997). Assumption of Risk is applicable when there is a sporting event or recreational activity sponsored or supported by the defendant or occurring in a designated athletic or recreational venue, Custodi v Town of Amherst, 20 NY 3d 83 (2012).

In *Litz v Clinton Central School*, 126 AD3d 1306 (4th Dept., 2015) the plaintiff, a high school hockey player was in the locker room changing out of equipment after practice. One of the plaintiff's teammates, who was still wearing his skates, stepped on the plaintiff's bare foot causing an injury, *Id.* The court found that the assumption of risk doctrine applies to any facet of the activity inherent in it, *Id.*, at 1308. The court further found that the plaintiff was still sufficiently involved in the recreational activity of hockey to allow for application of the doctrine *Id.* The court specifically stated that "it would be inconsistent with the purpose of the assumption of the risk doctrine to isolate the moment of injury and ignore the context of the accident," *Id.*

Similarly, in *Valverde v Great Expectations*, 131 AD3d 425 (1st Dept., 2009), the court found that plaintiff assumed the risks associated with golfing. Plaintiff was injured when she fell out of a golf cart while on her way to monitor a hole-in-one contest, *Id.* Even though the plaintiff was not actively engaged in her duties as a monitor at hole-in-one contest at the time she was a passenger in the cart, the court applied the assumption of the risk doctrine since it occurred at a designated recreational venue and it involved a sporting or recreational activity, *Id.*, at 427. The court held that it was not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results, *Id.,citing, Maddox v City of New York*, 66 NY2d 270,[1985]. The court further held that a nonparticipant may also be subject to a defense based on the doctrine of assumed risk, *Id.*

Each of the Appellate Division of the State of New York have held that a skier or snow-boarder assumes the risk of injury when engaging in skiing or snow-boarding, because skiing and snow-boarding takes place outdoors, often in inclement weather under conditions that can never be fully controlled, including the risk of encountering a patch of ice, (*see, Bedder v Windham*, 86 AD3d 428 (1st Dept., 2011); *Bono v Hunter*, 269 AD2d

482 (2nd Dept., 2000); *Hyland v State of New York*, 300 AD2d 794 (3rd Dept., 2002); and *Bennett v Kissing Bridge*, 17 Ad3d 990 (4th Dept., 2005).

Defendant contends that even though plaintiff hadn't yet begun to ski, he was still engaged in the activity, since inherent in skiing is walking on snow covered areas to rent equipment, buy lift tickets, and dine at the lodge and that this court should apply the same analysis as *Litz v Clinton Central School* and *Valverde v Great Expectations*, in determining that plaintiff was engaged in skiing at the time of his accident, *supra*.

Plaintiff's reliance on *Vogel v Venetz*, 278 Ad2d 489 (2nd Dept., 2000) is misplaced since the plaintiff Vogel's accident happened in a motel parking lot. Plaintiff was allegedly injured when he slipped and fell on snow and ice when he was loading his snow mobile onto a trailer, *Id*. The court denied the defendants' motion for summary judgment upon the grounds that they were not owners or operators of a sporting facility, *Id*.

Under the facts and circumstances of this case, the court finds that the plaintiff was engaged in a sporting activity at an area designated for skiing and assumed the risks of falling on snow and ice, when he was walking to the ski rental lodge for the purpose of renting skis.

Dated: February 5, 2016

Robert L. Nahman, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF QUEENS

PRALHAD SHARMA and REBECCA SHARMA,

Plaintiffs,

- against -

OAK MOUNTAIN, LLC

Defendant.

AFFIDAVIT OF SERVICE BY MAIL

Index No. 955-14

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Courtney S. Herkel, being duly sworn, deposes and says that:

1. I am not a party to the action, am over 18 years of age and reside in Albany, New York.

2. On February 9, 2016, I served a true copy of Decision and Order with Notice of Entry by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York to the last known address of the addressee as follows:

Ari Lieberman, Esq.
Louis Grandelli, P.C.
90 Broad Street, 15th Floor
New York, New York 10004

Courtney S. Herkel

Sworn to before me this
9th day of February, 2016.

Notary Public-State of New York

MATTHEW J. KELLY
Notary Public, State Of New York
No. 4708295
Qualified In Albany County
Commission Expires 10-2017

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ACCENT COMMERCIAL FURNITURE, INC.

Plaintiff,

- against -

P. SCHNEIDER & ASSOCIATES, PLLC,

Defendant.

NOTICE OF ENTRY

Index No. 74-12
RJI No.: 01-12-106588

PLEASE TAKE NOTICE that attached hereto is a true and correct copy of the Judgment with Bill of Costs duly filed and entered in the office of the Albany County Clerk on October 9, 2012.

DATED: October 11, 2012

ROEMER WALLENS & MINEAUX LLP

By: _____

Matthew J. Kelly, Esq.
Attorneys for Plaintiff
OFFICE & P.O. ADDRESS:
13 Columbia Circle
Albany, New York 12203
Tel. No. (518) 464-1300

TO: David W. Herkala, Esq.
Cerio Law Offices
Attorneys for Defendant
407 South Warren Street
5th Floor
Syracuse, New York 13202

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ACCENT COMMERCIAL FURNITURE, INC.

Plaintiff,

- against -

P. SCHNEIDER & ASSOCIATES, PLLC,

Defendant.

JUDGMENT

Index No. 74-12
RJI No.: 01-12-106588

This matter having come before the Supreme Court, Albany County, and the plaintiff having appeared, through their attorneys, Roemer Wallens Gold & Mineaux LLP, of counsel to Dorsman and Dorsman, and the defendants having appeared by their attorneys, Cerio Law Offices, and the Court (Hon. Thomas McNamara, Acting Justice of the Supreme Court), having rendered a Decision and Order on September 25, 2012, in favor of the plaintiff, and awarding plaintiff the amount of Thirty Thousand Two Hundred Twenty-Four and 85/100 Dollars ($30,224.85), together with interest of $9,670.40 from January 4, 2011 through October 5, 2012 and continuing at 1.5% per month or $15.11 per diem until paid, and costs of $616.70, for a total judgment of Forty Thousand Five Hundred ~~Eleven and~~ 95/100 ~~Dollars~~ ($40,511.95).

DATED: 10/09/12

MARLENE J. DION
Deputy County Clerk
Albany County Clerk

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY
ACCENT COMMERCIAL FURNITURE, INC.,

Plaintiff,

-against-

COSTS OF PLAINTIFF
Index No. 74-12
RJI No.: 01-12-106588

P. SCHNEIDER & ASSOCIATES, PLLC

Defendant.

COSTS			DISBURSEMENTS		
Costs before note of issue CPLR §8201 subd. 1	$ 200	00	Fee for index number CPLR §8018(a)	$ 210	00
Costs after note of issue CPLR §8201 subd. 2			Referee's fees CPLR §8301(a)1		
Trial of issue CPLR §8201 subd. 3			Commissioner's compensation CPLR §8301(a)2		
Allowance by statute CPLR §8302(a)(b)			Clerk's fee, filing notice of pend. or attach. CPLR §8018(e) §8021(a)12		
Additional allowance CPLR §8302(d)			Clerk's fee cancel. notice of pend. CPLR §8021(a)12		
Motion costs CPLR §8202			Entering and docketing judgment CPLR §8301(a)7 §8016(a)2		
Appeal to Appellate Term CPLR §8203(b)			Paid for searches CPLR §8301(a)10		
Appeal to Appellate Division CPLR §8203(a)			Affidavits & acknowledgments CPLR §8009		
Appeal to Court of Appeals before argument CPLR §8204 subd. 1			Serving copy summons & complaint CPLR §8011(c)1 §8301(d)	58	00
Appeal to Court of Appeals for argument CPLR §8204 subd. 2			Note of issue CPLR §8020(a)		
			Paid referee's report CPLR §8301(a)12		
			Certified copies of papers CPLR §8301(a)4		
			Satisfaction piece CPLR §5020(a) §8021		
			Transcripts and filing CPLR §8021		
			Certified copy of judgment CPLR §8021		
			Postage CPLR §8301(a)12	7	05
			Photocopies CPLR §8301(a)12	1	65
			Jury fee CPLR §8020(c)1		
			Stenographer's fees CPLR §8002 §8301		
			Sheriff's fees on execution CPLR §8011(b) §8012		
			Sheriff's fees, attachment, arrest, etc. CPLR §8011(a)(c)2, 3(g)		
			Paid printing cases CPLR §8301(a)6		
			Paid printing case CPLR §8301(a)6		
			Clerk's fees Court of Appeals CPLR §8301(a)12		
			Paid copies of papers CPLR §8016(a)4		
			Motion expenses CPLR §8301(b)	45	00
			Request for Judicial Intervention	95	00
			Fees for publication CPLR §8301(a)3		
			Serving subpoena CPLR §8011(c)1 §8301(d)		
			Paid for Register's Search CPLR §8301(a)10		
			" " County Clerk's Search		
			" " Loan Commissioner's Search		
			" " U.S. District Court Search		
			" " U.S. Circuit Court Search		
			" " Tax Search		
			" " Referee's Report		
			Attendance of Witnesses: CPLR §8001(a)(b)(c) §8301(a)1		

Marlene J. Dion
MARLENE J. DION
Deputy County Clerk
10/09/12

Costs	$	200	00	
Disbursements		416	70	
Total Costs Taxed	$	616	70	$ 416.70

Albany County Clerk
Document Number 11248594
Rcvd 10/09/2012 2:53:05 PM

State of New York, County of Albany ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 2012
deponent served the within bill of costs and notice of taxation on

attorney(s) for
herein, at his office at

during his absence from said office
strike out either (a) or (b)
(a) by then and there leaving a true copy of the same with

his clerk; partner; person having charge of said office.
(b) and said office being closed, by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or box.

.....

Sworn to before me, this
day of 2012

State of New York, County of ss.:
Sarah L. Boncke
being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Schoharie, NY

That on the 5th day of October 2012
deponent served the within bill of costs and notice of taxation on
David W. Herkala, Esq.

attorney(s) for the Defendant, at
Cerio Law Offices
407 South Warren Street
5th Floor
Syracuse, New York 13202

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in-a post office-official depository under the exclusive care and custody of the United States Postal Service within New York State.

Sarah L. Boncke

Sworn to before me, this 5th
day of October 2012

Jennifer A. Scott

JENNIFER A. SCOTT
Notary Public, State of New York
No. 01SC6223421
Qualified in Greene County
Commission Expires June 14, 2014

*Strike out one (CPLR §8402 §8403)

State of New York, County of Albany
ss.
ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that he is Matthew J. Kelly the attorney(s) of record for the Plaintiff in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses, attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from the same place of trial, hearing or examination; and that copies of documents or papers as charged herein are actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: October 5, 2012

.....
Matthew J. Kelly, Esq.

The name signed must be printed beneath

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ACCENT COMMERCIAL FURNITURE, INC. Plaintiff, - against - P. SCHNEIDER & ASSOCIATES, PLLC, Defendant.	**AFFIDAVIT OF SERVICE** **Index No. 74-12**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

SARAH L. BONCKE being duly sworn, deposes and says that:

1. I am not a party to the action, am over 18 years of age and reside in Schoharie, New York.

2. On October 11, 2012, I served a true copy of a Judgment and Bill of Costs with Notice of Entry thereof by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York to the last known address(es) of the addressee(s) as follows:

David W. Herkala, Esq.
Cerio Law Offices
Attorneys for Defendant
407 South Warren St.
5th Floor
Syracuse, NY 13202

Sarah L. Boncke

Sworn to before me this
12th day of October, 2012.

Notary Public-State of New York

BEVERLY ADELMAN
Notary Public, State of New York
No. 01AD6155385
Qualified in Saratoga County
Commission Expires November 13, 2014

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ACCENT COMMERCIAL FURNITURE, INC.,

Plaintiff,

-against-

P. SCHNEIDER & ASSOCIATES, PLLC,

Defendant.

DECISION & ORDER
Index No. 74-12
RJI No. 01-12-106588

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Roemer, Wallens, Gold & Mineaux LLP
(Matthew J. Kelly, Esq., of Counsel)
Attorneys for Plaintiff
13 Columbia Circle
Albany, New York 12203

Cerio Law Offices
(David W. Herkala, Esq., of Counsel)
Attorneys for Defendant
407 South Warren Street, 5th Floor
Syracuse, New York 13202

McNamara, J.:

Plaintiff Accent Commercial Furniture, Inc. moves pursuant to CPLR 3212 for dismissal of defendant's counterclaim for damages and for summary judgment in this action involving the purchase and sale of office furniture.

As the moving party, plaintiff bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Initially, plaintiff asserts that

defendant breached their oral contract by failing to pay for goods delivered by plaintiff, and accepted by defendant, shortly before January 4, 2011. Under UCC §2-201 a contract for the sale of goods in excess of $500.00 is not enforceable by action "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought ... ." Though no such writing exist in this case, the contract is nonetheless enforceable as defendant has admitted that the contract alleged by plaintiff was made (UCC § 2-201[3][b]).

Plaintiff alleges in its Verified Complaint and the affidavit of Michael Gleasman ("Gleasman"), principal and CEO, that the parties entered into an oral contract on or about September 20, 2010 in which defendant agreed to purchase certain commercial furniture from plaintiff for $44,330.21. Defendant paid plaintiff an initial deposit of $13,250.00 leaving a balance of $31,080.21 as reflected by the last page of plaintiff's January 4, 2011 invoice number 89400. Plaintiff concedes that installation of the furniture at defendant's office was initially delayed for approximately two months, until just before January 4, 2011, because its supplier provided the wrong panel fabric for the furniture. According to Gleasman, plaintiff was willing and able to install the furniture at defendant's office in early November 2010 and then apply the correct fabric to the furniture at no extra cost to defendant when it arrived. However, defendant did not want the furniture installed until the correct panel fabric was received and applied to the furniture panels.

In his affidavit Gleasman asserts that though the furniture was installed prior to January 4, 2011, defendant has retained possession of the furniture and has not indicated that it desires to return the furniture. Despite retaining the furniture for more than a year defendant has not paid the $31,080.21 balance on the contract or the 1.5% interest per month as set forth in the January 4, 2011 invoice for the furniture.

By establishing, prima facie, the existence of a contract, performance by plaintiff, breach by

defendant and damages, plaintiff has met its initial burden on the breach of contract cause of action (see *Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [2009]). Thus, it falls to defendant to demonstrate that the law does not support summary judgment and/or assemble and present facts sufficient to require a trial of any issue of fact to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposing the motion defendant has submitted an affidavit by its attorney and an affidavit by Patricia Schneider, its managing member. In addition, defendant has submitted a memorandum of law in which it argues that plaintiff did not provide goods that conformed to the contract and that defendant did not accept the non-conforming goods provided. The argument, however, is without merit. Defendant does not contend that the furniture ultimately provided by plaintiff was not the furniture defendant agreed to buy. Rather, the factual averments of both parties show that the correct furniture was delivered albeit beyond the time originally anticipated. Thus, the goods for which plaintiff seeks payment are not 'non-conforming' and inasmuch as defendant never rejected, and therefore, accepted, the goods (see UCC 2-606 [1][b]), plaintiff is entitled to payment (UCC 2-607).

The issue raised by defendant in arguing that the goods were not provided within the time agreed to by the parties relate to the counterclaim and concern whether plaintiff's admitted failure to provide the furniture in October 2011 constitutes a breach of contract and if so, what damages, if any, did defendant suffer (UCC 2-714).

Even assuming that the initial installation date contemplated by the parties constituted an essential term of the contract, plaintiff has established, prima facie, that defendant did not notify plaintiff of a breach within a reasonable time (UCC 2-607[3][a]) and defendant has failed to raise a triable issue of fact as to whether it did so. Moreover, the circumstances presented fail to show that the claimed damages of $17.

800.00 occurred as a consequence of the delay (see UCC 2-607[4]). Damages for breach of contract include direct damages, which compensate for the value of the promised performance, and consequential damages, which are indirect and compensate for additional losses incurred as a result of the breach (*Appliance Giant, Inc. v Columbia 90 Assocs., LLC*, 8 AD3d 932 [2004]; UCC 2-714, 2-715). Under UCC 2-715 (2) "[c]onsequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." The circumstances presented suggest that plaintiff was aware that the furniture defendant was purchasing was to be used to furnish new office space and thus, that delay in delivery could disrupt the move. However, defendant refused an offer from plaintiff to deliver the furniture with the wrong panel fabric and replace the fabric when the correct one arrived. Defendant could have avoided its claimed damages by agreeing to this arrangement but did not and has not offered any reasonable explanation for refusing to do so. Inasmuch as the offer by plaintiff presented a reasonable alternative to delaying the move and incurring the damages claimed, those damages are not recoverable.

That portion of the counterclaim which seeks to recover $855.36 in damages alleged to have been caused by improper installation of furniture and wall panels was not addressed by plaintiff in its motion for summary judgment and therefore, survives.

Based on the foregoing, it is

ORDERED and ADJUDGED, that the motion for summary judgment against defendant is granted and plaintiff is awarded $30,224.85 plus interest at 1.5 % per month from January 4, 2011 and it is further

ORDERED and ADJUDGED, that the motion for summary judgment dismissing so much of the

counterclaim of defendant as seeks to recover $17,800.00 for delay in installation is granted.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for plaintiff. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Saratoga Springs, New York
September 25, 2012

Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated April 4, 2012;
2. Affidavit of Matthew J. Kelly, Esq. sworn to April 4, 2012, with Exhibits A through C annexed;
3. Affidavit of Michael Gleasman sworn to March 30, 2012;
4. Memorandum of Law dated April 4, 2012;
5. Affidavit of David W. Herkala, Esq. sworn to May 16, 2012, with Exhibits A through C annexed;
6. Affidavit of Patricia Schneider, Esq. sworn to May 15, 2012, with Exhibits A through C annexed;
7. Memorandum of Law dated May 16, 2012;
8. Affidavit of Michael Gleasman sworn to May 24, 2012;
9. Affidavit of Matthew J. Kelly, Esq. sworn to May 24, 2012;
10. Memorandum of Law dated May 24, 2012.

2017 C.P.L.R. Update

January 27, 2017
3:10 pm – 4:00 pm

by David Paul Horowitz

Geringer, McNamara & Horowitz, LLP
5 Hanover Square – 3rd Floor
New York, N.Y. 10004
Telephone: 212-682-7050
Facsimile: 212-867-5987
david@newyorkpractice.org

"You will need to know much more than the piffle-paffle of procedure."

Chief Judge Benjamin N. Cardozo[1]

[1] Then Chief Judge of the New York Court of Appeals, in his 1928 commencement address to the first graduating class of St. John's University School of Law. Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 241 (1939).

Author Biography

DAVID PAUL HOROWITZ (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over twenty-eight years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), the most recent supplement to *Fisch on New York Evidence* (Lond Publications), and since 2004 has authored the monthly column *Burden of Proof* in the NYSBA *Journal*. Mr. Horowitz teaches New York Practice at Columbia Law School and lectures on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam, serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He has previously taught evidence, professional responsibility, and electronic evidence and disclosure at Brooklyn, St. John's, and New York Law Schools. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

Table of Contents

2017 C.P.L.R. Update

I. Statutory Amendments

a. 2016 CPLR Amendments

1. Amendment to C.P.L.R. 214-f, Effective July 21, 2016

> § 214-f. Action to recover damages for personal injury caused by contact with or exposure to any substance or combination of substances found within an area designated as a superfund site
>
> Notwithstanding any provision of law to the contrary, an action to recover personal damages for injury caused by contact with or exposure to any substance or combination of substances contained within an area designated as a superfund site pursuant to either Chapter 103 of Section 42 of the United States Code and/or section 27-1303 of the environmental conservation law, may be commenced by the plaintiff within the period allowed pursuant to section two hundred fourteen-c of this article or within three years of such designation of such an area as a superfund site, whichever is latest.

The legislature responds to Hoosick Falls (and Flint, Michigan) water contamination scandal by affording individuals exposed to toxic substances on "superfund" sites more time to sue.

CPLR 214-c(2) provides for a three-year statute of limitations for personal injury and property damage claims arising from the latent effects of exposure to a toxic substance. The three-year period runs from the date of discovery of the injury by the plaintiff or from the date when the plaintiff in the exercise of reasonable diligence, should have discovered the injury, whichever is earlier. (CPLR 214-c[4] provides for a special one-year statute of limitations in toxic tort actions where the plaintiff learned of the injury but had difficulty discovering the cause of the injury.) The Hoosick Falls and Flint, Michigan water contamination fiascos caused

our Legislature to review our laws relating to toxic tort actions. Under CPLR 214-c, many potential causes of action of those injured is a result of ingesting poisoned water would be time-barred -- many of the injured residents of Hoosick Falls had no idea they had been exposed to any hazardous substances until years after they had become sick.

Recognizing that CPLR 214-c would deny recourse to many Hoosick Falls plaintiffs, the Legislature adds a new CPLR 214-f. This provision gives an individual seeking damages for personal injuries caused by contact with or exposure to a substance within an area designated as a "superfund" site by the federal or State government the greater of the following periods: the limitations period of CPLR 214-c or within three years of the designation of the area as a "superfund" site. The effective date of CPLR 214-f is July 21, 2016.

2. Amendment to C.P.L.R. 2103(b)(2), Effective January 1, 2016

R 2103. Service of papers

(a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:

1. by delivering the paper to the attorney personally; or

2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period ***if the mailing is made within***

the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States; . . .

3. Amendment to C.P.L.R. 214-f, Effective December 20, 2016

R 3408. Mandatory settlement conference in residential foreclosure actions [Effective until December 20, 2016]

(a) In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

R 3408. Mandatory settlement conference in residential foreclosure actions [Effective December 20, 2016]

(a) [Until February 13, 2020] In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: 1. determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation

option; or 2. whatever other purposes the court deems appropriate.

(a) [Eff February 13, 2020] In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: 1. determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed toincluding, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or 2. whatever other purposes the court deems appropriate.

b. 2015 CPLR Amendment

Amendment to C.P.L.R. 3212(b), Effective December 11, 2015

LAWS OF NEW YORK, CHAPTER 529

AN ACT to amend the civil practice law and rules, in relation to the use in motions of expert affidavits in summary judgment

Became a law December 11, 2015, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (b) of rule 3212 of the civil practice law and rules, as amended by charter 651 of the laws of 1973, is amended to read as follows:

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts;

> and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. ***Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.*** The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

§ 2. This act shall take effect immediately and shall apply to all pending cases for which a summary judgment motion is made on or after the date on which it shall have become law and all cases filed on or after such effective date.

II. Spoliation

a. Fed.R.Civ.P. 37 Amendment Effective December 1, 2015

Significant amendments to the Federal Rules of Civil Procedure took effect on December 1, 2015. Relevant to ESI and spoliation are the change to Rule 37:

> **Rule 37.** Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
> …
> **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> **(A)** presume that the lost information was unfavorable to the party;
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> **(C)** dismiss the action or enter a default judgment.

The 2015 amendment to FRCP 37(e) expressly rejects the Second Circuit approach: "This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as ***Residential Funding Corp. v. DeGeorge Financial Corp.***, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." (Advisory Comments).

b. Court of Appeals Endorses the First Department's Adoption of *Zubulake*

Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 N.Y.3d 543 (2015)

In *Pegasus,* the Court of Appeals addressed a number of issues involving the spoliation of ESI. While the spoliated matter was electronic, the Court's holdings are not limited to ESI, and apply to all matter.

Three entities, collectively "Pegasus," were plaintiffs that leased cargo aircraft to a Brazilian company, Varig Logistica, S.A., referred to as "VariLog." VariLog went bankrupt, and was purchased out of bankruptcy by defendant MP, and operated for a time as a subsidiary of MP. Shockingly, at some point ESI in the possession of VariLog went missing, and plaintiff moved for contempt against VariLog and for an adverse inference against MP:

> Supreme Court granted Pegasus's motion, holding that VarigLog's failure to issue a "litigation hold" amounted to gross negligence as a matter of law, such that the relevance of the missing ESI was presumed. Supreme Court also found that the MP defendants, having been charged by the Brazilian court with the duty to "manage" and "administer" VarigLog, were in "control" of VarigLog for purposes of putting a "litigation hold" into place to preserve the ESI, and their failure to do so amounted to gross negligence. The court therefore struck the answer of VarigLog and imposed a trial adverse inference sanction against the MP defendants with regard to ESI and paper records relevant to the action and within the MP defendants' control.

MP appealed, and a majority[2] of the First Department reversed, holding that, while Pegasus had established that MP had sufficient control over VariLog to trigger a duty to preserve, the failure to do so was not gross negligence, the failure to institute a litigation hold was not *per se* gross negligence, and "because Pegasus failed to prove that the lost ESI would

[2] Justices Friedman, Sweeny, and Saxe.

have supported Pegasus's claims, a trial adverse inference sanction could not stand (citation omitted).” One justice dissented in part and would have held that “the matter should have been remanded to Supreme Court ‘for a determination of the extent to which [Pegasus has] been prejudiced by the loss of the evidence, and the sanction, if any, that should be imposed’ (citation omitted).” The fifth justice agreed with the motion court that the failure to take any steps to preserve constituted gross negligence, and would have affirmed the adverse inference.

The First Department granted Pegasus’s motion for leave to appeal to the Court of Appeals.

As it so often does, the Court, in a majority opinion[3] by Judge Pigott, opens with a succinct overview of the law, followed by an equally unencumbered recital of the issue presented and the resolution of that issue:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (citations omitted). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (citation omitted). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (citation omitted).
>
> On this appeal, we are asked to decide whether the Appellate Division erred in reversing an order of Supreme Court that imposed a spoliation sanction on the defendants. We hold that it did, and remand the matter to the trial court for a determination as to whether the evidence, which the Appellate Division found to be negligently destroyed, was relevant to the claims asserted against defendants

[3] Judge Stein wrote a dissenting opinion in which Judge Rivera joined.

> and for the imposition of an appropriate sanction, should the trial court deem, in its discretion, that a sanction is warranted.

For the three elements required to prove spoliation, *to wit*, that the party had control over the evidence, that the evidence was destroyed with a "culpable state of mind," and that the destroyed evidence was relevant to, and would support, the opposing party's claim or defense, the Court cited both the First Department's 2012 decision in *Voom* (93 A.D.3d 33 [1st Dep't 2012]) and Southern District Judge Sheindlin's 2003 *Zubulake IV* (220 F.R.D. 212 [SDNY 2003]) decision. Those courts had held that the "culpable state of mind" element includes ordinary negligence (*Voom* at 46, citing *Zubulake*).

When it came to establishing relevance where spoliation had been established, the Court of Appeals cited only to *Zubulake IV* as a source for its holding. However, the First Department in *Voom* "adopted" the standards set forth in *Zubulake IV* citing, however, a subsequent decision by Judge Scheindlin in *Pension Comm. Of Univ. Of Montreal Pension Plan*, 685 F. Supp 2d 456 at 467-468 (SDNY 2010).

> The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (citation omitted).

Again quoting *Pension Plan*, the First Department in *Voom* noted that the presumption was rebuttable:

> When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party

> had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required (citation omitted).

Thus, the Court of Appeals has adopted, *in toto*, *Voom*. *Voom*, of course, similarly adopted *Zubulake IV*. And for a time, lawyers shuttling between state and federal court in New York were working from the same playbook when it came to spoliation of ESI. More on that later.

After reciting the broad discretion possessed by trial courts to provide relief to a party for lost or destroyed evidence, the Court of Appeals explained its role in *Pegasus* based upon the record in the case:

> Here, the order of the Appellate Division reversed the order of Supreme Court "on the law and facts" (citation omitted). In its certified question to this Court, the Appellate Division certified that the "determination was made as a matter of law and not in the exercise of discretion." However, we are not bound by the Appellate Division's characterization in its certification order, and instead "look to see whether the Appellate Division's decision, regardless of the characterization, nonetheless reflects a discretionary balancing of interests" (citation omitted).

After reciting the different factual conclusions reached by each of the Justices below, the Court concluded "[t]hus, whether the MP defendants '"culpable mental state" rose to the level of gross negligence, as opposed to ordinary negligence, constituted differing factual determinations by the trial court and the Appellate Division."

When confronted with differing factual determinations, "'the scope of [the Court's] review is limited to determining whether the evidence of record . . . more nearly comports with the trial court's findings or with those of the Appellate Division' (citation omitted)." In *Pegasus*,

the Court of Appeals held that "the record evidence comports more with the Appellate Division majority's findings."

The Court held that the failure to institute a litigation hold did not amount to gross negligence, instead it was but one of several factors for a court to consider in determining culpable state of mind, and noted that the First Department had considered a number of relevant factors in reaching its "ultimate conclusion that, at most, the MP defendants' failures amounted to 'a finding of simple negligence' (citation omitted)."

There were two linked findings that all six justices on the trial and appellate court agreed upon, and the Court of Appeals agreed: "[W]e see no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over VarigLog to trigger a duty on its part to preserve the ESI. Nor is there any basis to disturb the findings of fact by the Appellate Division that the MP defendants were negligent in failing to discharge that duty."

However, there were two errors the Court of Appeals identified in the First Department's decision. First, it erred in determining that Pegasus had failed to make any arguments related to relevance, leading it to conduct its own inquiry:

> [A]lthough the Appellate Division possesses the authority to make findings of fact that are as broad as the trial court, in this instance, where it all but ignored Pegasus's arguments concerning the relevance of the documents, we conclude that the prudent course of action is to remit the matter to Supreme Court for a determination as to whether the negligently destroyed ESI was relevant to Pegasus's claims against the MP defendants and, if so, what sanction, if any, is warranted.

Second, the Court held that it was error to conclude that granting an adverse inference in an "alter ego" case was tantamount to a grant of summary judgment:

> Contrary to the Appellate Division majority's contention, a trial adverse inference sanction would not be akin to granting summary judgment to Pegasus on its alter ego claim, since such a charge is permissive and can be appropriately tailored by the trial court (citations omitted).

As *Pegasus* takes flight, a number of important issues concerning the preservation of ESI have been clarified, and clarity in New York Practice is helpful to practitioners. However, the time when lawyers in state and federal courts in New York could use the same playbook for spoliation of ESI ended two weeks before the Court of Appeals issued its decision in *Pegasus*. Effective December 1, 2015, there were a number of significant changes to the Federal Rules of Civil Procedure. Changes to Fed. R. Civ. P. 37 alter what had been, in many important ways, the *Zubulake* landscape in federal court, and the two court systems rules for spoliation of ESI are no longer congruent.

N.B.: The presumption of relevance of spoliated evidence that arises when a spoliator is grossly negligent may be rebutted (*see* ***AJ Holdings Group, LLC v IP Holdings, LLC***, 129 A.D.3d 504, 11 N.Y.S.3d 55 [1st Dep't 2015]).

N.B.: The ***Pegasus*** Court stressed that the spoliation sanction of an adverse inference instruction (*see* 1A NYPJI 1:77 [3d ed 2016]) is, in an appropriate case, a permissible sanction, and highlighted that such as instruction allows but does not require a fact-finder to draw a negative inference against the spoliator.

III. The Interplay Between CPLR 3216 & CPLR 3404

Second Department Holds That Where Prior Court Order "Was Effective To Return The Action To Pre-Note Status," CPLR 3404 Inapplicable & CPLR 3216 Demand Necessary To Obtain Dismissal

Florxile-Victor v. Douglas, 135 A.D.3d 903, 22 N.Y.S.3d 91 (2d Dep't 2016)

> Contrary to the hospital's contention, CPLR 3404 does not apply to this pre-note of issue (citations omitted). Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there any order directing the dismissal of the complaint pursuant to 22 NYCRR 202.27 (citations omitted).

Paradiso v. St. John's Episcopal Hosp., 134 A.D.3d 1002, 20 N.Y.S.2d 913 (2d Dep't 2015)

> The note of issue was vacated on April 29, 2013, and the plaintiff was not thereafter served with a 90-day demand pursuant to CPLR 3216. In June 2014, the defendant moved pursuant to CPLR 3404 to dismiss the complaint as abandoned . The plaintiff opposed the motion, asserting that CPLR 3404 was inapplicable. The Supreme Court granted the defendant's motion. We reverse.
>
> When the note of issue was vacated, the case reverted to its pre-note of issue status, and CPLR 3404 did not apply to this case (citations omitted). Accordingly, the defendant's motion pursuant to CPLR 3404 to dismiss the complaint should have been denied (citation omitted).
>
> Contrary to the defendant's contention raised for the first time on appeal, this action could not have properly been dismissed pursuant to CPLR 3126 based upon the plaintiff's failure to comply with court-ordered discovery, since there was no motion requesting this relief and the plaintiff was not afforded an opportunity to be heard on this issue (citations omitted).

Goodman v. Lempa, 124 A.D.3d 581, 997 N.Y.S.2d 912 (2d Dep't 2015)

> It is undisputed that when this action was "marked off" the calendar at a status conference in July 2013, the note of issue had not yet been filed. CPLR 3404 does not apply to this pre-note of issue case (citations omitted). Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there any motion pursuant to CPLR 3126 to dismiss the action based upon the plaintiff's failure to

comply with discovery (citations omitted). Accordingly, the plaintiff's motion to restore the action to the calendar should have been granted.

CPLR 3404: Third Department Diverges From First & Second Departments And Hold CPLR 3404 Applied Where A Note Of Issue Was Filed, The Action Was Placed On The Calendar, And The Note Was Subsequently Vacated

Hebert v Chaudrey, 119 A.D.3d 1170, 989 N.Y.S.2d 399 (3d Dep't 2014)

Plaintiffs commenced this action in 2003 seeking to recover damages for, among other things, the intentional infliction of emotional distress. After joinder of issue and limited discovery, they filed a trial note of issue in October 2009. Supreme Court then issued an order setting a day certain for trial and, soon thereafter, defendant moved to vacate the note of issue based on plaintiffs' failure to comply with outstanding discovery demands. In January 2010, Supreme Court issued a conditional order granting the motion. When plaintiffs failed to comply with the conditional order, defendant again moved for vacatur of the note of issue in July 2010. Supreme Court granted the motion, vacated the note of issue and struck the matter from the trial calendar in a September 2010 order. When plaintiffs filed a new note of issue almost two years later in August 2012, defendant moved to dismiss the complaint pursuant to CPLR 3404. Supreme Court denied the motion and defendant appeals.

This case was seven years old when Supreme Court struck it from the trial calendar in September 2010. We must agree with defendant that, as a result, when plaintiffs failed to restore the action within one year, the case was automatically dismissed pursuant to CPLR 3404. CPLR 3404 provides that "[a] case . . . marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute." Supreme Court's order striking the matter from the calendar places this case squarely within the plain language of the statute (citations omitted). While it has been held that vacating the note of issue alone is not enough to invoke the presumption of abandonment that arises pursuant to CPLR 3404, the statute clearly applies "when a case has been struck from the calendar or gone unanswered on a clerk's calendar call" (citations omitted). Inasmuch as plaintiffs did not restore the matter within one year, it is deemed abandoned and dismissed (citation omitted).

Gray v. Jim Cuttita Agency, Inc., 281 A.D.2d 785, 722 N.Y.S.2d 289 (3d Dep't 2001)

> Contrary to plaintiffs' contention, this case falls squarely within the ambit of CPLR 3404 (citations omitted). Where, as here, a case is actually placed on the trial calendar, (citations omitted), subsequently stricken therefrom by an order of the court (citation omitted) and then not restored within one year, it is deemed abandoned and dismissed pursuant to CPLR 3404 (citation omitted). The fact that the note of issue may have been stricken on consent is of no moment (citations omitted).
>
> Moreover, as noted by defendants, the dismissal is self-executing (citations omitted). While a court retains discretion to restore a dismissed case to the trial calendar upon a showing of a sufficient excuse for the delay, a lack of intent to abandon the case, a meritorious claim and the absence of prejudice to the nonmoving party (citations omitted), plaintiffs never specifically sought such relief in their motion, arguing instead that the statute simply did not apply and that defendants should be compelled to accept their bill of particulars. Further, when confronted with defendants' cross motion, they again failed in any way to address these factors (citations omitted). Under these circumstances, Supreme Court properly denied plaintiffs' motion.

CPLR 3402

> R 3402. Note of issue
>
> (a) Placing case on calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

On CPLR 3216 Motion, Where Defendant Contributed To Plaintiff's Inability To File The Note Of Issue, Plaintiff Was Excused From Demonstrating Meritorious Claim

Lee v. Rad, 132 A.D.3d 643, 17 N.Y.S.3d 489 (2d Dep't 2015)

> Here, although the plaintiff did not file a note of issue within the 90-day demand period, her conduct negated any inference that she intended to abandon the action (citation omitted). In opposition to the defendants' separate motions, the

plaintiff promptly cross-moved to strike the answer of the defendant Kayhan Sarab for his willful failure to appear for a court-ordered deposition. The plaintiff established that, due to an unresolved discovery dispute, she was unable to timely file a note of issue (citations omitted). Furthermore, since Sarab contributed to the plaintiff's inability to file a timely note of issue in the proper form, the plaintiff was not required to demonstrate a potentially meritorious cause of action (citations omitted). Accordingly, the defendants' separate motions to dismiss the complaint insofar as asserted against each of them should have been denied.

IV. Depositions

a. Deposition Rules

§ 221.1. Objections at depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2. Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question the examining party shall have the right to complete the remainder of the deposition .

§ 221.3. Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

b. CPLR 3116 Corrections

Once a deponent has given oral testimony at deposition, the deponent has the opportunity to review the transcript for accuracy and make changes. CPLR 3116(a) provides:

> R 3116. Signing deposition; physical preparation; copies
>
> (a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

Proposed Commercial Division Rule On Testimony By Affidavit
(Public Comment Period Over)

> The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering testimony.

The language of the rule is straightforward, "and any changes in form or substance which the witness desires." What is required when a witness makes changes is "a statement of the reasons given by the witness for making them."

The 1996 Recommendation of the Advisory Committee on Civil Practice stated:

> The Committee recommends the amendment of CPLR 3116(a) to require that a deponent make any changes he or she wishes to make to the transcript within sixty days from the date the deposition is submitted to the witness.

Changes that are substantive, even potentially outcome determinative, are permitted. In *Natale v. Woodcock*, 35 A.D.3d 1128, 830 N.Y.S.2d 785 (3d Dep't 2006), plaintiff contended the collision with defendant's vehicle, at night, occurred in part because defendant's vehicle's headlights were not on. Defendant made changes to the transcript of his deposition testimony:

> [D]efendant was asked two separate times whether his headlights were on and both times responded, "I don't believe so." Thereafter, he supplied an errata sheet in compliance with CPLR 3116 (a), correcting one of the responses to: "Yes, my headlights were on." The reason provided for the correction was that "[a]fter reading the statement, it came back to me."

The Third Department addressed these deposition changes in the context of a motion for summary judgment, made by defendant, and relying on the changed deposition testimony. Reversing the trial court's denial of defendant's motion, the appellate court held:

> Even overlooking the fact that defendant corrected only one of his statements from his deposition regarding his headlights, summary judgment should not have been granted. Where, as here, there is a significant conflict on a material issue between the original deposition testimony and the correction on the errata sheet a credibility issue is created that cannot be resolved by summary judgment (citations omitted). The explanation offered for the change was insufficient to extinguish the factual issue.

So, the takeaway from *Natale* is that significant changes to testimony are permitted, but the original answer remains as part of the record, thus creating a credibility issue between the original and changed testimony, the credibility issue must be resolve by the factfinder.

This was also the case in *Breco Envtl. Contrs. Inc. v. Town of Smithtown*, 31 A.D.3d 359, 818 N.Y.S.2d 2444 (2d Dep't 2006), where the Second Department held that defendant's motion for summary judgment was properly denied due to credibility issues arising from changes plaintiff made to his deposition transcript:

> [Plaintiff] testified at his deposition that although he signed the document he had no affirmative recollection of having ever reviewed the document or of personal knowledge of the basis for the claim. Shortly thereafter [plaintiff] furnished an errata sheet in accordance with CPLR 3116 (a), in which he corrected the substance of his deposition testimony, claiming that after refreshing his recollection about a meeting he attended before preparation of the notice of claim, he now recalled that he had adequate knowledge about the basis of the claim and had in fact reviewed the document before he signed it.

So, per *Breco*, a witness whose recollection is refreshed after the deposition may furnish changes to the testimony based upon that refreshed recollection.

The First Department in *Cillo v. Resjefal Corp.*, 295 A.D.2d 257, 743 N.Y.S.2d 860 (1st Dep't 2002), permitted "substantive" changes that were accompanied by a statement of the reason for the changes:

> Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor (citations omitted). Plaintiffs' amended errata sheets are accompanied by such a statement. The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial (citations omitted).

Cillo makes clear that resolving the credibility issue created by the deponents deposition transcript changes is for the finder of fact.

The right to make changes to deposition testimony was recognized before the enactment of CPLR 3116(a). In *Skeaney v.Silver Beach Realty Corp.*, 10 A.D.2d 587, 201 N.Y.S.2 163 (1st Dep't 1960), decided under the C.P.A., predecessor to the C.P.L.R., the First Department held:

> The right to make corrections or changes in the testimony is recognized by decision (citation omitted) and is implicit in the statute (citation omitted) by the requirement that

> "[the] deposition, when completed, must be read by, or carefully read to, the person examined and must be subscribed by him."

Although the C.P.A. did not explicitly permit changes to the deposition transcript by the deponent, the First Department in *Van Son v. Herbst*, 215 A.D. 563, 214 N.Y.S. 272 (1st Dep't 1926), that right was inherent in the requirement that the transcript be reviewed by the witness:

> That he must do so without making such changes in it as are properly to be made, in order to have it conform to his more deliberate recollection of the facts, is not directed by the rule. Otherwise there would be no need of having the transcribed testimony read before it is signed. It is read so that corrections may be made and we see no changes, such as plaintiff might not properly have caused to be made. Indeed the new matter would have to be very remarkable or quite unresponsive and unjustified by the questions to require its exclusion.

Where the deponent makes changes to the transcript but fails to give a reason for the changes, the changes will not be considered by the court:

> The IAS Court properly refused to consider plaintiff's correction sheet to her deposition testimony, in which she claimed that the hole over which she tripped was in the street and not, as she had testified, on the sidewalk in front of the house owned by defendants, on the ground that the correction sheet lacked a statement of the reasons for making the corrections (CPLR 3116 [a]). Nor are we persuaded by the reason that was offered in plaintiff's opposition to the motion, that she has difficulty communicating in English. The record shows that plaintiff testified through an interpreter whose adequacy was never challenged by her lawyer, acknowledged having fallen in the street more than on the single occasion that she wants to correct, and fully comprehended the questions posed to her.

Rodriguez v. Jones, 227 A.D.2d 220, 642 N.YS.2d 267 (1st Dep't 1996)

In *Dima v. Morrow St. Assoc*, 31 A.D.3d 697, 818 N.Y.S.2d 474 (2d Dep't 2006), the Second Department held that "the Supreme Court properly declined to consider the plaintiff's correction sheet to her deposition testimony which lacked a statement of the reasons for making the corrections (citations omitted).

CPLR 3116(a) requires timely submission of deposition changes: "No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Quoting Professor Siegel, the First Department in *Zamir v. Hilton Hotels, Inc.*, 304 A.D.2d 493, 758 N.Y.S.2d 645 (1st Dep't 2003), discussed the reason for the sixty day requirement:

> As further noted in the Practice Commentary, "[a]ccording to the Advisory Committee, the statutory purpose of imposing the 60-day restriction in the first place is to enable other parties, including the party who took the deposition, 'to rely upon the deposition as final,' an aim that would be frustrated by '[l]ast-minute changes.'" (*citation omitted*) We agree that courts should be circumspect about extending the 60-day period inasmuch as "[a]n indication from the courts that an extension will be allowed without a strong showing of justification will quickly evolve a dilatory attitude that can undermine the purpose of CPLR 3116 (a)'s time limit altogether" (citations omitted).

The *Zamir* Court noted that an extension of the sixty day period would require a showing of good cause, which plaintiff failed to provide:

> the 60-day period, not being a rigid statute of limitations, is presumably extendable pursuant to CPLR 2004 (citations omitted). Nevertheless, CPLR 2004, while giving courts discretion to extend nearly all time limits in the CPLR for doing "any act," nevertheless premises such relief upon a showing of good cause.

A slight delay in furnishing a deposition errata sheet was excused by the First Department in *Binh v. Bagland USA, Inc*, 286 A.D.2d 613, 730 N.Y.S.2d 317 (1st Dep't 2001)*:*

> The motion court, stating its preference for disposing of cases on the merits, properly exercised its discretion in forgiving plaintiff's slight delay in furnishing the errata sheet (*see,* CPLR 3116 [a]; 2004), and correctly ruled that the conflict between the original deposition testimony and the errata sheet raised an issue of credibility inappropriate for summary judgment treatment. Upon this record, plaintiff's deposition correction does not appear to be patently untrue or tailored to avoid the consequences of his earlier testimony, made as it was before defendants moved for summary judgment (citation omitted).

The timing of the submission of depositions corrections, *vis a vis* the making of a motion for summary judgment by an adverse party, is a critical issue when the claim is that the errata sheet or an affidavit submitted in opposition is feigned or tailored.

CPLR 3116: No Corrections Due to Nervousness

Ashford v. Tannenhauser, 108 A.D.3d 735 (2d Dep't 2013)

> The plaintiff Kenneth Ashford (hereinafter the injured plaintiff), and his wife suing derivatively, commenced this action sounding in ordinary negligence to recover damages for injuries he sustained when he fell from a ladder while attempting to gain access to a shelf at the plumbing business where he worked. At his deposition, the injured plaintiff testified that he used a straight, 10–foot–tall aluminum ladder to gain access to the shelf, which was 12 to 15 feet above the ground. He further indicated that the feet of the ladder were equipped with rubber pads, and that there was no problem with either the feet or the pads. Before ascending the ladder, he made sure that the rubber pads were flat on the ground, and that the ladder was stable and safe. The injured plaintiff further testified that he climbed to the top of the ladder and that it "walked out [or] slid out from under [him]" as he prepared to place his left foot on the shelf. According to the injured plaintiff, his employer, North Shore Plumbing Supply, Inc. (hereinafter North Shore), was the owner of the ladder. The injured plaintiff had "no idea" why the ladder slid out from under him.
>
> In support of their motion for summary judgment dismissing the complaint, the defendants, all of whom were named herein in their capacities as cotrustees of a trust established for the benefit of Max Tannenhauser (hereinafter the trust), relied upon the foregoing deposition testimony of the injured plaintiff, as well as, inter alia, the affidavit of the defendant Robert Tannenhauser. That affidavit demonstrated that, at the time of the accident, the property at which the plumbing business was operated was owned by the trust as an out-of-possession landlord. The defendants also submitted a lease reflecting that the premises were occupied by North Shore, which was obligated, with certain exceptions not relevant herein, to perform all required repairs. Additionally, Robert Tannenhauser averred that the subject trust neither owned nor furnished any ladders at the premises, and did not maintain any of the flooring at the property.
>
> Based on the foregoing, the defendants made a prima facie showing of their entitlement to judgment as a matter of law on the ground that they did not own or

> control the ladder in question and had no duty to maintain the floor at the premises (citation omitted) and that, in any event, the injured plaintiff was unable to identify any defect that caused his fall (citations omitted).
>
> In his post-deposition errata sheet, the injured plaintiff radically changed much of his earlier testimony, with the vague explanation that he had been "nervous" during his deposition. CPLR 3116(a) provides that a "deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of reasons given by the witness for making them." Since the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall (citations omitted). In the absence of the proposed alterations, the injured plaintiff's deposition testimony was insufficient to raise a triable issue of fact with respect to the defectiveness or inadequacy of the ladder so as to warrant the denial of summary judgment. Likewise, in opposition to the defendants' prima facie showing that the trust was an out-of-possession landlord with no duty to repair or maintain the ladder or the floor, the plaintiffs failed to raise a triable issue of fact. Therefore, the Supreme Court erred in denying the defendants' motion for summary judgment dismissing the complaint.

Inadequate Reason & Material or Critical Changes to Testimony Grounds to Reject of *Errata* Sheet

Torres v Board of Education of City of New York, 137 A.D.3d 1256, 29 N.Y.S.3d 396 (2d Dep't 2016)

CPLR 3016(a) governs the signing of the deposition transcript. It provides, in pertinent part, that "[t]he deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." The statute does not purport to limit or restrict the nature of the changes a deponent may make by way of an errata sheet. In Torres, the Second Department sets forth a

limitation: “material or critical changes to [deposition] testimony through the use of an errata sheet is … prohibited.” Also, the court stresses that any change reflected in the errata sheet must be accompanied by an adequate reason for the change; the more important the change, the more persuasive the reason for it must be:

> CPLR 3116(a) provides that a witness may make "changes in form or substance" to his or her deposition testimony as long as such changes are accompanied by "a statement of the reasons given by the witness for making them." A correction will be rejected where the proffered reason for the change is inadequate (citations omitted). Further, material or critical changes to testimony through the use of an errata sheet is also prohibited (citation omitted).
>
> Here, the defendants demonstrated that the plaintiff made numerous and significant corrections to his deposition testimony on his errata sheets. Such corrections sought to substantively change portions of the plaintiff's deposition testimony which would have been in conflict with his earlier testimony at his General Municipal Law § 50-h hearing on issues concerning the basis for the defendants' alleged negligence as alleged in the plaintiff's pleadings (citation omitted). Moreover, the plaintiff's stated reasons that he "mis-spoke" and that he was clarifying his testimony were inadequate to warrant the corrections (citations omitted).
>
> The plaintiff's contention that the defendants' motion should have been denied due to their failure to annex the errata sheets as exhibits to their initial moving papers is without merit, since the plaintiff submitted a copy of the errata sheets as an exhibit to his opposition papers (citation omitted) and, in any event, the defendants annexed a copy of the errata sheets as an exhibit to the reply affirmation of their counsel (citation omitted). Since no substantial right of the plaintiff was prejudiced thereby, it would have been an improvident exercise of the Supreme Court's discretion to not consider the defendants' motion on its merits on this ground (citation omitted).

CPLR 3116(a): Witness May Make Significant Changes To Deposition Transcript

Lieblich v Saint Peter's Hosp. of the City of New York, 112 A.D.3d 1202, 977 N.Y.S.2d 780 (3d Dep't 2013)

CPLR 3116(a) provides that a witness may make a change to the form or substance of his or her deposition testimony by noting the change at the end of the transcript and providing a statement of the reasons for making the change. Even significant changes are permitted so long as the witness provides a reason why the changes are necessary. The Court in *Lieblich* holds that a witness who makes significant changes to his or her deposition in the errata sheet of the transcript may be required to appear for a further deposition.

Changes to Deposition Testimony Due to Pre-EBT Review of Incorrect Photographs Not Permitted

Horn v. 197 5th Ave. Corp., 2014 NY Slip Op 08605 (2d Dep't 2014)

> The plaintiff commenced this action against the defendants to recover damages for injuries she sustained when she allegedly tripped and fell over a sidewalk cellar door adjacent to the defendants' property at 197 Fifth Avenue in Brooklyn. However, at her deposition, the plaintiff repeatedly testified in great detail that she tripped and fell at 140 Fifth Avenue, a location which was approximately two to three blocks away and on the other side of the street from the defendants' property. The plaintiff thoroughly described the route she took and the direction and distance she traveled that brought her to the site of her accident, as well as the name and address of the business at 140 Fifth Avenue where she fell. Moreover, she testified that she confirmed the address of the location by visiting the site of her accident a few days later, at which time she wrote down the address, and she circled on a photograph of the cellar door at 140 Fifth Avenue the spot on which she claimed to have tripped.
>
> Notwithstanding the detailed, consistent, and emphatic nature of the plaintiff's deposition testimony regarding the location of her accident, she subsequently executed an errata sheet containing numerous substantive "corrections" which conflicted with various portions of her testimony and which sought to establish that she actually fell at 197 Fifth Avenue, not 140 Fifth Avenue. The only reason

> proffered for these changes was that, prior to her deposition, she was shown photographs of 140 Fifth Avenue that mistakenly had been taken by an investigator hired by her attorney, and that she thereafter premised her testimony on her accident having occurred at the location depicted in those photographs. The defendants Li Xing Hellen Weng and Sun Luck Restaurant, Inc., moved, and the defendant 197 5th Avenue Corp. separately moved, to strike the errata sheet and for summary judgment dismissing the complaint insofar as asserted against each of them. The Supreme Court denied the motions. We reverse.
>
> Contrary to the determination of the Supreme Court, the plaintiff failed to provide an adequate reason for the numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony (citations omitted).

No Reason For Deposition Correction Precludes Consideration of Revised Testimony

Vazquez v Flesor, 128 A.D.3d 808, 9 N.Y.S.3d 150 (2d Dep't 2015)

> As to the merits, the defendant established his prima facie entitlement to judgment as a matter of law on the ground that the plaintiff was unable to identify the cause of his accident (citations omitted). In support of his motion, the defendant submitted, inter alia, a transcript of the deposition testimony of the plaintiff, who testified that he did not know why Lopez tripped. The defendant also submitted a transcript of the deposition testimony of Lopez, who similarly testified that he did not know what caused him to fall. Although Lopez later amended his testimony in a post-deposition errata sheet to reflect that he tripped over a garden hose, he failed to offer any reason for materially altering the substance of his deposition testimony. Therefore, the amended testimony could not properly be considered (citation omitted). Accordingly, contrary to the plaintiff's contention, Lopez's deposition testimony did not reveal a triable issue of fact as to whether the plaintiff was unable to identify the cause of his fall (citation omitted).

V. Expert Exchanges & Testimony

CPLR 3101(d)(1)(i)

CPLR 3101(d)(1)(i) provides in pertinent part:

However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph.

Commercial Division Expert Rule 13

(c) If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure — including the identification of experts, exchange of reports, and depositions of testifying experts — all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court. Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and the reasons for them;

(B) the data or other information considered by the witness in forming the opinion(s);

(C) any exhibits that will be used to summarize or support the opinion(s);

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and

(F) a statement of the compensation to be paid to the witness for the study and testimony in the case.

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

Proposed Amendment to Expert Rule 13
(Comment Period Ends December 20, 2016)

_ _ _ . Consultation Regarding Expert Testimony.

The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.

Failure To Specifically Object To & Reject Allegedly Defective Expert Exchange Waives Objection

Rivera v. Montefiore Med. Ctr., 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *affirmed* 2016 NY Slip Op 06854 (2016)

Just when to make a motion where an expert exchange is late, or inadequate, or both, is particularly vexing. There is no statute or rule that addresses the issue. Case law does not offer concrete guidance. And the vehicle to make an application to the court to preclude or limit an expert's testimony, the motion *in limine*, is one of the least understood tools in the lawyers toolbox, and with good reason. *Rivera v. Montefiore Med. Ctr.*, warrants the attention of any lawyer whose practice involves the use of experts.

At trial, plaintiff moved to preclude any testimony by defendant's medical expert "regarding any possible causes of the decedent's death as defendant's expert exchange did not comply with the requirements of CPLR § 3101(d), in that, it was not specific." At oral argument, "[d]efendant opposed the application as untimely because, plaintiff previously objected to the expert exchange as it did not contain information about the expert's residency (which the parties resolved), but failed to reject the expert exchange as not being specific." The

court denied plaintiff's motion, the defendant's expert testified about the cause of death, and a verdict was returned for the plaintiff.

Both sides made post-trial motions, and the trial court denied plaintiff's post-trial motion seeking, *inter alia*, an order "striking from the record all testimony that the decedent died from sudden cardiac arrest:"

> Admission of an expert's testimony is at the trial court's discretion. The facts upon which the expert's testimony is based must be established or "fairly inferable" from the evidence, rather than based on speculation or guessing. Here, plaintiff's motion to strike defendant's expert opinion regarding the cause of death as sudden cardiac arrest is denied as it was untimely made at the time of trial.
>
> *Rivera v. Montefiore Med. Ctr.*, 2012 N.Y. Slip Op. 33671(U), *1 (Sup. Ct., Bronx Co. 2012)

On appeal, the First Department affirmed:

> We reject plaintiff's challenge to the aspect of the order that declined to strike the testimony of defendant's expert, Dr. Marc Silberman, in which he asserted that the cause of the decedent's death was a sudden, unexpected cardiac arrhythmia. Plaintiff's in limine application during trial to preclude Dr. Silberman's testimony was properly denied as untimely. Plaintiff's argument at trial for precluding Dr. Silberman's testimony was based on the lack of specificity of defendant's CPLR 3101(d) statement. The statement recited, with regard to the causation of the decedent's death, that defendant's expert would "testify as to the possible causes of the decedent's injuries and contributing factors . . . [and] on the issue of proximate causation"; also included in its formulaic recitation was the assertion that "the grounds for the expert's opinion will be said expert's knowledge and experience . . . and [the] trial testimony."
>
> 123 A.D.3d 424, 425 (1st Dep't 2014)

After reciting the requirements for expert disclosure, the court stated "upon receipt of this 3101(d) statement, the only objection that plaintiff voiced was that the expert's

qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death." (*Id.* at 426).

The First Department concluded:

> Having failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence.
>
> *Id.*

The Court of Appeals framed, and answered, the question on appeal:

> The issue on this appeal is whether the trial court abused its discretion as a matter of law in denying as untimely plaintiff's motion to preclude the testimony of defendant's expert on the grounds that the CPLR 3101 (d) disclosure statement was deficient. We hold that it did not.
>
> *Rivera*, 2016 N.Y. Slip Op. 06854, *1–2.

After chronicling the prior decisions, the Court reviewed the broad discretion trial courts possess to supervise expert disclosure: "'A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with 3101(d) (1) (i) is left to the sound discretion of the court' (citations omitted)."

The Court concluded:

> Plaintiff made her motion mid-trial immediately prior to the expert's testimony. Plaintiff argues that at the time of the expert exchange, she had no reason to object to the disclosure statement because the statement gave no indication that defendant would challenge plaintiff's theory of decedent's cause of death. Assuming defendant's disclosure was deficient, such deficiency was readily

> apparent; the disclosure identified "causation" as a subject matter but did not provide any indication of a theory or basis for the expert's opinion. This is not analogous to a situation in which a party's disclosure was misleading or the trial testimony was inconsistent with the disclosure. Rather, the issue here was insufficiency.
>
> The trial court's ruling did not endorse the sufficiency of the statement but instead addressed the motion's timeliness. The lower courts were entitled to determine, based on the facts and circumstances of this particular case, that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised – and potentially cured – before trial. Accordingly, there was no abuse of discretion as a matter of law.
>
> *Id.* at 3.

Cases Citing *Rivera*

In *Dedona v. DiRaimo*, 137 A.D.3d 548 (1st Dep't 2016), a First Department decision following, and citing, the First Department decision in *Rivera*, a trial court precluded the plaintiff from presenting evidence, including expert testimony, against the defendant, based upon the defendant's *in limine* motion made after jury selection but before opening statements.

The First Department reversed, reinstated plaintiff's complaint, and ordered a new trial:

> The trial court improvidently exercised its discretion in granting the motion and in dismissing the complaint based on the preclusion of evidence. Defendants' argument that they had no notice of plaintiffs' theory and were unfairly surprised is unavailing. The theory concerning vascularization of decedent's left leg was adequately disclosed in plaintiff's original and supplemental bills of particulars. Further, while CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time, here plaintiff served the CPLR 3101(d) expert disclosure notice about eight months before trial, which was sufficient notice. Furthermore, during that period, defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice.
>
> *Id*. at *1–2 (citations omitted).

Rivera is cited for the final proposition, *to wit*, that there was a waiver by the defendant of an objection to the plaintiff's expert exchange, in part, because the defendant did not object at the pretrial conferences conducted in the case.

So, under *DeDona*, it appears incumbent upon counsel to now advise their adversaries, at pretrial conferences (where there is generally no record of the proceedings), of the assorted shortcomings in their case, or risk having waived the right to object when the evidence is ultimately offered at trial.

In *Fermas v. Ampco Sys. Parking*, 2016 N.Y. Slip Op. 32096(U) (Sup. Ct., Queens Co. 2016), defendant sought to amend its answer to assert an affirmative defense that plaintiff failed to use an available seatbelt. The trial court had initially denied the motion on procedural grounds, but on the second application, granted the motion:

> To that end, plaintiff can claim neither surprise nor prejudice. Plaintiff was aware of the existence of this defense as early as it was interposed by codefendants in January 2013. Moreover, moving defendants' expert witness disclosure clearly indicated that the expert was to be "expected to testify that plaintiff failed to mitigate all injuries she did or would have suffered by failing to make use of the seatbelts available to her in the vehicle in which she was traveling." It is of particular significance that plaintiff made no objection in response to this CPLR 3101 (d) exchange.
>
> *Id*. at *5 (citing *Rivera*, 123 A.D.3d 424 (1st Dep't 2014).

In *Fermas*, the trial court uses *Rivera* to impose a burden on the plaintiff to object to defendant's expert disclosure because it advanced a defense theory not asserted in the defendant's answer. Plaintiff is penalized for not objecting to an expert disclosure for what is, in essence, a pleading defect.

Commercial Division Rule On Motions *In Limine*

There is no CPLR rule on motions *in limine*. There is no provision in the general provisions of the Uniform Rules for Trial Courts governing, or even discussing, motions *in limine*. In fact, the only Uniform Rule I am aware of discussing motions *in limine* appears in the Commercial Division Rules:

> Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.

So, had this motion *in limine* been made in a trial court in the Commercial Division at least ten days prior to the pre-trial conference, seeking to preclude an expert economist rather than an expert physician, would the motion have been untimely, even if a prior objection had been made to a different portion of the expert economist's CPLR 3101(d)(1)(i) exchange?