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FAILURE TO FILE SUMMONS WITHIN STATUTE OF LIMITATIONS IS NOT CORRECTABLE IRREGULARITY UNDER CPLR 2001; DISMISSAL IS RESULT

CPLR 2001 is the state's general, across-the-board provision that allows an unprejudicial "mistake, omission, defect or irregularity" in judicial procedure to be corrected by the court without fatal consequences to the offending party.

A longtime difficulty, however, was that the statute was held inapplicable to mistakes made at the very commencement of the action, because at that point they were deemed "jurisdictional" and, under the caselaw, could not be cured or ignored under CPLR 2001. Dismissal was consistently the result in those situations.

A 2007 amendment of CPLR 2001 aimed to cure that, and to overrule the line of cases that had made that strict construction of CPLR 2001. Under the amendment, the statute was explicitly extended to include mistakes in

> the filing of a summons with notice, summons and complaint or petition to commence an action ... including the failure to purchase or acquire an index number or other mistake in the filing process ... provided that any applicable fees shall be paid.

In a lead note in Digest 609, less than a year ago, we reviewed the status of the amended CPLR 2001.

Various omissions claiming the benefit of the amendment have appeared in a number of cases, including a few in the Court of Appeals. In one of these, the 2010 *Ruffin* decision (Digest 612), the Court held that service outside the state by one not on the CPLR 313 list of permissible servers is a mere irregularity that a court can excuse under the amended CPLR 2001.

From the plaintiffs' point of view, that was a rosy result under the statute. Not so rosy is the Court's more recent decision in *Goldenberg v. Westchester County Health Care Corp.*, 16 N.Y.3d 323, ... N.Y.S.2d .... (March 24, 2011). Without - attempting to review all of the mistakes that might appear at jurisdiction time and challenge the generosity of the amended CPLR 2001, the Court holds in *Goldenberg* that the various proceedings engaged in by a plaintiff with a claim in medical malpractice against a county entity came to nought because of the complete "absence of a summons" filing, without which, says the Court, "there was a complete failure to file within the statute of limitations, which CPLR 2001 does not allow a trial judge to disregard".

The result is a final dismissal.

Because of the governmental status of the would-be defendant (D) in *Goldenberg*, would-be plaintiff (P) had to file a notice of claim. One wasn't filed, so the initial step for P was a special proceeding for leave to file a late notice of claim. P brought that proceeding, which the trial court sustained, allowing P to serve a late notice on D. P did, serving with it – but not filing with the court – a summons and complaint. Affidavits of service were then filed with the court – through the clerk, as required – and they bore an index number, but it was the index number of the special proceeding, not of any action on the claim.

Filed in court or not, in due course D answered and included affirmative defenses of the statute of limitations and lack of jurisdiction, which preserved D's objections. Then, three weeks after the statute of limitations expired, D moved to dismiss P's claims on those preserved-in-the-answer grounds, securing an index number for the purpose. P cross-moved for leave to file a summons and complaint nunc pro tunc, "adopting the index number affixed to the motion". (He also "pledged to reimburse" D for the index number, not exactly a momentous gesture under the circumstances.)

P is too late, holds the Court, denying the cross-motion. In an opinion by Judge Read it reviews the history of the amendment and observes that this whole case

> turns on whether CPLR 2001, as amended in 2007, vests Supreme Court with discretion to forgive the particular kind of mistake made by [P]. We conclude that it does not.

The Court quotes from the legislative memorandum on the CPLR 2001 amendment, that

> [t]he purpose of this measure is to clarify that a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED, is a mistake subject to correction in the court's discretion.

The capitalization, the Court notes, appears in the memo itself and emphasizes that in *Goldenberg* there was no mistake as to method, but as to content, because P

> never filed a summons and complaint. The closest he came was the proposed complaint attached to the petition he filed when seeking permission to file a late notice of claim, itself a prerequisite to the commencement of this action.

We can mention an incidental point affecting the application and construction of CPLR 2001. The complaint that was ultimately served on D differed substantially from the complaint that P had earlier proposed; it added lack of informed consent as a ground of liability and it alleged application of the "continuous treatment" doctrine (which, when properly applied, postpones the start of the statute of limitations to the moment when treatment of the patient in respect of the complained-of condition ceases). As a general principle the complaint served on D after an action's filing

should be identical with the complaint initially filed. (See the subheading "Altering Papers After Filing But Before Service" in Siegel, New York Practice 5th Ed. § 63.) The Court found it unnecessary to address the point in *Goldenberg* because its conclusion to dismiss rested on the independent ground of the filing omission.

Another incidental point in *Goldenberg* concerns P's attempt to bar D's dismissal motion because D didn't make the motion within 60 days after serving its answer. P relied on CPLR 3211(e) for that, but the Court points out that the 60-day limit applies only to an objection based on improper service, which wasn't the objection here.

OTHER DECISIONS

UNINSURED MOTORIST ENDORSEMENT

Deliberately Driving Car Into Insured Is Still "Accident" from Insured's Viewpoint, Invoking Coverage Under Insured's Own Policy

The accident occurred at the intersection of 7th Avenue and 32d Street in Manhattan, where the driver – later found guilty of second degree murder – deliberately drove his car into pedestrians. Decedent was seriously injured and later died from resulting complications. His administrator sought coverage from his own insurer, the plaintiff (P) here, under the uninsured motorist (UM) endorsement of his own policy. (We may assume that the driver's liability policy would not cover because it doesn't apply to intentional conduct.)

A divided Court of Appeals holds the UM coverage applicable and finds against P, the UM insurer that brought this action to declare noncoverage. The declaration goes against P, and upholds coverage. *State Farm Mutual Automobile Ins. Co. v. Langan*, 16 N.Y.3d 349, ... N.Y.S.2d .... (March 29, 2011; 5-2 decision).

In an opinion by Chief Judge Lippman, the Court stresses that the "accident" referred to in the UM coverage must be adjudged from the insured's point of view, not that of the tortfeasor, and from that vantage point this event must be deemed a covered "accident", citing the Court's 1976 decision in *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 389 N.Y.S.2d 565. *Miller* held that whether an occurrence is an accident rather than the result of intentional conduct is gauged not from the standpoint of the assailant, but from the standpoint of the insured.

Also playing a role in the case is *McCarthy v. Motor Veh. Acc. Indem. Corp.*, 16 A.D.2d 35, 224 N.Y.S.2d 909 (4th Dep't 1962), affirmed in 12 N.Y.2d 922, 238 N.Y.S.2d 101 (1963). There, too, the wrongdoer deliberately assaulted the victim with a vehicle, whose insurer denied coverage, but the victim's policy in that case contained an MVAIC endorsement. MVAIC is a corporation funded by all car insurers; it supplies coverage to one injured by an uninsured motorist. The court in *McCarthy* denied coverage under the MVAIC endorsement as well, holding that an

event not qualifying as an "accident" under the direct coverage of the wrongdoer's policy would not be an "accident" under MVAIC coverage either.

The Court here in *Langan* distinguishes *McCarthy* on two grounds. First, UM coverage is part of the insured's own policy and is hence a coverage that doesn't come out of a state fund – as MVAIC does – but is something for which the insured has paid. Second,

> the insured is the victim in this case, not the tortfeasor, and the public policy against providing coverage for an insured's criminal acts is not implicated.

The majority also observes that the trend in other states is in the same direction as its holding here.

Rejecting the MVAIC distinction made by the Court, the dissent, written by Judge Smith, would apply *McCarthy*. But it notes that a better argument might have been made: an argument for a change in the law, i.e., an overruling of *McCarthy* and a holding that in a compulsory insurance state like New York it would be appropriate to carve out an exception to recognize that "victims should be protected no less against intentional than against negligent acts". The argument wasn't raised, however, comments the dissent, and it should therefore not be addressed – nor should the issue of whether it would be more appropriate for the legislature or the courts to make the change – until properly presented.

CONFRONTATION CLAUSE

MD Can Testify to Statement Scalded 3-Year-Old Made About Why He Didn't Get Out of Tub That Mom's Boyfriend Put Him In

He – the accused boyfriend – "wouldn't let me out", the infant told the pediatrician (MD) in the emergency room of the hospital, to which the mother and boyfriend took the child when the mother returned five hours after the incident. The infant sustained second and third degree burns to his feet and lower legs. The only issue was whether the Sixth Amendment right to confront witnesses was violated when the trial court allowed the statement in and the "babysitting" boyfriend ended up convicted of first degree assault.

Affirming the lower courts, a unanimous Court of Appeals, finds the statement admissible and upholds the conviction. *People v. Duhs*, 16 N.Y.3d 405, ... N.Y.S.2d .... (March 29, 2011).

In an opinion by Judge Pigott noting characteristics of the hearsay rule, the Court applies the distinction made by the U.S. Supreme Court in the application of the confrontation rule, which seems to come off in the opinion as something like a subdivision of the hearsay rule, at least in this context, and one to which the Supreme Court has attached a special exception known as the "primary purpose" rule. Citing one of the major decisions in point, *Davis v. Washington*, 547 U.S. 813

(2006), the Court explains the importance of determining the "primary purpose" of the kind of question the pediatrician directed to the infant here.

The distinction is between a "testimonial" and "nontestimonial" inquiry. The inquiry here was in the latter class and had the "primary purpose" of assisting the doctor in treating the patient, "so she could render a diagnosis and administer medical treatment".

But what about the physician's obligation to report instances of child abuse? The Court recognizes that, too, but sees it as a "secondary" obligation in this setting. Hence, finds the Court,

> it is of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse.

The result, of course, avoids an actual "confrontation" in the case.

It's interesting to imagine what a "confrontation" would consist of between an injured three-year-old and the adult who injured him. It would apparently entail bringing the child, whatever age he may be at trial time, into the courtroom – or, more likely, and much better, into the judge's chambers – to face the defendant's lawyer. But would chambers be permissible if there's a jury in the case? Would the defendant himself be present, too? Would either the defendant or his lawyer be allowed to ask the infant leading questions? With the defendant present, and were he really an ogre, would it be all that hard to lead the infant? What a job the judge would have in taming that inquiry!

BUFFALO'S WAGE FREEZE

Allowance of One-Step Increase for City Workers Upon Lifting of Wage Freeze Doesn't Revive the Four Steps of Increase That Would Have Applied Had There Been No Freeze

Created by the legislature to address the city's crisis, the Buffalo Fiscal Stability Authority imposed in 2004 a wage freeze on city employees. Lifting the freeze in 2007, the BFSA allowed a one-step increase in municipal salaries, but the unions argued that the lifting of the freeze would also entitle the workers to the four steps of increase they "would have received had the freeze not been imposed". They prevailed on the point in the lower courts, but lose in the Court of Appeals, which finds the city's position more in line with the intent behind the applicable legislation. *Meegan v. Brown*, 16 N.Y.3d 395, ... N.Y.S.2d .... (March 29, 2011).

The legislation is in the Public Authorities Law (§ 3850 et seq.). The Court quotes specially from § 3858 of the law, finding in it power for the BFSA to suspend not only "salary adjustments", but also any "step-ups" that take effect after the date of

the suspension order. Hence step increases, concludes the Court in an opinion by Judge Pigott, "did not accrue during the wage freeze" and thus had and have no existence to give status to after the lifting of the freeze.

Holding otherwise would undermine the purpose of the statute, says the Court, which was to "place the City of Buffalo on sound financial ground over the long term".

UTILITY'S RATE INCREASE APPLICATION

Public Service Commission Had No Ground to Conclude That Utility's Formula for Ascribing Environmental Cleanup Costs Among Its Subsidiaries Was Imprudent

Petitioner P in this Article 78 proceeding is a natural gas utility operating in western New York. It's one of several subsidiaries of National Fuel (NF), which was figuring up the expenses it was facing for environmental "remediation", in conjunction with which it filed notices of "potential" claims with its insurers. A settlement reached with the insurers fell short of covering all of the liability. The issue was what P's share of the settlement proceeds should be.

Two formulae were relevant in this case. In one, an estimate might be made of the actual losses each subsidiary would face based on its particular loss. In the other, the premiums paid by each subsidiary might be used to set up ratios for distributing the insurance proceeds. NF opted for the latter, under which P ended up shortchanged because it turned out to have sustained greater losses than a premium-based allocation would recognize. So P applied to the PSC for a rate increase that would pass its uninsured costs on to its customers.

The PSC rejected NF's choice of the "premiums paid" method as imprudent, but in an Article 78 proceeding the PSC determination is overturned and the use of the "premiums" method upheld by a divided Court of Appeals. *National Fuel Gas Distrib. Corp. v. Public Service Commission of the State of New York*, 16 N.Y.3d 360, ... N.Y.S.2d .... (March 29, 2011; 4-3 decision).

In an opinion by Judge Graffeo, the majority holds that NF did not act imprudently in refusing to determine the actual cleanup expenses that each subsidiary would "ultimately" incur because on the facts available at the time it would have been "too speculative". This made the "premiums paid" alternative "prudent" at the time, holds the Court, and renders the PSC's finding of imprudence "erroneous as a matter of law".

The dissent, by Chief Judge Lippman, would have reversed and held the premiums method an impermissible choice under the circumstances. It would uphold the PSC's view that the apportionment of the insurance proceeds should have been based on the "potential liabilities each subsidiary faced" for the cleanup costs. The dissent's position is that there was "substantial evidence" to support the PSC's

conclusion – see CPLR 7803(4) – and that's as much as the courts are allowed to investigate in an Article 78 proceeding brought against the commission.

The burden of proving that a rate change is "just and reasonable" is on the utility applying for it, the dissent points out, and whether it was just and reasonable must be based on the facts as discernible at the time of the decision, "without the benefit of hindsight". Looking at those facts as of that key time, the PSC had ample basis for concluding that NF acted imprudently by opting for the "premiums paid" standard when it had at hand enough facts for a more realistic assessment of the actual "potential liabilities" of the several subsidiaries.

RENT STABILIZATION LAW

In Adjusting Rents, Rent Guidelines Board Can Direct Higher Increases for Those Apartments That Had No Recent Vacancies

When there's a vacancy, a substantial increase is allowed in the rental of an apartment governed by the Rent Stabilization Law. In those apartments in which there has not been a vacancy for a long while, therefore, the rental experiences no such upward adjustment and remains at a lower non-market figure for a longer period. In one of its annually required reviews of rent levels, the Rent Guidelines Board (RGB) recently distinguished a category of apartments that had had no vacancies for a stated time from those in which vacancies did occur, and allowed modest additional dollar increases in the former beyond the percentage increase that applied to all of the apartments for the year. Two tenants and a tenants' rights organization brought these Article 78 proceedings contesting the power of the RGB to do this. The Court of Appeals upholds the RGB. *Casado v. Markus*, 16 N.Y.3d 329, ... N.Y.S.2d .... (March 24, 2011; 5-2 decision).

In an opinion by Judge Smith, the Court says that the "costs of maintaining an apartment and providing services to its occupant are often not in proportion to historical rents" – a gently phrased observation that at a landlords' convention would be considered the humorous part of the program. The Court adds that even the "small annually-authorized increases ... do not come close to covering increased costs". That brings a round of applause from the convention – a modest round, however, commensurate with the proportionate nature of the annual increase being promulgated.

The petitioners contested even that small increase, which still brings them nowhere near the feared line of market value. They "make no claim that the minimum increases are unreasonable or unfair" – recognizing a loser when they see one – "but assert that the RGB lacks the power to permit them". It's on that point that they lose.

The law enumerates three classes of regulated housing: apartments, hotel units, and lofts. The petitioners argue that the RGB can address each class as a whole, but "is

forbidden to draw any distinctions within" a given class, which is what the petitioners say the RGB has done within the "apartments" class here.

The Court sees no need for such a rigid construction. It says that requiring rent regulation by classes, as the law does, says "nothing at all about whether, or by whom, multiple levels of rent increases may be permitted within each class". The legislature "assumed that the RGB would make common-sense distinctions", which is all the RGB has done in this case.

In support of that conclusion, the Court points to other kinds of distinctions that have often been made "within" a class, like "fuel adjustment surcharges", and differences based on whether or not the landlord includes electricity or heat in the rent. The distinctions made here in the *Casado* case are of a piece with those.

But those, respond the petitioners, can stand only because the "the power to create them has never been challenged". We could have challenged them, add the petitioners, "but chose not to" – an act of landlord-indulgence absolutely unknown in New York City tenant circles and destined to supply additional humor at the convention.

The dissenting opinion, written by Judge Ciparick, agrees with the petitioners' argument that the existing law, and existing principles of administrative law in general, withhold such power from the RGB. While this attempt at "evenly distributing maintenance costs" among various regulated apartments may appeal to what the majority calls "common-sense", such an attempt at "equalization is anathema to the purpose of the Rent Stabilization Law".

MAJOR DECISION ON LONGARM JURISDICTION

UPLOADING NEW YORK PUBLISHER'S BOOKS ONTO INTERNET EVEN OUTSIDE STATE GIVES COPYRIGHT INFRINGEMENT JURISDICTION TO NEW YORK COURTS

Noting the unique impact that the use of the Internet has in the realm of copyright infringement, the New York Court of Appeals, applying a key provision – CPLR 302(a)(3)(ii) – of New York's longarm statute, distinguishes earlier decisions and sustains jurisdiction in favor of a New York publisher against a defendant (D) who uploaded the publisher's books at D's own west coast base. *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, ... N.Y.S.2d .... (March 24, 2011).

A statement made by the Court in summing up can furnish a good introduction for our digest here:

> In sum, the role of the Internet in cases alleging the uploading of copyrighted books distinguishes them from traditional commercial tort cases where

> courts have generally linked the injury to the place where sales or customers are lost.

Other cases applying the statute often stress as one element the place of the tortious conduct, but in a unanimous opinion by Judge Graffeo the Court explains that

> [t]he location of the infringement in online cases is of little import inasmuch as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection ....

CPLR 302(a)(3)(ii) requires the convergence of several elements to support New York jurisdiction of a claim against a nondomiciliary, which D was in *Penguin*. Two of them are that D committed a tortious act outside New York and that the act caused injury to the plaintiff (P) within New York. The latter was the issue here in *Penguin*: whether New York could be deemed the place where P sustained injury. To conclude that it could, the Court had to clear away some earlier precedents that could be taken as going the other way. It did.

Perhaps the major of these earlier cases is the Court's 1980 *Fantis* decision, in which P and D were competitors in wholesaling imported cheese. D was a New York corporation. D impleaded X, a nondomiciliary importer, alleging conversion, but it was shown that the goods at issue were shipped f.o.b. Greece and were addressed to Chicago. Apparently all D could show was consequential damage to itself in New York. This did not suffice for jurisdiction of the impleaded X because, the Court held, the original injury must occur in New York, and in *Fantis* it was not established that it did.

The importation of the physical product in *Fantis* offers no parallel to the electronic product involved in *Penguin* under the New York statute, the Court finds; here the "copyright holder ... suffers something more than the indirect financial loss" experienced in *Fantis*. In

> online copyright infringement cases ... the place of uploading is inconsequential and it is difficult, if not impossible, to correlate lost sales to a particular geographic area.

The Court finds this kind of "digital piracy" unique, even just for a jurisdictional measure. (For that the merits of the claim are assumed, unless patently phony.) The only consequence of the Court's holding is that New York law requires D to come to New York to defend the case; that P is not to be forced to cross a continent to sue D at its home base.

The case arose on a certified question from the Second Circuit. The federal district court had held that P's injury was sustained only in the west coast states where D put the books on its website, concluding that the Internet played no role in determining

the situs of the injury "since the claimed infringement occurred in Oregon or Arizona".

The Court here obviously finds that notion an all too casual disregard of the enormous reach and potency of the Internet. People anywhere in the nation, and perhaps the world, the Court observes, can find and read P's books on D's Internet site. The Court remarks that the Internet is "by its nature intangible and ubiquitous"; that "the rate of e-book piracy" has expanded greatly with the proliferation of electronic devices; and that publishers, especially of "scholarly" works that are at best only "marginally profitable", need the "economic incentives" that would be severely undermined by Internet theft of the kind alleged here.

Ironically, even with respect to jurisdiction, the decision is not the last word. The supervening and celebrated federal requirement that the jurisdictional exercise comport also with "traditional notions of fair play and substantial justice" must also be examined, but that's for the Second Circuit, with the New York answers now in tow, to decide for itself after remand.