Not One Source Can be Consulted Exclusively to Determine Practice and Procedure Issues

- The CPLR
- The Various Uniform Rules
- The Commercial Part Rules in the Uniform Rules (22 NYCRR 202.70)
- Local Court Rules
- Individual Judge's Rules
- Individualized Orders (e.g., PCO)
- Appellate Division Rules: **Note new Appellate Division rules effective 9/17/2018**
- Judiciary Law
- General Construction Law
- "Local Practice"

Examples of Influence of Rules Over Practice

- Rule 130 signing requirement v. CPLR 2101(d) indorsement by attorney/party
- Rule 130 v. CPLR 8303-a: Sanctions
- Calendar Practice Issues in rules, including motion to vacate Note of Issue, 22 NYCRR 202.21 (Note of Issue), 202.26 (Pretrial Conferences), 202.27 (defaults at calendar call or conference) v. CPLR Article 34
- 22 NYCRR 202.12 (Preliminary Conference); 202.15 (videotape depositions); 202.19 (DCM) v. CPLR Article 31

Examples of Influence of Rules Over Practice (Continued)

- 22 NYCRR 202.17 (Exchange of medical reports in p-i and w-d actions) v. CPLR 3121
- Motion Practice: 22 NYCRR 202.6 (RJI); 202.7 (Calendaring of Motions); 202.8 (Motion Procedure) v. CPLR 2214, 2215 etc.
- CPLR 3217 v. 202.28 (Discontinuance of civil actions)
- Appellate Division Rules v. CPLR
- Commercial Part Rules (22 NYCRR 202.70) v. CPLR

2018 Amendment: CPLR 203(g)(2) and 214-a (eff. 1/31/2018)

- Discovery statute for claims alleging failure to diagnose cancer or a malignant tumor.
- 2 ½ years runs from later of either (i) when the person knows or reasonably should have known of the alleged negligent act or omission and knows or reasonably should have known that it caused the injury, with a cap of seven years from the alleged act or omission, or (ii) the date of the last treatment, where there is continuous treatment for such injury, illness or condition.
- Applies to Notices of Claim and Statutes of Limitations for actions against the state and municipal defendants.
- Also applies to negligent failures prior to effective date but within applicable statutory period.
- Contains revival provision.

2018 CPLR Amendment: CPLR 214-b (eff. 7/1/2018)

Amended to extend the expiration date for revival of time barred Agent Orange claims to June 16, 2020.

2018 CPLR Amendment: CPLR 1349(2)(h)(i) (eff. 8/24/2018)

Amended to provide that money received through forfeiture can be used for law enforcement assisted diversion of individuals with substance use disorders (into substance abuse treatment, health or mental health services, housing assistance, with other services as may be needed).

2018 CPLR Amendment: CPLR 2111 (eff. 7/24/2018)

Amended to extend provisions of law relating to the use of electronic means for the commencement and filing of papers in certain actions or proceedings until September 1, 2019.

2018 CPLR Amendment: CPLR 2305(d) (eff. 8/24/2018)

Added to provide that where a trial subpoena directs service of the subpoenaed documents to the attorney or a self-represented party at the return address noted on the subpoena (rather than to the court clerk), a copy of the subpoena must also be served "simultaneously" upon all of the parties. In addition, the receiving party is to deliver "forthwith" a complete copy of the produced documents in the same format as received, to all opposing counsel and self-represented parties.

2018 CPLR Amendment: CPLR 4511(c) (eff. 12/28/2018)

Added to provide that when requested by a party, the court "shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool," subject to a rebuttable presumption that such image, map, location, etc. accurately depicts the evidence presented. The presumption can be rebutted by credible and reliable evidence that the image or information did not "fairly and accurately portray that which is being offered to prove."

2018 CPLR Amendment: CPLR 4540-a (eff. 1/1/2019)

Added to provide that material provided by a party in response to a CPLR Article 31 demand for "material authored or otherwise created by such party" is presumed to be authentic when it is offered into evidence by an adverse party. The presumption can be rebutted, however, by a preponderance of evidence proving that the material was not authentic and it does not preclude any other admissibility objections.

2018 CPLR Amendment: CPLR 5003-b (eff. 7/11/2018)

Added to provide that an employer (or its employee or officer) cannot include in a settlement agreement in connection with a sexual harassment claim, a nondisclosure agreement preventing the disclosure of the underlying facts and circumstances of the claim or action unless it is the plaintiff's (settling individual's) preference. In addition, the plaintiff must have 21 days to consider whether to accept the provision; and even after signing the agreement, the plaintiff has an additional seven days to revoke the agreement.

2018 CPLR Amendment: CPLR 7515 (eff. 7/11/2018)

Added to bar mandatory arbitration clauses in connection with sexual harassment claims, except where inconsistent with federal law. The mandatory arbitration clause concerns a provision in a written contract (1) requiring the submission of a matter to arbitration (as defined in CPLR Article 75) prior to bringing any legal action, and (2) providing that an arbitrator's determination with respect to an alleged "unlawful discriminatory practice based on sexual harassment [is] final and not subject to independent court review." If such provisions are included, they will be deemed null and void. Where there is a conflict between provisions of this section and a collective bargaining agreement, the latter controls.

2018 CPLR Amendment: CPLR 8003(a) and 8003(b) (eff. 12/21/2018)

- **CPLR 8003(a):** Amended to increase referee compensation from $50 to $350 for each day spent as a referee unless the court sets a different compensation OR by the consent in writing of all parties not in default for failing to appear.
- **CPLR 8003(b):** Amended to increase the maximum referee's fees from $500 to $750, upon a sale pursuant to a judgment in any action, unless the property sold for $50,000 or more, in which case the referee can receive additional compensation as the court deems proper.

CPLR 503(a): 2017 Amendment

- Amended to authorize venue in "the county in which a substantial part of the events or omissions giving rise to the claim occurred.“

L. 2017, Ch. 366, effective October 23, 2017.

New E-Filing Rules Applicable to the Appellate Division

Effective March 1, 2018, the four Departments of the Appellate Division have implemented electronic filing through NYSCEF with respect to certain appellate matters and original proceedings. See 22 NYCRR Part 1245. As of the effective date, the applicable actions covered – which differ from Department to Department – were as follows:

- **First Department:** All appeals in commercial matters originating in Supreme Court, Bronx and New York Counties.
- **Second Department:** All appeals in matters originating and electronically filed in Supreme and Surrogate's Courts in Westchester County.
- **Third Department:** All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.
- **Fourth Department:** All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial District.

The list of cases and case types are being increased and, thus, practitioners should keep up to date on the developing rules.

New Statewide Practice Rules of the Appellate Division Effective 9/17/2018

- 22 NYCRR 1250

Individual Rules Adopted by Each Department

- First Department: 22 NYCRR 600
- Second Department: 22 NYCRR 670
- Third Department: 22 NYCRR 850
- Fourth Department: 22 NYCRR 1000

e.g. § 1250.3 – filing initial informational statement with notice of appeal;
§ 1250.10(a), (c) – failure to perfect within 6 months of notice of appeal-appeal dismissal, but may move to vacate within one year of dismissal

Recent Commercial Division Rules

- **Movant Must Provide Copy of Supporting Motion Papers to Opposing Party When Seeking a Temporary Restraining Order** -22 NYCRR § 202.70(g), Rule 20, Effective July 1, 2017

David L. Ferstendig, *New Commercial Division Rules*, 682 N.Y.S.L.D. 3,4 (2017)

Recent Commercial Rules (Continued)

- **If Requested, Parties Are to Provide Details as to Length of Trial - 22 NYCRR § 202.70(g), Rule 26 - Effective July 1, 2017**
  - Existing rule requires that parties give court a "realistic estimate" of the trial length.
  - Now parties must include estimate of number of hours each party believes it will use for direct examination, cross examination, redirect examination, and argument.
  - Trial court can rule on potential number of hours each party will be entitled to, and it can increase the total number of hours "as justice may require."
  - Trial judge has discretion to employ this new procedure.

Recent Commercial Rules (Continued)

- **Sample Choice of Forum Provisions Adopted - § 202.70(d)(2) - Effective July 1, 2017**
- Provides two alternatives:
  - a provision in which the parties consent to the exclusive jurisdiction of the Commercial Division, subject to meeting the procedural and monetary or other threshold jurisdictional requirements; or
  - one in which the parties consent to the exclusive jurisdiction of the New York federal courts or the Commercial Division, subject to meeting the jurisdictional and procedural requirements of the courts.
- Contracting parties may wish to provide an alternative venue, in the event the jurisdictional requirements are not met.

Recent Commercial Rules (Continued)

- **Parties' Consultation Prior to Pre-Trial Conference Regarding Expert Testimony - Rule 30(c) - Effective May 1, 2017**
- Adopted to narrow disagreement among competing experts.
- Court may direct that prior to the pre-trial conference, counsel for parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute.
- Court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.
- Rule provides discretion to trial judge to use this provision as tool to streamline the trial.

Additional Recent Commercial Division Rules

- **§ 202.70(d)(2)** was further amended (eff. 1/1/2018) to add a sample choice-of-law provision.
- **Revised New Model Compliance Conference Stipulation and Order** form was issued for "optional use" (eff. 1/1/2018).
- **22 NYCRR 202.70(g), Rule 10 & Rule 11:** Certification relating to ADR at preliminary conference – Counsel certifies that he or she has had discussions with party regarding availability of ADR provided by CD and / or private ADR providers, and states whether party is presently willing to pursue mediation at some point during litigation; PCO to provide date by which mediator will be identified.
- **22 NYCRR 202.70(g), Rule 11-g:** To mitigate risk associated with inadvertent disclosure of privilege waiver during disclosure. Provides form for privilege clawback provision.
- **22 NYCRR 202.70(g), Rule 11(e):** Technology-assisted review in discovery (eff. 10/1/2018).

Adoption of Numerous Commercial Division Rules in 2015

- **Rule 11-a:** 25 Limited Interrogatories
- **Rule 11-b:** Privilege Logs
- **Rule 11-c:** Guidelines for Discovery of Electronically Stored Information From Nonparties
- **Rule 11-d:** Depositions and the 10/7 Rule
- **Rule 11-e:** Document Responses
- **Rule 11-f:** Permits Identification of Matters for Examination at Deposition of Entity
- **Rule 14:** Discovery Disputes and the Preference for Letters and Court Conferences Over Formal Motions
- **Rule 34:** Staggered Court Appearances

CPLR 202: Contractual Choice-of-Law Provision Does Not Preclude Application of Borrowing Statute

- Borrowing Statute: Nonresident suing on claim accruing outside state, gets lesser of statute of limitations of New York and state where cause of action accrued.
- Provision here reflected parties' intent to apply New York's substantive and procedural law.
- **CPLR 202 is part of the procedural law.**
- Forum shopping does not have to be consideration in case – It is not the statute's only purpose (also adds clarity and certainty to law).

Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d 372 (2018)

CPLR 203 Relation Back Principles

Parties United in Interest

- **Relation doctrine is not applicable because there was no unity of interest.** *Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 A.D.3d 1263 (3d Dep't 2018).
- **Intentional decision not to assert claim initially is not a mistake.** *Yanez v. Watkins*, 164 A.D.3d 547 (2d Dep't 2018).

- **CPLR 203(f): Relation back doctrine inapplicable because original complaint did not give the defendant notice of the transactions, occurrences, or series of transactions or occurrences.** *Lang-Salgado v. Mount Sinai Med. Ctr., Inc.*, 157 A.D.3d 532 (1st Dep't 2018).

CPLR 205 Termination of Action 6 Month Extension – Numerous Requirements etc.

- **Applies to actions and special proceedings; dismissal of prior proceeding by being marked off calendar is not dismissal on the merits.** *Matter of Lindenwood Cut Rate Liquors, Ltd. v. New York State Liq. Auth*., 161 A.D.3d 1077 (2d Dep't 2018).
- **Sua sponte dismissal of first action was not due to neglect to prosecute because order did not set forth any specific conduct that demonstrated a general pattern of delay; Court splits on whether plaintiff's second action was timely and that rested on determining when the first action was "terminated" for the purposes of CPLR 205(a).** *Bank of N.Y. Mellon v. Slavin*, 156 A.D.3d 1073 (2d Dep't 2017).

CPLR 205 Termination of Action 6 Month Extension – Numerous Requirements etc. (Continued)

- **Majority of Second Department holds that CPLR 205(a) applies even where plaintiffs in first and second actions are different. Finds plaintiffs sought to enforce the very same right.** *Wells Fargo Bank, N.A. v. Eitani*, 47 N.Y.S.3d 80 (2d Dep't 2017), is a mortgage foreclosure action. See also *U.S. Bank N.A. v. Gordon*, 158 A.D.3d 832 (2d Dep't 2018)

CPLR 205 Termination of Action 6 Month Extension – Numerous Requirements etc. (Continued)

- **CPLR 205(a) does not apply because out of state action is not "prior" action.** *Deadco Petroleum v. Trafigura AG*, 151 A.D.3d 547 (1st Dep't 2017).
- **CPLR 205(a) Does not apply where prior action was dismissed for neglect to prosecute.** *Familio v. Hersh*, 150 A.D.3d 1203 (2d Dep't 2017).
- **CPLR 205(a) Does not apply where prior action dismissed for lack of personal jurisdiction.** *Matter of Littlejohn v. New York State Dept. of Corr. & Community Supervision*, 150 A.D.3d 1523 (3d Dep't 2017).

CPLR 208 – Infancy/Disability Toll

- **No evidence that dementia disability existed at time claim accrued.** *Estate of Smulewicz v. Meltzer, Lippe, Goldstein & Breitstone, LLP*, 160 A.D.3d 543 (1st Dep't 2018).
- **Toll did not terminate upon the appointment of the article 81 guardian.** *Mederos v. New York City Health & Hosps. Corp*., 154 A.D.3d 597 (1st Dep't 2017).
- **Even where some of the decedent's distrubutees are infants, where the plaintiff was "also a distributee and was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion", the infancy toll in unavailable.** *Has K'Paw Mu v. Lyon*, 158 A.D.3d 1084 (4th Dep't 2018).
- **Infancy toll was not altered by earlier unsuccessful efforts of plaintiff's father to pursue a claim on plaintiff's behalf.** *Sherb v. Monticello Cent. Sch. Dist*., 163 A.D.3d 1130 (3d Dep't 2018).

CPLR 213-a - Residential Rent Overcharge

- **Court properly looked back beyond the four-year limitation period for plaintiffs' rent-overcharge claim to establish the proper base rent, as there was sufficient indicia of fraud.** *Butterworth v. 281 St. Nicholas Partners, LLC*, 160 A.D.3d 434 (1st Dep't 2018). See also *Kreisler v. B-U Realty Corp*., 164 A.D.3d 1117 (1st Dep't 2018) (fraudulent scheme to deregulate).
- **How to compute stabilized rent.** *Matter of 333 E. 49th Partnership, LP v. New York State Div. of Hous. & Community Renewal*, 165 A.D.3d 93 (1st Dep't 2018).
- First Department has issued conflicting decisions with respect to the method for determining the legal base rent where there is no allegation of fraud, but where there are no stabilized leases and rent registrations available for the four-year period.

CPLR 214(2)-David L. Ferstendig, Majority of Court of Appeals Applies Three-Year Statute of Limitations to No-Fault Claims Against a Self-Insurer

- **Appellate Division Departments had applied 6-year Statute of Limitations to no-fault claims against insurers.**
- **Majority: No-fault law is a creature of statute not known at common law; provided not by contract with private insurer, but by self-insurer meeting statutory obligations.**
- **Dissent Advocates Six-Year Limitation Period, Seeing No Reason to Distinguish Between No-Fault Claims Versus a Self-Insurer, as Opposed to an Insurer.**

***Contact Chiropractic, P.C. v. New York City Tr. Auth.*, 31 N.Y.3d 187 (2018)**

CPLR 214-a: Two and One Half-Year Statute of Limitations Running from Act, Omission or Failure

Exceptions

Continuous Treatment Doctrine:

- Is it continuous treatment as opposed to a continuous diagnosis, continuous relationship or a chronic condition?
- Is it for same condition / injury?
- Gaps in treatment – not fatal (30 months in *Lohnas*)
- *Lohnas v. Luzi*, 30 N.Y.3d 752 (2018) (4-3 decision)

Foreign Object Rule

2018 amendment to CPLR 214-a and 203(g)(2) discussed above

CPLR 214-a: Majority of Court of Appeals Holds that Wrongful Birth Claim Accrues Upon Infant's Birth

- Claim for past and future "extraordinary financial obligations" relating to the care of child during minority.
- Must establish that malpractice deprived parents of opportunity to terminate pregnancy within legally permissible time period or child would not have been conceived.
- Fragile X, chromosomal abnormality produces intellectual disabilities and other defects, particularly in males.
- Alleges failure to perform adequate genetic screening on egg donor.
- **Majority**: No extraordinary expenses claim until child is born.
- *LaBello* (85 N.Y. 2d 701): Infant's claim arising out of acts or omissions prior to birth, accrues upon birth.
- **Dissent**: Majority creating third exception under CPLR 214-a that does not exist in CPLR 214-a and contravenes language there for accrual (act, omission or failure).

***B & F v. Reproductive Medicine Assocs. of New York, LLP*, 30 N.Y.3d 608 (2017)**

CPLR 217

- **Limitation period applicable to proceeding against body or officer can be less than four months.** *Matter of Beer v. Village of New Paltz*, 163 A.D.3d 1215 (3d Dep't 2018).
- **30-day statute of limitations applies.** *Matter of Woodworth v. Town of Groveland*, 160 A.D.3d 1373 (4th Dep't 2018).

CPLR 301: Daimler Doing Business Standard Revisited – United States Supreme Court Concludes that Defendant Railway Company Was Not "At Home" in Montana

- This was not "exceptional case" (e.g. *Perkins*) where a defendant's operations in another state "may be so substantial and of such a nature as to render the corporation at home in that State." (*Daimler*, 134 S. Ct. 746, 761 FN 19)
- 2000 miles of railroad track and more than 2000 employees in Montana.
- But focus not solely on in-state contacts. "Rather, the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; '[a] corporation that operates in many places can scarcely be deemed at home in all of them.'" *BNSF Ry v. Tyrell*, 137 S. Ct. 1549, 1559 (2017).

CPLR 301: Daimler Doing Business Standard Revisited (Continued)

- "[I]n-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana." *Id.*

BNSF Ry. V. Tyrrell, 137 S. Ct. 1549 (2017)

- How about individual doing business? *See Lebron v. Encarnacion*, 253 F. Supp. 3d 513 (E.D.N.Y. 2017).
- How about consent jurisdiction? Authorized foreign corporation? See **Aybar v. Aybar**, 2019 NY Slip Op 00412 (2d Dep't January 23, 2019).

CPLR 302: United States Supreme Court Finds No Specific Jurisdiction

- California state court lacked specific jurisdiction over 592 nonresident plaintiffs in action—out of a total of 678 plaintiffs who filed eight separate complaints-related to the use of Plavix, a prescription drug intended to thin the blood and inhibit blood clotting.
- Defendant drug company in underlying litigation was foreign corporation with headquarters in New York; substantial operations in New York and New Jersey (50 percent of its U.S. workforce); and business activities in other jurisdictions including California where it had significant operations and a small state government advocacy office.
- Significantly, California was not the place where defendant developed Plavix, created a marketing strategy, or manufactured, labeled, packaged, or worked on regulatory approval of the drug. All those activities were done in New York or New Jersey.

***Bristol-Myers Squibb Co. v. Superior Court*, 137 S. C.t 1773 (2017)**

CPLR 302: United States Supreme Court Finds No Specific Jurisdiction (Continued)

- Nonresident plaintiffs did not allege that they obtained Plavix through California doctors or elsewhere in California, or that they were injured or treated for their injuries in California.
- Supreme Court rejected California Supreme Court's "sliding scale approach" under which, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." (Strength of requisite connection between forum and specific claims is relaxed if defendant has extensive forum contacts unrelated to those claims.)
- Instead, lacking here was a showing that there was an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." The fact that the resident plaintiffs could show that they were prescribed, obtained, and ingested the drug in California "does not allow the State to assert specific jurisdiction over the nonresidents' claims."
- Non-residents could have sued in New York or Delaware; or probably sued in plaintiffs' resident states.

***Bristol-Myers Squibb Co. v. Superior Court*, 137 S. C.t 1773 (2017)**

CPLR 302/3213 – Long Arm Jurisdiction

- **Insurance Policy's "Territory of Coverage" Clause Insufficient to Confer Personal Jurisdiction**
- Clause covers any accident within New York or elsewhere in the U.S.
- Car accident in North Carolina with U-Haul vehicle driven by New York resident; Repwest (Arizona company), U-Haul's excess carrier, paid personal injury settlement; brought action in North Carolina against Country-Wide (Delaware corporation; principal place of business New York), which issued personal auto policy to New York resident; obtained default judgment against Country-Wide; Repwest sought to domesticate judgment in New York.
- Results in Dismissal of CPLR 3213 Action to Domesticate North Carolina Judgment
- Appellate Division split in authority on "territory of coverage" clause
- Here Court finds no minimum contacts and conferring jurisdiction would not comport with traditional notions of fair play and substantial justice.

Repwest Ins. Co. v. Country-Wide Ins. Co., 166 A.D.3d 61 (1st Dep't 2018).

CPLR 302(a)

- **"Arising out of" requirement: There must be substantial relationship of activities to cause of action.** *Hall v. City of Buffalo*, 151 A.D.3d 1942 (4th Dep't 2017). See also *Leuthner v. Homewood Suites by Hilton*, 151 A.D.3d 1042 (2d Dep't 2017).
- **Defendants did not conduct sufficient purposeful activities in New York, which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of New York's laws.** *Abad v. Lorenzo*, 163 A.D.3d 903 (2d Dep't 2018).

CPLR 302(a) (Continued)

- **CPLR 302(a)(3) - Situs of injury was in New Jersey, where the accident occurred, not New York, where the resultant damages were subsequently felt by the plaintiff.** *Abad v. Lorenzo*, 163 A.D.3d 903 (2d Dep't 2018).
- **CPLR 302(a)(3) - Situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.** *Deutsche Bank AG v. Vik*, 163 A.D.3d 414 (1st Dep't 2018).

CPLR 304

- **Filing with the wrong clerk renders the proceeding a nullity.** *Matter of Dougherty v. County of Greene*, 161 A.D.3d 1253 (3d Dep't 2018). Memories of *Mendon Ponds*.
- **Failure to file papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect.** *Matter of Ennis v. Annucci*, 160 A.D.3d 1321 (3d Dep't 2018).
- CPLR 2001 cannot help you!

CPLR 306-b: Completing Service After Filing

- 120 / 15 Day Rule
- Must file action properly and in timely fashion.
- Good cause and interest of justice extensions.
- Diligent efforts to effect service (prerequisite of good cause standard); factor for interest of justice standard.

Other Factors – Interest of Justice Standard

- Length of delay in service.
- Promptness of plaintiff's request for extension – cross-move
- Meritorious action.
- Running of statute of limitations.
- Prejudice to defendant.

CPLR 306-b - Service of Initiating Pleadings

- **Plaintiff's motion for extension under CPLR 306-b permitted after motion to dismiss on jurisdictional grounds was granted because no judgment had been entered.** *US Bank N.A. v. Saintus*, 153 A.D.3d 1380 (2d Dep't 2017).
- **Beware of a potential danger associated with using an order to show cause where the statute of limitations is about to expire. The jurisdictional time limits established by CPLR 306-b for service of process apply. Thus, where the 15-day period following the expiration of the statute of limitations had expired prior to the date the court signed the order to show cause, it was held the lower court properly dismissed the action.** *Matter of Genting N.Y., LLC v. New York City Envtl. Control Bd.*, 158 A.D.3d 684 (2d Dep't 2018).

CPLR 306-b - Service of Initiating Pleadings (Continued)

- **Here, Court holds that CPLR 306-b does not permit an extension of time for service provided in an order to show cause. Is this an exception applicable to inmate circumstances or conflict among Departments? See Weinstein, Korn & Miller, CPLR 306-b.** *Matter of Sharp v. Annucci*, 164 A.D.3d 1580 (3d Dep't 2018).
- **Inasmuch as defendant failed to move to dismiss the complaint based on improper service within 60 days of serving his answer, he cannot challenge the court's determination to grant that part of plaintiff's cross motion seeking an extension of time for service of the summons and complaint pursuant to CPLR 306-b.** *Doe v. D'Angelo*, 154 A.D.3d 1300 (4th Dep't 2017)
- **Extension denied; lack of reasonable diligence: Plaintiff should have known person served was not authorized to receive service, and made no effort to learn the identity of the current officers.** *Goldstein Group Holding, Inc. v. 310 E. 4th St. Hous. Dev. Fund Corp*., 154 A.D.3d 458 (1st Dep't 2017).

CPLR 308(2)- Leave and Mail Service

- **Service on defendant's mother while she was inside her own apartment in same multiple dwelling as defendant is insufficient.** *Thacker v. Malloy*, 148 A.D.3d 857 (2d Dep't 2017).
- **Person of SAD does not have to reside in premises.** *Wells Fargo Bank, N.A. v. Decesare*, 154 A.D.3d 717 (2d Dep't 2017).
- **Failure to file proof of service. Defendant cannot be held in default.** *Divito v. Fiandach*, 160 A.D.3d 1404 (4th Dep't 2018).

CPLR 308(4) - Nail and Mail – Avoid If Possible

- **Failure to file proof of service is not jurisdictional defect and may be cured by motion or sua sponte by court. However, the court cannot "make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order."** *First Fed. Sav. & Loan Assn. of Charleston v. Tezzi*, 164 A.D.3d 758 (2d Dep't 2018).
- **Issue of fact as to whether pleadings were affixed to door of condominium unit, or exterior door of condominium complex.** *Sinay v. Schwartzman*, 148 A.D.3d 1068 (2d Dep't 2017).
- **General Business Law § 13 - Need a hearing to determine whether service on a Sabbath observer on Saturday was done with malice.** *JPMorgan Chase Bank, N.A. v. Lilker*, 153 A.D.3d 1243 (2d Dep't 2017).

CPLR 308(5) – Court Ordered Service

- **Service via email permitted.** *Kozel v. Kozel*, 161 A.D.3d 700 (1st Dep't 2018).
- **Compare prior decisions re social media:** *Baidoo v. Blood-Dzroky*, 48 Misc. 3d 309 (Sup. Ct., N.Y. Co. 2015)(Yes); *Qaza v. Alshalabi*, 54 Misc. 3d 691 (Sup. Ct., Kings Co. 2016)(No). See next PowerPoint.

CPLR 308(5): Service "Impracticable" Here, Service by Facebook Not Permitted

- In *Baidoo v. Blood-Dzraku*, 48 Misc.3d 309 (Sup. Ct. N.Y. Co. 2015), Supreme Court Justice permitted service by Facebook without any additional service in a divorce action. Plaintiff established that Facebook account she identified actually belonged to the defendant; that defendant regularly logged into his account; and that the plaintiff had no other means of contacting or serving the defendant.
- But in *Qaza v. Alshalabi*, 54 Misc.3d 691 (Sup. Ct. Kings Co. 2016), another Supreme Court Justice refused to permit Facebook service, finding plaintiff failed to sufficiently authenticate the Facebook profile as being the defendant's or establish that the defendant actually used the Facebook page to communicate or receive messages.
- The court concluded that "[g]ranting this application for service by Facebook under the facts presented by plaintiff would be akin to the Court permitting service by nail and mail to a building that no longer exists." *Id*. at 694.

CPLR 312-a – Service by Mail

- **Plaintiff moves for immediate judgment in the amount of $110.53, for the amount expended by plaintiff in serving defendants by the alternative method of service of process.** *McGriff v. Mallory*, 160 A.D.3d 1460 (4th Dep't 2018).
- **But remember not to use where expiration of Statute of Limitations is approaching. Completion of service in defendant's hands (return of acknowledgement of receipt).**

CPLR 320 - Defendant's Appearance

- **The Potential Trap of Serving a Notice of Appearance**
- **Distinguish between garden-variety case and mortgage foreclosure situation.**
- **Serve Demand for a Complaint rather than Notice of Appearance, in general.**
- **Serve NIA to be aware of developments in case**
- **Mortgage foreclosure action –** appearance after default at foreclosure settlement conference. Waiver of jurisdictional defenses? *American Home Mtge. Servicing, Inc. v. Arklis*, 150 A.D.3d 1180 (2d Dep't 2017).

CPLR 403[a] / 2001

- **Court's Ability to Correct or Disregard Mistakes, Omissions, Defects or Irregularities**
- The Third and Fourth Departments Switch Course on Whether the Failure to Include Return Date in Notice of Petition Is Fatal, Precluding a Court's Resort to CPLR 2001.
- Not a jurisdictional defect.
- CPLR 2001 comes to the rescue. See PowerPoint below.

CPLR 503(c): Residence of Domestic Corporation For Venue Purposes is County Designated in Certificate of Incorporation

***Villalba v. Brady*, 162 A.D.3d 533 (1st Dep't 2018)**

- Same for foreign corporation: *Crucen v. Pepsi-Cola Bottling Co. of N.Y.*, Inc., 139 A.D.3d 538 (1st Dep't 2016)
- Office or place of business does not have to be in that county: *See Janis v. Janson Supermarkets LLC,* 161 A.D.3d 480 (1st Dep't 2018).
- Check Department of State site
- Residence of Limited Liability Company: principal office as designated in Articles of Organization

***Pinos v. Clinton Cafe & Deli, Inc*., 139 A.D.3d 1034 (2nd Dep't 2016)**

- How about Biennial Filing stating a different office? *See* ***Astarita v Acme Bus Corp*., 55 Misc. 3d 767 (Sup. Ct. Nassau Co. 2017)**. *See also* J. Saxe dissent in ***Discolo v. River Gas & Wash Corp*., 41 A.D.3d 126, 128 (1st Dep't 2007)**.

CPLR 510/511

- **Effect of Five-Day Response Period on Motion to Change Venue on Improper County Grounds**
- **Does It Limit Defendant's Right to Move Before That Period Expires?**
- **Improper county grounds –** Special procedure and timing; failure to comply forfeits opportunity to obtain change of venue "as of right" – turns into discretionary change

Matter of Aaron v. Steele, 85 N.Y.S.3d 634 (3d Dep't 2018).

CPLR 1411, 1412, 3212: Majority of Court of Appeals Resolves Confusion

- Plaintiff does not have to establish that he or she is free from comparative negligence in order to be successful on summary judgment motion on liability only.
- CPLR 1412: Diminution of damages is affirmative defense to be pleaded and proven by party asserting defense.
- CPLR 3212(b): Comparative negligence is not a defense.
- Resolved a conflict / confusion.

***Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018)**

CPLR 2001: Mistakes, Omissions, Defects and Irregularities

- What is covered? See Weinstein, Korn & Miller § 2001.03 for exhaustive list of applications, and materials here for examples.
- Does ***not*** save jurisdictional type defects – e.g., nonfiling of initiating papers, filing with wrong clerk. See, e.g., *Matter of Dougherty v. County of Greene,* 161 A.D.3d 1253 (3d Dep't 2018); *DiSilvio v. Romanelli*, 150 A.D.3d 1078 (2d Dep't 2017); *Dealy-Doe-Eyes Maddux v. Schur*, 139 A.D.3d 1281 (3d Dep't 2017).
- Third Department changes course and holds notice of petition missing return date is ***not*** jurisdictionally defective. See *Oneida Pub. Lib. Dist. v. Town Bd. of The Town of Verona*, 153 A.D.3d 127 (3d Dep't 2017). Fourth Department follow suit. See *Matter of Kennedy v. New York State Off. for People with Dev. Disabilities*, 154 A.D.3d 1346 (4th Dep't 2017). See above.

CPLR 2001- Can be used to correct/disregard mistakes, omissions, defects and irregularities. . . .

- ***NYCTL 2011-A Trust v. Kahn***, 163 A.D.3d 837 (2d Dep't 2018) - **by correcting the spelling of the name of the defendant**
- ***Lipinsky v. Yarusso***, 164 A.D.3d 896 (2d Dep't 2018)- **affidavit was admissible**, **notwithstanding that it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), as such a defect is not fatal**, and no substantial right of the defendant was prejudiced by disregarding the defect. **Be careful here.**
- ***First Fed. Sav. & Loan Assn. of Charleston v. Tezzi***, 164 A.D.3d 758 (2d Dep't 2018) - **failure to file proof of service is a procedural irregularity, not a jurisdictional defect**, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004
- ***Sensible Choice Contr., LLC v. Rodgers***, 164 A.D.3d 705 (2d Dep't 2018) - defendant's contention that the **plaintiff's failure to annex the pleadings to its motion** papers was a fatal defect is without merit.

CPLR 2001- Can be used to correct/disregard mistakes, omissions, defects and irregularities. . . . (Continued)

- ***Tokar v. Weissberg*, 163 A.D.3d 1031 (2d Dep't 2018) - the notice of appeal dated July 20, 2016, is deemed to be a notice of appeal by nonparty Stanley Tokar**, as administrator of the estate of Patricia Tokar, deceased
- ***Status Gen. Dev., Inc. v. 501 Broadway Partners, LLC*,** 163 A.D.3d 740 (2d Dep't 2018) - **The fact that Dunne's signature and the jurat appeared on a page separate from the rest of the affidavit** did not render it inadmissible. If anything, the separate signature page amounted to an irregularity that the court should have disregarded.
- ***Matter of Duck v. Mannion*,** 164 A.D.3d 1103 (4th Dep't 2018) - **although the notice of appeal indicates that petitioners are the appellants, the cover of the appellate brief, the CPLR 5531 statement, and the CPLR 5532 stipulation all indicate that they were submitted on behalf of petitioners-objectors only.**

CPLR 2001- Can be used to correct/disregard mistakes, omissions, defects and irregularities. . . . (Continued)

- ***Young v. City of New York***, 164 A.D.3d 711 (2d Dep't 2018) – **Service of faulty digital copy of Order to Show Cause was technical defect in service.**
- ***Galluccio v. Grossman*****,** 161 A.D.3d 1049 (2d Dep't 2018) - **plaintiffs initially opposed the motion with physician affirmations** that did not comply with CPLR 2106, the court providently disregarded the defect after the plaintiffs replaced the affirmations with affidavits.
- ***Matter of Secaira v. Caluna***, 159 A.D.3d 826 (2d Dep't 2018) -the **Family Court erred in dismissing the petition based on the father's failure to timely serve the mother with the petition. The mother consented, inter alia, to "waive the issuance of service of process in this matter,"** and since no substantial right of a party was prejudiced by the inartful language in the second waiver form, which referred to custody, the court should have disregarded any mistake and conducted a hearing on the petition.

CPLR 2001- Can be used to correct/disregard mistakes, omissions, defects and irregularities. . . . (Continued)

- ***Northern Blvd Corona, LLC v. Northern Blvd Prop., LLC*,** 157 A.D.3d 893 (2d Dep't 2018) - **the appellants failed to establish that a substantial right of theirs was prejudiced by the court's sua sponte, inter alia, deeming the property to have been sold as one lot as of July 11, 2014**
- ***Abreu v. Casey*,** 157 A.D.3d 442 (1st Dep't 2018) - **Plaintiff's failure to file the amended pleadings as a separate docket entry is not fatal to his maintaining the action against defendant, because the amended pleadings were timely filed** with the Clerk of the Court after being served upon defendant (citation omitted), and defendant has not shown any prejudice (citation omitted). Further, CPLR 2001 authorizes the court to direct plaintiff to correct this type of filing mistake.

CPLR 2103(b) -Interlocutory Service on Counsel

- **Overnight Delivery Means Overnight Delivery**
- **Dropping Off Papers on Friday with Federal Express for Monday Delivery Does Not Suffice**

Moran v. BAC Field Servs. Corp., **164 A.D.3d 494 (2d Dep't 2018).**

CPLR 2219/2220

- **Appeal was not properly before the court because order was neither filed nor entered.** *Matter of Merrell v. Sliwa*, 156 A.D.3d 1186 (3d Dep't 2017).
- **Failure to settle order in accordance with 22 NYCRR 202.48(a)**. *Lasalle Bank N.A. v. Benjamin*, 164 A.D.3d 1223 (2d Dep't 2018).

CPLR 2221 – Motions for Leave to Renew/Reargue

- **Failure to include copy of original motion with renewal motion did not violate CPLR 2214(c), because original motion had been filed electronically.** *Leary v. Bendow*, 161 A.D.3d 420 (1st Dep't 2018)
- **Proper vehicle to challenge order on default is a motion to vacate under CPLR 5015(a)(1), and not a CPLR 2221 motion to renew or reargue.** *Hutchinson Burger, Inc. v. Bradshaw*, 149 A.D.3d 545 (1st Dep't 2017).
- **Appeal of Order Denying *Leave* to Reargue (CPLR 2221).** Holding off on an appeal until the reargument motion is decided, rather than appealing from the original order, presents certain dangers. While the denial or grant of a motion for leave to renew is appealable, only an order granting a motion to reargue is appealable. What sometimes becomes confusing when reading the case law in this area is what is meant by the denial of a motion to reargue. *Lewis v. Rutkovsky*, 153 A.D.3d 450, 453 (1st Dep't 2017).

CPLR 3018 - Responsive Pleadings

- **Preserving affirmative defenses in a pre-answer motion or in responsive pleading.** *Outdoors Clothing Corp. v. Schneider*, 153 A.D.3d 717 (2d Dep't 2017).
- **Non-jurisdictional defenses can be raised in an answer amended via a motion in the absence of prejudice.** *Charles v. William Penn Life Ins. Co. of N.Y.*, 162 A.D.3d 490 (1st Dep't 2018).
- **<u>Beware of Waiver!</u>**

CPLR 3019 - Counterclaims

- **Cannot later assert in state court, previously unasserted "compulsory counterclaim" in prior federal action.** *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64 (2018).
- **Counterclaims need to be appended to answer; cannot be "standalone."** *Rubin v. Napoli Bern Ripka Shkolnik, LLP*, 151 A.D.3d 603 (1st Dep't 2017).

CPLR 3025: Conflict on Standard to Apply on Motion to Amend Resolved

- Leave is freely granted.
- Absence of prejudice or surprise resulting directly from delay.
- Unless amendment is palpably insufficient or patently devoid of merit. See *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dep't 2008).
- Third Department finally joined the pack. *NYAHSA Servs., Inc. Self-Insurance Trust v. People Care Inc*., 156 A.D.3d 99 (3d Dep't 2017). No affidavit of merit necessary.
- Prejudice is not merely alleged exposure to increased liability; must indicate party has been hindered in preparation of his/her case or has been prevented from taking some measure in support or his/her position. *NYAHSA Servs., Inc. Self-Insurance Trust v. People Care Inc*., 156 A.D.3d 99 (3d Dep't 2017).

CPLR 3025 – Amended and Supplemental Pleadings

- **When amending personal injury complaint to add cause of action for wrongful death, plaintiff is required to submit competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff.** *Frangiadakis v. 51 W. 81st St. Corp*., 161 A.D.3d 478 (1st Dep't 2018).
- **Amendment contradicting allegation in original complaint does not render proposed amendment patently without merit.** *Brannigan v. Christie Overhead Door*, 149 A.D.3d 892 (2d Dep't 2017).

CPLR 3025(a), 306-b, 203(f) - *Vanyo*, As Of Right Amendment; 306-B; 203(f)

- Plaintiff unsuccessfully seeks to amend complaint "as of right" after having never served defendants with the original complaint in a timely Fashion. Amended complaint merely added cause of action.
- Majority and dissent disagree as to application of as of right amendment and relation back doctrine
- **Majority:** Relation back doctrine does not apply because plaintiff failed to timely serve original complaint and provide notice.
- Was amended complaint filed and served within time limits of CPLR 3025(a)?

Vanyo v. Buffalo Police Benevolent Ass'n, 159 A.D.3d 1448 (4th Dep't 2018).

CPLR 3101: Disputes Over Scope of Social Media Are Governed by Well Established Discovery Rules

- Court rejects Appellate Division heightened standard (need to establish factual predicate identifying relevant information in Facebook account – Information that contradicts / conflicts with plaintiff's alleged restrictions, losses and other claims before access to private portion was permitted; had to first establish contradiction in public portion).
- Governed by "material and necessary" standard enunciated in CPLR 3101(a) – discovery sought must be relevant to prosecution or defense of the action.
- Nothing so novel about Facebook.
- Threshold rule would permit account holder to obstruct discovery by manipulating privacy settings or curating materials on public portion.
- There is no condition to the receipt of discovery that it be shown that items actually existed.

***Forman v. Henkin*, 30 N.Y.3d 656 (2018)**

CPLR 3101: First Department Articulates New Test Where Party Seeks Deposition of Opposing Counsel

- Material and necessary.
- Good faith basis for seeking deposition.
- Information unavailable from another source. (Compare *Matter of Kapon v. Koch*, 23 N.Y.3d 32 (2014) regarding non-party disclosure. Did not addres the "special situation" here.)
- Burden of proof on motion for protective order
  - NYS: Individual or entity seeking a protective order bears initial burden to establish either that discovery sought is "utterly irrelevant," or that the "futility of the process to uncover anything legitimate is inevitable or obvious."
  - Federal Law: Places initial burden on party seeking disclosure

***Liberty Petroluem Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep't 2018)**

CPLR 3101(d) – Expert Disclosure

- **Plaintiff is required to differentiate and specify which allegations of negligence apply to each defendant, and to delete any alleged act of negligence that is not applicable to any particular defendant.** *Kanaly v. DeMartino*, 162 A.D.3d 142, 147-148 (3d Dep't 2018).
- **No evidence that failure to disclose experts was intentional or willful and no showing of prejudice.** *Yampolskiy v. Baron*, 150 A.D.3d 795 (2d Dep't 2017).
- **Plaintiff's Motion at Trial Seeking to Preclude Defense Expert's Testimony on Causation Grounds Denied as Untimely. Plaintiff Failed to Object Initially to Defendant's CPLR 3101(a) Expert Disclosure.** *Rivera v. Montefiore Medical Center*, 28 N.Y.3d 999 (2016). **Lesson** – Review disclosures immediately.

CPLR 3101(d)(1)(i): Conflict Among Appellate Division Departments as to Whether Responding Party in Medical, Dental or Podiatric Malpractice Action Can Withhold Expert's Qualifications

- With modern technology, revelation of *qualifications* can easily lead to revelation of *identity* of expert.
- **Second Department:** Full disclosure of qualifications required unless can show there exists "reasonable probability" that prospective expert medical witness would be subject to intimidation or threats if his or her name were revealed before trial. *Thomas v. Alleyne*, 302 A.D.2d 36 (2d Dep't 2002).
- **Third Department:** Recently joins Second Department in *Kanaly v. DeMartino*, 162 A.D.3d 142 (3d Dep't 2018).

CPLR 3101(d)(1)(i): Conflict Among Appellate Division Departments as to Whether Responding Party in Medical, Dental or Podiatric Malpractice Action Can Withhold Expert's Qualifications (Continued)

- **Fourth Department:** Responding party can withhold information concerning expert's medical school education and location of his or her internships, residencies and fellowships. See *Thompson v. Swiantek*, 291 A.D.2d 884 (4th Dep't 2002).
- **First Department:** Trial court decisions mixed; trending towards Second Department standard.

CPLR 3101(d)(1)(i): Conflict Among Appellate Division Departments as to Whether Treating Physician Who Testifies at Trial as Expert Must Provide CPLR 3101(d)(1)(i) Expert Disclosure

- First, Second, Fourth Departments: No such requirement. Disclosure of doctor's records and reports pursuant to CPLR 3121 and 22 NYCRR § 202.17 is sufficient.
- Third Department: Requires CPLR 3101(d)(1)(i) disclosure

***Schmitt v. Oneonta City Sch. Dist.*, 151 A.D.3d 1254 (3d Dep't 2017)**

CPLR 3116 – Signing Deposition

- **Substantive changes to errata sheet without providing sufficient explanation improper.** *Carrero v. New York City Hous. Auth.*, 162 A.D.3d 566 (1st Dep't 2018). Court strikes errata sheets.
- **Translator's affidavit did not accompany errata sheets.** *Gonzalez v. Abreu*, 162 A.D.3d 748 (2d Dep't 2018).
- **Plaintiff's unsigned transcript admissible because it was certified and because it was provided to plaintiff's counsel more than 60 days prior to defendant's motion; but nonparty transcript not admissible because defendant did not mail until after motion.** *Tsai Chung Chao v. Chao*, 161 A.D.3d 564 (1st Dep't 2018).

CPLR 3119 – Uniform Interstate Depositions and Discovery

- **Applies in action pending *outside* NY, not the other way around.** *Matter of 91 St. Crane Collapse Litig*., 159 A.D.3d 511 (1st Dep't 2018).
- In N.Y. litigation, remember to check foreign state law.

CPLR 3126 – Penalties for Refusal to Comply with Order or to Disclose

- **Willful and contumacious conduct merits striking pleadings.** Westervelt v. Westervelt, 163 A.D.3d 1036 (2d Dep't 2018); *Rosengarten v. Born,* 161 A.D.3d 515 (1st Dep't 2018); *Clark v. Allen & Overy, LLP*, 159 A.D.3d 478 (1st Dep't 2018); *Rodriguez v. Nevei Bais, Inc*., 158 A.D.3d 597 (1st Dep't 2018); *Watson v. City of New York*, 157 A.D.3d 510 (1st Dep't 2018).
- **Motion to strike complaint should have been granted.** *Honghui Kuang v. MetLife*, 159 A.D.3d 878 (2d Dep't 2018).
- **Sanction of dismissal of complaint without prejudice.** *U.S. Bank Natl. Assn. v. Harrington*, 160 A.D.3d 1230 (3d Dep't 2018).
- **Penalty of striking pleading versus monetary sanction.** *Lucas v. Stam*, 147 A.D.3d 921 (2d Dep't 2017).
- **Appellate court modifies trial court order striking answer and imposes costs instead.** *Woloszuk v. Logan-Young*, 162 A.D.3d 1548 (4th Dep't 2018).

CPLR 3126 – Penalties for Refusal to Comply with Order or to Disclose (Continued)

- **Trial court abused discretion in precluding plaintiff, where there was no willfulness**. *Hypercel Corp. v. Stampede Presentation Prods., Inc.*, 158 A.D.3d 1237 (4th Dep't 2018).
- **Sanction of preclusion order.** *Heins v. Public Stor.*, 164 A.D.3d 881 (2d Dep't 2018).
- **Willful and contumacious conduct; but striking answer improvident exercise of discretion when trial court already precluded offending party from offering any evidence.** *Chowdhury v. Hudson Val. Limousine Serv., LLC*, 162 A.D.3d 845 (2d Dep't 2018).

CPLR 3126 – Penalties for Refusal to Comply with Order or to Disclose (Continued)

- **CPLR 3126 - Failure to preserve surveillance footage merits negative inference charge.** *SM v. Plainedge Union Free Sch. Dist*., 162 A.D.3d 814 (2d Dep't 2018).
- **Non-intentional or willful spoliation of physical evidence merits adverse inference charge and reimbursement of costs.** *Smith v. Cunningham*, 154 A.D.3d 681 (2d Dep't 2017).
- **Loss of video was negligent rather than intentional, and loss did not completely deprive plaintiff of ability to prove her case; thus, sanction was adverse inference charge.** *Eksarko v. Associated Supermarket*, 155 A.D.3d 826 (2d Dep't 2017).
- **Adverse inference charge sanction did not obviate the need for a trial on liability issue.** *Neve v. City of New York*, 164 A.D.3d 1458 (2d Dep't 2018).

CPLR 3126 – Penalties for Refusal to Comply with Order or to Disclose (Continued)

- **Monetary sanctions.** *Vizcaino v. Western Beef, Inc.,* 161 A.D.3d 632 (1st Dep't 2018); *Maxim, Inc. v. Feifer*, 161 A.D.3d 551 (1st Dep't 2018).
- **Significant award of attorneys' fees for willful and contumacious conduct.** *Jackson v. OpenCommunications Omnimedia, LLC*, 147 A.D.3d 709 (1st Dep't 2017).

CPLR 3126 – Penalties for Refusal to Comply with Order or to Disclose (Continued)

- **Spoliation: "Although that evidence was relevant to the plaintiff's claims, the plaintiff failed to establish that it was the defendants who discarded that evidence and that the defendants had an obligation to preserve the evidence at the time the evidence was destroyed."** *Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino*, 164 A.D.3d 1309 (2d Dep't 2018).
- **Spoliation- Plaintiff failed to establish that defendant intentionally or negligently failed to preserve video after being placed on notice that the evidence might be needed for future litigation.** *Tanner v. Bethpage Union Free Sch. Dist.,* 161 A.D.3d 1210 (2d Dep't 2018).
- **Plaintiff failed to issue a litigation hold or take precautions to preserve the documents before the date of the alleged theft, which was well after the commencement of litigation, and failed to notify defendants upon discovery of the alleged theft.** *International Brain Research Found., Inc. v. Cavalier*, 158 A.D.3d 464 (1st Dep't 2018).

CPLR 3211(a)(1) – Motion to Dismiss

- **CPLR 3211(a)(1) - To succeed on motion to dismiss based upon documentary evidence, the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law.**
- **CPLR 3211(a)(1) - What qualifies as documentary evidence.** *First Choice Plumbing Corp. v. Miller Law Offs., PLLC*, 164 A.D.3d 756 (2d Dep't 2018) ("'In order for evidence to qualify as documentary,' it must be unambiguous, authentic, and undeniable' (citations omitted). **'[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' (citation omitted). 'Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence' (citations omitted).** Here, the emails and letters submitted in support of the defendant's motion were not documentary evidence within the meaning of CPLR 3211(a)(1).").
- **But First Department decisions appear to conclude that emails can suffice as documentary evidence.**

CPLR 3211(e) – Motion to Dismiss (Continued)

- **CPLR 3211(e) – 60-day provision applies to service objection, not to statute of limitations defense.** *Baity v. City of Buffalo*, 159 A.D.3d 1380 (4th Dep't 2018).
- **CPLR 3211(e) - Purported rejection of answer does not extend the 60-day time limit.** *Deutsche Bank Natl. Trust Co. v. Acevedo*, 157 A.D.3d 859 (2d Dep't 2018).
- **CPLR 3211(e) - Waiver of service defense in failing to move within 60 days of serving answer; Jurisdiction defense also waived by asserting unrelated counterclaim; Defendant cannot challenge court granting of extension to plaintiff to serve beyond 120 day period.** *JP Morgan Chase Bank, Natl. Assn. v. Venture*, 148 A.D.3d 1269 (3d Dep't 2017).

CPLR 3211 – Motion to Dismiss (Continued)

- **CPLR 3211(e) / 3018 - Can amend to add statute of limitations defense.** *Woloszuk v. Logan-Young*, 162 A.D.3d 1548 (4th Dep't 2018).
- **CPLR 3211(e) -Waiver of personal jurisdiction defense.** *U.S. Bank N.A. v. Pepe*, A.D.3d 811 (2d Dep't 2018).
- **CPLR 3211 - When a motion to dismiss invokes an erroneous ground, but other grounds do apply, the court can treat the motion as having specified the correct grounds and grant relief, where no prejudice has been demonstrated.** *Miller v. Brunner*, 164 A.D.3d 1228 (3d Dep't 2018).

CPLR 3212(a): Summary Judgment Motion Deadline

- Issue must have been joined (answer) ***before*** you can move: Notice of Appearance is not responsive pleading; so plaintiff is barred from moving for summary judgment at that point in time. *Jbbny, LLC v. Begum*, 156 A.D.3d 769 (2d Dep't 2017).
- 120 days after filing note of issue by statute, unless other deadline set by court (not less than 30 days).
- Rule in many courts is less (60 days).
- Late motions will not be heard "except with leave of court on good cause shown."

CPLR 3212(a): Summary Judgment Motion Deadline (Continued)

- *Brill v. City of New York*, 2 N.Y.3d 648 (2004): must show good cause for delay; even motion one day late is to be denied as untimely.
- *Lewis v. Rutkovsky*, 153 A.D.3d 450 (1st Dep't 2017): trial court denied summary judgment motions which were "untimely" because, on date OTSC timely filed, courts closed early and closed the following day as a result of Winter Storm Juno and orders not signed until 2-3 days after summary judgment motion deadline. Appellate Division reverses on this issue.
- In *Khan v. Macchia*, 165 A.D.3d 637 (2d Dep't 2018), ultimately the Appellate Division held that the trial court should have granted the defendant's unopposed motion to extend the time to move for summary judgment.
- Cost of vindication!

CPLR 3212(a) – Summary Judgment Motion Deadline (Continued)

• *Mitchell v. City of Geneva*, 158 A.D.3d 1169 (4th Dep't 2018) ("Defendants' summary judgment motion was made 618 days after the deadline set forth in the court's scheduling order and 204 days after the filing of the note of issue. . . . Plaintiffs opposed the motion on the ground that it was untimely. It was only in reply papers that defendants addressed the issue of 'good cause.' The court considered the merits of the motion, granted summary judgment to defendants and dismissed the complaint. That was error. It is well settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first time in reply papers (citations omitted). Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely (see CPLR 3212 [a]), and the court should have declined to reach the merits. We therefore reverse the final order and judgment, deny defendants' motion and reinstate the complaint.").

CPLR 3212(a) – Summary Judgment Motion Deadline (Continued)

• *Cullity v. Posner*, 143 A.D.3d 513 (1st Dep't 2016) ("The motion should have been denied as untimely. The motion court's rules required dispositive motions to be filed within 60 days of the filing of a note of issue. Defendant filed the motion papers **nine days after the time** to do so had expired, rendering the motion untimely (citations omitted). Defendants' failure to address the missed filing deadline or offer, let alone show, good cause for the delay in filing, is fatal to their motion (citation omitted).").

• *Nationstar Mtge., LLC v. Weisblum*, 143 A.D.3d 866 (2d Dep't 2016) – 8 days late

• Reeps v. BMW of N. Am., LLC, 160 A.D.3d 603 (1st Dep't 2018): Prior court orders and stipulations between the parties show that the parties, with the court's consent, charted a procedural course that deviated from the path established by the CPLR and allowed for defendants' filing of this round of summary judgment motions more than 120 days after the filing of the note of issue.

CPLR 3212 (b)

- **Failure to include copies of pleadings merits denial of motion.** *Burnside v. State of New York*, 157 A.D.3d 1071 (3d Dep't 2018)
- **But Failure to attach petition here is forgiven.** *Matter of Bordell*, 162 A.D.3d 1262 (3d Dep't 2018) ("For the first time on appeal, Basic contends that petitioner's motion was procedurally defective because it did not include a copy of the petition (citation omitted). Even had this contention been preserved for our review (citations omitted), we would find that the omission was not fatal given that the petition was submitted in connection with the earlier summary judgment motion and was before Surrogate's Court (citations omitted). Moreover, inasmuch as we may take judicial notice of the record in the prior appeal, which includes the petition (citations omitted), the record before us is 'sufficiently complete to address the merits' (citations omitted)."). **And see CPLR 2001.**
- **New York Court of Appeals Cannot Search Record. Princes Point LLC v. Muss Dev. L.L.C., 30 N.Y.3d 127 (2017).**

CPLR 3213 – Summary Judgment in Lieu of Complaint

- **Proof outside of the agreements requires denial of motion.** *Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036 (2d Dep't 2017).
- **Unopposed motion for summary judgment in lieu of complaint - plaintiff still bore the burden of establishing that the defendants were properly served with the summons and motion, but not to furnish proof of the Florida court's personal jurisdiction over them.** *TCA Global Credit Master Fund, L.P. v. Puresafe Water Sys., Inc.*, 151 A.D.3d 1098 (2d Dep't 2017).
- **Where Israeli judgments were included among plaintiff's claims, judgments and debts in a settlement agreement between the parties, and an issue of fact existed as to plaintiff's right under the agreement to enforce his claims, the trial court properly denied the motion addressed to the judgments.** *Yerushalmy v. Resles*, 159 A.D.3d 552 (1st Dep't 2018).
- **Used to enforce a foreign default judgment.** *TCA Global Credit Master Fund, L.P. v. Puresafe Water Sys., Inc.*, 151 A.D.3d 1098 (2d Dep't 2017).

CPLR 3215 – Default Judgment

- **Plaintiff failed to move for leave to enter judgment within one year of default.** *Quadrozzi Concrete Corp. Individual Account Plan & Trust v. Javash Realty, LLC*, 164 A.D.3d 1491 (2d Dep't 2018); *OneWest Bank F.S.B. v. Woodford*, 163 A.D.3d 432 (1st Dep't 2018).
- **CPLR 3215(c) - Failure to demonstrate a reasonable excuse for her delay in moving for a default judgment.** *Ibrahim v. Nablus Sweets Corp*., 161 A.D.3d 961 (2d Dep't 2018).
- **CPLR 3215(c) - Failure to take proceedings for entry of judgment within one year of default.** *Wells Fargo Bank, N.A. v. Pietro A. Cafasso*, 158 A.D.3d 848 (2d Dep't 2018); *Deutsche Bank Trust Co. Ams. v. Deutsch*, 157 A.D.3d 767 (2d Dep't 2018).
- **CPLR 3215(c) - Plaintiff's preliminary step of moving for order of reference evidenced intent to continue prosecution of action**. *Bank of Am., N.A. v. Lucido*, 163 A.D.3d 614 (2d Dep't 2018); *US Bank N.A. v. Brown*, 147 A.D.3d 428 (1st Dep't 2017).

CPLR 3215 – Default Judgment (Continued)

- **CPLR 3215(c) - How to waive right to seek dismissal of action as abandoned. A defendant can waive its right to obtain a dismissal of an action as abandoned under CPLR 3215(c) by his or her conduct, such as "serving an answer or taking any other steps which may be viewed as a formal or informal appearance."** *US Bank N.A. v. Gustavia Home, LLC*, 156 A.D.3d 843 (2d Dep't 2017) ("Here, National City Bank, Gustavia's predecessor in interest, waived its right to seek a dismissal pursuant to CPLR 3215(c) by serving a notice of appearance and waiver, which constituted a formal appearance in the action, and by its stipulation dated October 23, 2015 (citations omitted)."). See *Bank of Am., N.A. v. Rice*, 155 A.D.3d 593 (2d Dep't 2017) ("Here, the defendant Gustavia Home, LLC, waived its right to seek dismissal of the complaint insofar as asserted against it pursuant to CPLR 3215(c) by filing a notice of appearance (citations omitted). Accordingly, the Supreme Court properly denied that branch of its motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against it as abandoned.").

CPLR 3216

- **Conditional order failed to comply with requirements to be valid 90 day notice.** *Deutsche Bank Natl. Trust Co. v. Bastelli*, 164 A.D.3d 748 (2d Dep't 2018).
- **Compliance conference order fails to set forth any specific conduct constituting neglect by the plaintiff; thus, court could not dismiss**. *Goetz v. Public Serv. Truck Renting, Inc*., 162 A.D.3d 859 (2d Dep't 2018).
- **Court erred in administratively dismissing action without further notice.** *Deutsche Bank Natl. Trust Co. v. Cotton*, 147 A.D.3d 1020 (2d Dep't 2017).
- **Relief is not authorized where issue not joined.** *U.S. Bank N.A. v. Ricketts*, 153 A.D.3d 1298 (2d Dep't 2017).

CPLR 3217(a)(1): Conflict as to Whether a Motion to Dismiss Is a Responsive Pleading Within Meaning of CPLR 3217(a)(1) (Providing for Service of Notice of Discontinuance)

- Right to serve Notice of Discontinuance within statutory time frames; no stipulation or leave of court required.
- First Department concludes that motion to dismiss is a responsive pleading because otherwise, "a plaintiff would be able to freely discontinue its action without prejudice solely to avoid a potentially adverse decision on a pending dismissal motion." See *BDO USA, LLP v. Phoenix Four, Inc*., 113 A.D.3d 507 (1st Dep't 2014).
- Fourth Department has come to a contrary conclusion. See *Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808 (4th Dep't 2017) ("Based on the statute's language and the legislative history, we conclude that a determination that a motion to dismiss is a responsive pleading is contrary to the statute. Moreover, if the Legislature intended for a motion to dismiss to defeat a plaintiff's absolute right to serve a notice of discontinuance, it could easily have said so.").

CPLR 3404: Conflict Among Appellate Division Departments as to Whether CPLR 3404 Applies to Actions Where Note of Issue Has Been Vacated

- CPLR 3404: Dismissal of abandoned cases – cases marked off, struck from calendar or unanswered on clerk's calendar call, and not restored within a year, is deemed abandoned and dismissed.
- Vacating Note of Issue within 20 days of service of Note of Issue – Premature, inaccurate or improper Note of Issue. See 22 NYCRR 202.21(e).
- **First, Second, Fourth Departments: CPLR 3404** does not apply.
- Vacating Note of Issue returns case to pre-note of issue status; does not constitute "marking off" or striking case from calendar.
- **Third Department: CPLR 3404** does apply.

CPLR 4102: Conflict Among Appellate Division Departments as to Whether Defendant Waives Right to Jury Trial on All Legal Claims, Including Plaintiff's Claim, When Asserting Equitable Counterclaims Based on Same Transactions

- **First, Second, Third Departments:** There is a waiver.
- **Fourth Department:** No waiver. (Permits legal action and equitable claims to be tried at same time.)
- CPLR 4102(c) waiver does not address issue.
- Majority rule forces defendant to commence separate action to assert counterclaim; encourages inefficient and wasteful actions.
- Avoids possibility of inconsistent results.

CPLR 4515 – Form of Expert Opinion

- **Majority of Court of Appeals Rules That Evidence Was Insufficient as Matter of Law to Establish Proximate Cause. Affirms Lower Courts' Granting of Ford's Motion to Set Aside Verdict Under CPLR 4404(a).**
- **Brief majority opinion**
- **J. Wilson concurrence: Plaintiffs' experts failed to rebut Ford's argument that physical properties of asbestos in its products had been radically altered.**

Matter of New York City Asbestos Litig. (Juni), 2018 N.Y. Slip Op. 08059 (November 27, 2018).

CPLR 4545: Court of Appeals Splits on Whether Accidental Disability Benefits Act as Offset Against Both Future Earnings and Pension Benefits

- CPLR 4545: The Collateral Source Rule – Dramatic change in law.
- Purpose of CPLR 4545: Avoids duplicative recovery by plaintiff.
- **Majority:** Yes – ADR Benefits operate sequentially as payment for future lost earnings ***and*** pension benefits.
- They replace income plaintiff would have earned if she did not have to retire early (because of injury); once she reaches what would have been in-service retirement, ADR benefits replace pension.

***Andino v. Mills*, 31 N.Y.3d 553 (2018)**

CPLR 4545: Court of Appeals Splits on Whether Accidental Disability Benefits Act as Offset Against Both Future Earnings and Pension Benefits (Continued)

- **Dissent:** Prior decision in *Oden* applies – particular category of loss cannot mean two or more categories of loss.
- May leave plaintiff undercompensated.
- Plaintiff's "wages" or "salary" are not the same as "benefits"
- ADR benefits: "neatly correspond to the category of pension benefits, not to the category of wages."

***Andino v. Mills*, 31 N.Y.3d 553 (2018)**

Appeals – CPLR 5501 - Scope of Review

- **CPLR 5501 - Party Finality Doctrine.** *Hain v. Jamison*, 28 N.Y.3d 524, footnote 2 (2016) (Although the Appellate Division order granting summary judgment to co-defendant Farm was "non-final" because the claims asserted by plaintiff against the Jamison co-defendants remained, the Court nevertheless treated the order as final as to Farm under party finality doctrine (that is, an order that finally determines rights of one of multiple parties is considered final, even though unresolved issues not impacting that party remain.)). See David L. Ferstendig, *Court Holds Defendant Failed to Meet its Burden on Summary Judgment Motion on Proximate Cause Issue*, 674 N.Y.S.L.D. 3 (2017).

Appeals – CPLR 5501 - Scope of Review (Continued)

- **CPLR 5501(c) - Awards for pain and suffering deviated materially from what would be reasonable compensation: award *reduced*.**
- *Jones v. New York Presbyt. Hosp*., 158 A.D.3d 474 (1st Dep't 2018) (Lower court order "which granted defendant's motion to reduce the jury's damages awards, and ordered a new trial on damages unless plaintiff stipulated to reduce the award for past pain and suffering from $600,000 to $150,000 and the award for future pain and suffering over a five-year period from $400,000 to $150,000, unanimously modified, on the facts, to order a new trial on damages for past pain and suffering unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award for such damages to $400,000, and otherwise affirmed, without costs.").

Appeals – CPLR 5501 - Scope of Review (Continued)

- **CPLR 5501(c) - The amounts awarded for plaintiff's injuries deviate materially from what is reasonable compensation: award *increased*.**
- *Nawrocki v. Huron St. Dev. LLC,* 161 A.D.3d 697 (1st Dep't 2018) ("Order, Supreme Court, Bronx County (Ruben Franco, J.), entered January 14, 2016, which, after an inquest, inter alia, awarded **plaintiff $25,000 for past pain and suffering and $25,000 for future pain and suffering, unanimously modified, on the facts, to increase the awards to $250,000 for past pain and suffering, and $250,000 for future pain and suffering, and otherwise affirmed,** without costs. Plaintiff, a 28-year-old plumber, fell from a ladder while working, and sustained two fractures in his jaw and an impacted tooth, requiring internal fixation surgery and plastic surgery. He could not eat without using a straw for eight weeks, then not without pain for six to eight months, and was left with scarring. Under these circumstances, the amounts awarded for plaintiff's injuries deviate materially from what is reasonable compensation, and we modify to the extent indicated (citations omitted).").

CPLR 5511 – Permissible Appellant and Respondent

- **CPLR 5511 - Party not aggrieved**
- *Matter of Olney v. Town of Barrington*, 162 A.D.3d 1610 (4th Dep't 2018) ("The fact that the judgment '**may remotely or contingently affect interests which [defendants] represent**[] does not give [them] a right to appeal' (citation omitted). Likewise, the fact that the judgment 'may contain language or reasoning which [defendants] deem adverse to their interests does not furnish them with a basis . . . to take an appeal' (citations omitted).").
- *Hernstat v. Anthony's Windows on the Lake, Inc*., 162 A.D.3d 751 (2d Dep't 2018) ("The appeal must be dismissed, as the plaintiff is not aggrieved by the order appealed from, which denied the defendants' motion for summary judgment and **imposed the lesser sanction of an adverse inference charge in accordance with the plaintiff's request (citations omitted).").**

CPLR 5511 – Permissible Appellant and Respondent (Continued)

- *Carney v. Carney*, 160 A.D.3d 218 (4th Dep't 2018) (" '**The fact that the adjudication may remotely or contingently affect interests which [the party] represents does not give [it] a right to appeal' (citation omitted).** Here, Donaher has no direct interest in the controversy between plaintiff and defendant, and the fact that the court's determinations may contingently affect interests that Donaher and his office represent does not give him a right to appeal. 'The fact that the [decisions] contain[] language or reasoning that [Donaher] deems adverse to his interests does not provide him with a basis for standing to take an appeal' (citations omitted).").
- **CPLR 5511**: Language in order **deemed adverse to parties' interest does not furnish basis for standing to take appeal**. *NYCTL 2011-A Trust v. Master Sheet Co., Inc*., 150 A.D.3d 755 (2d Dep't 2017).
- **CPLR 5511**: Grandmother was not aggrieved by order granting relief to father against mother. *Matter of Kone v. Martin*, 146 A.D.3d 781 (2d Dep't 2017).
- **CPLR 5511**: Since plaintiff did not appeal, the Court could not reinstate the complaint. *Hain v. Jamison*, 28 N.Y.3d 524, footnote 3 (2016).

CPLR 5513 – Time to Take Appeal

- **CPLR 5513 - Notice of appeal untimely: 30 days runs from service of notice of entry of original order, not supplemental order, which contained no material change. *Matter of Twin Bay Vil., Inc*., 162 A.D.3d 1265 (3d Dep't 2018).**
- **CPLR 5515 - Complete failure to comply with CPLR 5515 deprives Court of jurisdiction to entertain the appeal. *Matter of Henry*, 159 A.D.3d 1393 (4th Dep't 2018).**

CPLR 5526 – Content and Form of Record on Appeal- Failure to Include Necessary Documents

- *Woodman v. Woodman*, 162 A.D.3d 1650 (4th Dep't 2018) **"[T]he record does not contain the necessary and relevant motion papers and exhibits with respect to the issues raised on appeal.** We note that, although defendant has attached some additional documents as exhibits to his appellant's brief, those documents are not properly part of the record on appeal (citations omitted).").
- *County of Jefferson v. Onondaga Dev., LLC*, 162 A.D.3d 1602 (4th Dep't 2018) ("To the extent that the County contends that the encroachment was permissible under the doctrine of lateral support, the **County's submissions in support of its motion do not contain that contention, and thus that contention is not properly before us** (citation omitted). Although the County asserts that it raised that contention in the memoranda of law that it submitted in support of its motion, we note that the memoranda of law are not part of the record on appeal, and the County failed to object to defendant's submitted appendix and failed to submit its own appendix containing those memoranda (citations omitted).").

CPLR 5526 – Content and Form of Record on Appeal- Failure to Include Necessary Documents (Continued)

- *JR Factors, Inc. v. Astoria Equities, Inc.*, 159 A.D.3d 801 (2d Dep't 2018) ("**The record also does not contain the entire transcript of the trial.** In particular, the record is missing a portion of the transcript of the testimony of one of the plaintiff's witnesses and the entire transcript of the testimony of a witness called by the defense. As the record is inadequate to enable this Court to render an informed decision on the merits of the appeals, the appeals must be dismissed (citations omitted).").

CPLR 5530 – Filing Record and Briefs

- **CPLR 5530 - Beware of dangers of dismissal of prior appeal for lack of prosecution, even though the court has discretion to bail you out. *Budoff v. City of New York*, 164 A.D.3d 737 (2d Dep't 2018)**