CPLR Update

Bridging the Gap | August 2018

New York State Bar Association Committee Continuing Legal Education

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Speaker: **David L. Ferstendig, Esq.**
Law Offices of David L. Ferstendig, LLC.
New York City

Date: Thursday, August 16, 2018

Time: 9:05 to 10:20 a.m.

Where: Hotel Pennsylvania
401 7th Avenue
New York, NY 10001

DAVID L. FERSTENDIG BIO

David L. Ferstendig, currently a member of Law Offices of David L. Ferstendig, LLC, New York, was a founding officer of the law firm Breindel & Ferstendig, P.C. He litigates a spectrum of civil and commercial matters, including breach of contract, products liability, toxic tort, insurance and reinsurance coverage, jewelers' block, political risk, environmental liability, trade secret, and professional indemnity. Mr. Ferstendig is also an adjunct law professor at Brooklyn Law School and New York Law School, where he teaches New York Practice. He is the General Editor of Weinstein, Korn & Miller New York Civil Practice: CPLR (LexisNexis), the premier 15-volume litigation treatise cited regularly as authoritative by New York State and Federal courts; author of Ferstendig, Chase New York CPLR Manual (LexisNexis) and LexisNexis AnswerGuide New York Civil Litigation; and General Editor of CPLR Practice Insights, published in New York Consolidated Laws Service (LexisNexis). He has written articles for the New York Law Journal, authored a law review article entitled: "A Practitioner's Continued Uncertainty: Disclosure from Nonparties," 74 ALB. L. REV. 731 (2010/2011) and was a panelist at New York University School of Law in March 2013 for the symposium entitled "The CPLR at Fifty: Its Past, Present, and Future" which resulted in the publication of his remarks, "The CPLR: A Practitioner's Perspective." Mr. Ferstendig has co-authored two law review articles with Professor Oscar Chase of NYU Law School entitled: Chief Judge Kaye: Improving the Pace and Integration of Litigation, 92 N.Y.U. L. REV. 11 (2017) and Should Counsel for a Non-Party Deponent be a "Potted Plant"?, 2014 N.Y.U. J. Legis. Pub. Pol'y Quorum 52. Mr. Ferstendig has provided expert testimony interpreting the meaning and application of New York law and has been quoted as an expert on legal procedure in New York in The Washington Post. He was a 2015 and 2011 recipient of New York Law School's Otto L. Walter Distinguished Writing Award. A graduate of New York University School of Law, Mr. Ferstendig has lectured on civil practice issues for bar associations, the New York State Judicial Institute and LexisNexis. He is a member and past Chair of the CPLR Committee for the New York State Bar Association. Effective with the May, 2015 edition, Mr. Ferstendig became the Editor of the New York State Law Digest. He was selected by the New York State Board of Law Examiners as a faculty member presenting Civil Practice and Procedure to 2016 bar examination candidates as part of the New York law course.

Table of 2018 CPLR Amendments

CPLR Section or Rule	Amendment	Effective Date
NY CLS CPLR 203(g)(2) and 214-a	CPLR 214-a and 203(g) were amended to significantly alter the limitation period for claims alleging failure to diagnose cancer or a malignant tumor. CPLR 214-a was amended to provide that the two and a half year limitation period in cases alleging a failure to diagnose cancer or a malignant tumor, begins to run from the 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. In addition, CPLR 203(g)(2) was added to apply to notices of claim and statutes of limitation for actions against the state (see Court of Claims Act § 10) and municipal defendants (see General Municipal Law § 50-e and § 50-i). It parallels the CPLR 214-a amendment. Includes revival provision.	1/31/2018
NY CLS CPLR 214-b	Amended to extend the expiration date for renewal of time barred Agent Orange claims to June 16, 2020.	7/1/2018
NY CLS CPLR 2111	Amended to extending 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.	7/24/2018
NY CLS CPLR 5003-b	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.	7/11/2018
NY CLS CPLR 7515	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	7/11/2018

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.

Table of 2017 CPLR Amendments

CPLR Section or Rule	Amendment	Effective Date
NY CLS CPLR § 503	Amended to authorize venue in "the county in which a substantial part of the events or omissions giving rise to the claim occurred."	10/23/2017
NY CLS CPLR § 1101	Amended to extend the expiration dates for subsections (d) and (f) with respect to the waiver of the fee in certain cases and the fees for inmates to September 1, 2019.	4/20/2017
NY CLS CPLR § 2111	Amended to extend the expiration date for subsection (b) 2-a to September 1, 2018.	7/24/2017
NY CLS CPLR § 2112	Amended to eliminate present exclusions from mandatory e-filing in the Appellate Division.	7/24/2017
NY CLS CPLR R 3408	Amended to add Para (a)(2) and clarify that Para (a)(1) shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless (i) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure, or (ii) the last surviving borrower's successor in interest, who was residing in the property when the last surviving borrower died, owns or has a claim to the ownership of the property subject to foreclosure. In addition, the amendment empowers the superintendent of financial services to promulgate rules as are necessary to implement these provisions.	4/20/2017
NY CLS CPLR R 4518	Amended to provide that hospital records located in a jurisdiction other than New York State, may be admissible "by either a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician."	8/21/2017
NY CLS CPLR R 5521	Amended to reference Public Officers Law § 89(4)(d), relating to an order requiring disclosure of documents under the Freedom of Information law.	5/27/2017

New Appellate Division Uniform Rules

A new set of Uniform Rules applicable to all four Departments of the Appellate Division (Practice Rules of the Appellate Division) will become effective on September 17, 2018. See 22 NYCRR Part 1250. In addition, each Department has enacted its own new set of supplemental rules. See 22 NYCRR Part 600 (First Department); Part 670 (Second Department); Part 850 (Third Department – its prior rules were in Part 800); and Part 1000 (Fourth Department). The new Practice Rules of the Appellate Division and individual Department rules are attached.

New E-Filing Rules Applicable to 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 (attached). For now, the applicable actions covered – which differ from Department to Department – are 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 will be increased in the coming months.

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CPLR UPDATE

By: David L. Ferstendig

STATUTE OF LIMITATIONS

CPLR 202 - Borrowing statute

David L. Ferstendig, *Court of Appeals Agrees That Contractual Choice-of-Law Provision Does Not Preclude Application of Borrowing Statute*, 692 N.Y.S.L.D. 1-2 (2018).

Court of Appeals Agrees That Contractual Choice-of-Law Provision Does Not Preclude Application of Borrowing Statute

The Provision Reflected the Parties' Intent to Apply New York's Substantive and Procedural Law and CPLR 202 Is Part of That Procedural Law

In the November, 2016 edition of the Digest, we discussed the First Department's decision in *Ontario, Inc. v. Samsung C&T Corp*., 144 A.D.3d 122 (1st Dep't 2016). There, the court held that a broadly drawn contractual choice-of-law provision did not preclude the application of New York's borrowing statute, contained in CPLR 202. It found that while the choice-of-law provision prohibited a conflict of law analysis, the borrowing statute was not a choice-of-law directive, but a statute of limitations. Here, we are dealing with the Court of Appeals' affirmance. 2018 N.Y. Slip Op. 04274 (June 12, 2018).

As we previously noted, CPLR 202 provides that where a nonresident brings an action in New York with respect to a claim accruing outside of the state, the applicable statute of limitations is the lesser of New York's limitation period and the limitation period where the cause of action accrued. The contractual choice-of-law provision here states in relevant part:

This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York. You hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York and of the United States District Courts located in the County of New York for any lawsuits, actions or other proceedings arising out of or relating to this Agreement and agree not to commence any such lawsuit, action or other proceeding except in such courts. (Emphasis added.)

It was undisputed that the plaintiff's claims accrued in Ontario, that Ontario's limitation period was two years, in contrast to the applicable New York six-year statute of limitations, and that if Ontario's two-year period applied, the action was time-barred

The Court of Appeals noted that generally contractual choice-of-law provisions apply to substantive issues and statutes of limitations are procedural. In this case, however, the parties agreed with the Appellate Division's finding that the contract should be interpreted to reflect the parties' intent to apply both the substantive and procedural law of New York State to their dispute. The plaintiff argued that because the choice-of-law provision specifically stated that the contract would be "enforced" under New York law, it indicated the parties' intent to apply New York's procedural law except for its statutory choiceof-law provisions. The plaintiff claimed that CPLR 202 was such a statutory choice-of-law provision. The Court of Appeals rejected that argument, holding

> that the mere addition of the word "enforced" to the NDA's choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York's six-year statute of limitations in CPLR 213 (2) to the exclusion of CPLR 202. Rather, the parties have agreed that the use of the word "enforced" evinces the parties' intent to apply New York's procedural law. CPLR 202 is part of that procedural law, and the statute therefore applies here.

Id. at ∗1.

The Court distinguished the statutory choice-of-law provision it dealt with in Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466 (2015), which it characterized as "a codification of a long-standing common-law conflict-of-laws principle" and CPLR 202, which "is in derogation of the long-standing common-law conflicts principle that the law of the forum applies to procedural issues such as the statute of limitations." Ontario, 2018 N.Y. Slip Op. 04274 at ∗1. Thus, it rejected the plaintiff's plea "to broadly redefine a 'statutory choice-of-law directive' as any statute that may require the application of the law of another state." Id.

The Court also dismissed plaintiff's argument that it was "irrational" to conclude that the parties intended CPLR 202 to apply:

> As explained, the borrowing statute is a stable fixture of New York's procedural law, of which these sophisticated commercial entities were presumably aware when they chose New York's procedural law to govern their arrangement. Notably, the NDA was signed in 2008, several years before we decided Ministers and Missionaries and therefore before the phrase "statutory choice-of-law directive" entered our vocabulary. It is therefore reasonable to conclude that the parties may have intended for CPLR 202 to apply, perhaps for strategic reasons, or because they did not think at the time that it was possible to contract around the application of statutes they believed to be statutory choice-of-law directives, or otherwise.

Id. at ∗1–2.

The Court stressed that while forum shopping was not a consideration in this case because the parties agreed contractually that New York was the exclusive forum, and forum shopping is a primary purpose of CPLR 202, it is not the statute's only purpose. In fact, it also adds clarity and certainty to the law.

Because the parties did not expressly agree that New York's six-year limitation period governed or that CPLR 202 did not apply, the Court had

> no occasion to address whether enforcement of such a contractual provision would run afoul of CPLR 201 or General Obligations Law § 17-103, or would otherwise violate New York's public policy against contractual extensions of the statute of limitations before accrual of the cause of action. We therefore express no opinion on that issue (citation omitted).

Id. at ∗2.

CPLR 202 - Borrowing statute

David L. Ferstendig, *Court Holds that Cayman Islands Rule is Procedural in Nature*, 686 N.Y.S.L.D 3 (2018).)

Court Holds That Cayman Islands Rule Is Procedural In Nature

Thus, Under Choice of Law Principles, It Did Not Apply To Derivative Action Brought In New York

The issue in Davis v. Scottish Re Group Ltd., 2017 N.Y. Slip Op. 08157 (November 20, 2017), was whether a particular Cayman Islands Rule was substantive and thus applied under choice of law principles to an action brought here.

Some basic principles first when analyzing choice of law issues. First, under New York common law principles, the forum's procedural rules govern. Moreover, the law of the forum generally governs the determination as to whether a particular foreign law is procedural or substantive in nature, although the foreign jurisdiction's characterization of the law is instructive, but not dispositive. See Tanges v. Heidelberg N. Am., Inc., 93 N.Y.2d 48, 54 (1999).

Here, the plaintiff commenced an action asserting both direct and derivative claims against various defendants, including Scottish Re Group Limited (Scottish Re), a Cayman Islands company, formerly a reinsurer. Rule 12A, contained in Order 15 of the Cayman Islands Grand Court Rules 1995, provides that a plaintiff who brings a contested derivative action in the Cayman Islands is required to apply to the Cayman Islands Grand Court for leave to continue the action. The Rule is intended to avoid vexatious or unfounded litigation. If Rule 12A was determined to be substantive, then under choice of law principles, the plaintiff would be barred from bringing this action in New York (having failed to seek leave from the Cayman Islands Grand Court).

The parties agreed that Cayman Islands substantive law governed the merits of this action. Plaintiff argued Rule 12A was inapplicable because it

> is a procedural rule governing the way in which the parties appear before the Cayman courts, what manner of evidence shall be presented and, should a court make a determination to grant the plaintiff leave to continue, the next steps to be taken toward ultimate resolution of a derivative action.

Davis, 2017 N.Y. Slip Op. 08157, at ∗3

The defendants countered that the rule is a "substantive 'gatekeeper' in derivative actions involving Cayman Island companies." *Id.* As a result, a plaintiff who files a derivative action anywhere in the world on behalf of a Cayman Islands-organized company is required to comply with Rule 12A and seek leave from the Cayman Islands Grand Court.

The Court first looked to the language of Rule 12A, which talks of derivative actions "commenced by writ," and states that an application to the Grand Court is required when the defendant has "given notice of intention to defend." The Court noted that these procedures are specific to Cayman Islands litigation; actions in New York are not commenced by writ, and the Grand Court rules have their own specific method for how a defendant acknowledges service of the writ. Thus, it concluded that Rule 12A was procedural and did not apply in New York courts. The Court added that there is no suggestion in the rule's language that it applies to derivative actions brought on behalf of Cayman Island companies outside the Cayman Islands.

The Court here found that the defendant's reliance on the Court's decision in Tanges, supra, was misplaced. In Tanges, answering a certified question from the Second Circuit, the Court of Appeals applied a Connecticut limitation period in products liability actions "barring any action commenced later than 10 years from the date the defendant no longer had control of the injury-causing product." Tanges, 93 N.Y.2d at 54–55. In doing so, the Court found the limitation period to be a statute of repose, which is substantive in nature, as opposed to a statute of limitations, which is procedural:

> In Tanges, we reasoned that statutes of limitation are generally treated as procedural in New York because they pertain "to the remedy rather than the right," meaning that when the allotted time period under the statute has expired, the plaintiff loses its remedy, although it continues to have the underlying right.

Statutes of limitation begin to run when a cause of action accrues. Statutes of repose are "theoretically and functionally" different. A statute of repose begins to run when a specified event takes place, and can expire before a possibly valid cause of action ever accrues. The repose period creates an "absolute barrier" to a plaintiff's right of action. Given this potential impact on the right of a plaintiff to bring a cause of action, the Tanges Court held that repose statutes "exhibit a substantive texture, nature and consequence," different from regular statutes of limitation, and thus

are substantive. In other words, unlike a statute of limitations, a statute of repose "envelop[es] both the right and the remedy (citations omitted)." Davis, 2017 N.Y. Slip Op. 08157, at ∗5.

The Court here stated that Rule 12A was not functionally similar to a statute of repose, since it did not nullify a plaintiff's right to ever bring an action. Rather,

> allows any plaintiff the right to commence a derivative action, and sets forth a procedural mechanism for a threshold determination of merits and standing. Certainly, if a plaintiff does not seek leave to continue, the rule creates an impregnable barrier to continuing the derivative action, forestalling any remedy, just as a statute of limitations forecloses a plaintiff who sleeps on its rights from obtaining a remedy. However, Rule 12A itself neither creates a right, nor defeats it. Rather, it is the initial decision by the Grand Court judge, made after an evaluation of the plaintiff's complaint using the substantive law, along with the defendant's evidence, that may terminate the action.

Id. at ∗5–6.

Finally, the Court maintained that the general policy considerations described in Tanges compelled the Court here to conclude that Rule 12A is procedural. Finding that Rule 12A is procedural does not impose a burden on either the New York or Cayman Islands courts. However, if the rule was determined to be substantive

> it is unclear what procedural path a party seeking to bring a derivative action in New York on behalf of a Cayman company would follow to comply with Rule 12A. Must the party first proceed by writ in the Grand Court and then discontinue the Cayman action to return to, or commence its action here in New York? Would the ruling by the Grand Court that there was a sufficient showing of merit be binding on a New York court on a motion to dismiss or for summary judgment? Rule 12A provides no answers.

Id. at ∗6.

As a result, the Court concluded that plaintiff's failure to first seek leave from the Cayman Islands Grand Court did not bar his derivative claims here.

Relation Back

CPLR 203(b) - Relation doctrine not applicable because there was no unity of interest

Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc., 61 A.D.3d 1263 (3d Dep't 2018) ("Plaintiffs failed to establish the second prong of the relation back doctrine. 'Unity of interest requires a showing that the judgment will similarly affect the proposed defendant, and that the new and original defendants are vicariously liable for the acts of the other' (citations omitted). The proposed

amended complaint alleges that Treiber — like all brokers — engaged in a cooperative strategy with CRM to market the trust; however, it contains no allegations that there was a jural, or legal, relationship between Treiber and CRM that would make either vicariously liable for the acts of the other. Thus, Supreme Court properly denied plaintiffs leave to amend the complaint to assert a negligence cause of action against Treiber.").

Jones v. Seneca County, 154 A.D.3d 1349, 63 N.Y.S.3d 620 (4th Dep't 2017) ("Contrary to plaintiff's further contention, we conclude that the court properly denied her motion seeking leave to amend her complaint to add respondent as a defendant. Plaintiff failed to establish that respondent and defendant are united in interest, and thus plaintiff is not entitled to the benefit of the relation back doctrine (citations omitted). Here, respondent and defendant are not united in interest inasmuch as defendant cannot be held vicariously liable for the acts of its Sheriff's deputies (citations omitted). In view of our determination, we do not address the alternative ground upon which the court denied the motion.").

CPLR 203(c) - Relation back - intentional decision not to name proposed defendant is not a mistake

Ahrorgulova v. Mann, 144 A.D.3d 953, 42 N.Y.S.3d 203 (2d Dep't 2016) ("The plaintiff's intentional decision not to name Perl as a defendant in the original complaint, even though she performed the subject medical procedure, cannot be viewed as the kind of inadvertent mistake as would trigger the application of the relation-back doctrine (citation omitted).").

CPLR 203(d) - Otherwise untimely defense or counterclaim is not barred, and may be asserted as an offset only

Matter of Jenkins v. Astorino, 155 A.D.3d 733, 64 N.Y.S.3d 285 (2d Dep't 2017) ("The language of CPLR 203(d) is based on the equitable doctrine of recoupment (citation omitted). By the plain language of the statute, an otherwise untimely defense or counterclaim is 'not barred' only 'to the extent of the demand in the complaint' (citation omitted). Accordingly, CPLR 203(d) does not permit a defendant to obtain affirmative relief by way of a counterclaim (citations omitted). . . . Contrary to the Supreme Court's conclusion, the defendants' answer does not seek any affirmative relief. Rather, it raises a defense that is 'predicated on [an] act or fact growing out of the matter constituting the cause or ground of the action brought' by the plaintiffs (citation omitted). In other words, the assertion that the Local Law was not validly enacted in accordance with the applicable referendum procedures specified in state and local law 'arises from, and directly relates to' the plaintiffs' claim that the Local Law was, in fact, enacted in accordance with the applicable referendum procedures and that they were therefore entitled to a declaration that the Local Law was valid (citations omitted). Accordingly, the court erred when it, in effect, dismissed the affirmative defense contained in the defendants' answer alleging that the Local Law was not validly enacted on the ground that the affirmative defense was time-barred (citation omitted). Since the merits of the defendants' affirmative defense were not reached by the court, it should not have awarded judgment in favor of the plaintiffs.").

CPLR 203(f) - Majority and dissent disagree as to whether the original timely pleading alleging gender discrimination gave notice of occurrence plaintiff seeks to prove in amended (otherwise untimely) pleading alleging discrimination on the basis of sexual orientation

O'Halloran v. Metropolitan Transp. Auth., 154 A.D.3d 83, 60 N.Y.S.3d 128 (1st Dep't 2017) ("**Compare majority:** The narrow issue on appeal is whether the motion court providently permitted plaintiff to amend her complaint to include belated claims of discrimination on the basis of sexual orientation on the ground that those claims related back to the original pleading, which timely alleged, inter alia, discrimination on the basis of gender. We hold that it did, because the original pleading gave defendants notice of the occurrences plaintiff seeks to prove pursuant to her amended complaint (see CPLR 203[f]), and defendants will not suffer undue prejudice as a result of the delay (see CPLR 3025[b])."; a**nd dissent:** "With regard to whether the relation-back exception to the timeliness requirement is applicable in this case, while the original complaint included factual allegations in support of its claims of gender and disability discrimination, as well as retaliation, it contained no factual allegations as to any transactions or occurrences attributed by plaintiff to discrimination on the basis of sexual orientation. Indeed, although plaintiff filed a series of complaints both within her own agency and with administrative agencies and courts on both the federal and state level, she never asserted a claim of sexual orientation discrimination in any of those complaints. Neither does the record reveal any mention by her of sexual orientation discrimination in two days of deposition testimony. Thus, defendants were provided with no notice of any transactions or occurrences that plaintiff intended to use to prove the sexual orientation discrimination claims she now seeks to add by way of her proposed amended complaint. In any event, even actual notice of a potential sexual orientation claim would not suffice to permit plaintiff to invoke the relation-back doctrine, because notice of the potential claim, including the conduct with which defendants would be charged in the new claim, must be provided in the original pleading itself (citations omitted).").

CPLR 205(a) - Six Month Extension

CPLR 205(a) - Termination of action, 6 month extension; 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, 67 N.Y.S.3d 328 (2d Dep't 2017), (the first foreclosure action was dismissed in January 2013 as a result of plaintiff's failure to appear at a mandatory conference. The trial court twice denied plaintiff's motion to vacate the dismissal, and in July 2015, the Appellate Division affirmed. In August 2015, plaintiff brought a second foreclosure action against the defendant, among others. The Appellate Division was unanimous

in finding that the sua sponte dismissal of the first action was not due to a neglect to prosecute because the order did not set forth any specific conduct that demonstrated a general pattern of delay. However, the court split 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). In finding the second action timely, the majority found that because the trial court's sua sponte dismissal gave rise to a motion to vacate and an appeal from the order deciding that motion, the January 2013 order did not terminate the action. The dissent maintained that that the first action was terminated upon the January, 2013 dismissal. It asserted that prior case law in this area mandated that conclusion.).

CPLR 205(a) - Applied even though plaintiffs in first and second actions were different

David L. Ferstendig, *Majority of Second Department Holds That CPLR 205(a) Applies Even Where Plaintiffs in First and Second Actions Are Different,* 677 N.Y.S.L.D. 3-4 (2017).

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

We have referred to CPLR 205(a) on several occasions in the past, most recently in the July 2016 Law Digest. As you may recall, CPLR 205(a) provides that if an action is timely commenced and is terminated in a manner other than that prescribed by the statute (for example, a dismissal for neglect to prosecute the action), the plaintiff can commence a second action upon the same transactions or occurrences or series of transactions or occurrences within six months after termination of the first action. Service upon the defendant(s) must also be effected within that six-month period.

Wells Fargo Bank, N.A. v. Eitani, 47 N.Y.S.3d 80 (2d Dep't 2017), is a mortgage foreclosure action. The first action was commenced by Argent Mortgage Company, LLC ("Argent"); however, during the course of the action, Argent assigned and delivered the adjustable rate note and mortgage to Wells Fargo Bank, N.A., as trustee ("Wells Fargo"). In addition, the defendant Eitani conveyed by deed to the defendant-appellant David Cohen the subject property while the action was pending. Almost eight years after the first action was commenced, the Administrative Judge, "on a routine clearing of the docket," issued an order dismissing the action "as abandoned pursuant to CPLR 3215(c), without costs or prejudice." *Id*. at 82. The handwritten caption on the form order still noted Argent as the plaintiff, even though Argent had divested itself of the note and mortgage to Wells Fargo more than five years earlier.

Within four months of the dismissal, Wells Fargo commenced this action and served the defendant pursuant to CPLR 205(a). The questions presented were (1) whether the ministerial dismissal of the first action fell under the neglect to prosecute exclusion, and (2) if the plaintiff in this action, Wells Fargo, could take advantage of CPLR 205(a), even though it was not the named plaintiff in the first action.

The Second Department unanimously agreed that the ministerial dismissal of the first action without prejudice was not "a neglect to prosecute" under the statute. The majority stated that the order tracked the language of CPLR 3215(c) (not CPLR 3216), stating that the plaintiff had failed to proceed to enter a judgment within one year of the default, and that the "[t]ime spent prior to discharge from a mandatory settlement conference [was not] computed in calculating the one year period." *Id*. at 84. In addition, the order did not comply with CPLR 205(a)'s requirement, added via a 2008 amendment, that where the dismissal is for a neglect to prosecute, "the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." *Id*. at 89.

The second issue, which the majority characterized as "more novel," split the court. The majority focused on the fact that Argent had transferred the note and mortgage to Wells Fargo and recorded the assignment during the pendency of the first action. As a result,

> Wells Fargo became Argent's successor in interest with respect to the right to foreclose under the note and mortgage (citations omitted). As the assignee of the mortgage, Wells Fargo had a statutory right, pursuant to CPLR 1018, to continue the prior action in Argent's place, even in the absence of a formal substitution (citations omitted). Since, by virtue of CPLR 1018, the prior action could have been continued by Argent's successor in interest, Wells Fargo was, in actuality, the true party plaintiff in the prior action, and is entitled to the benefit of CPLR 205(a).

Id. at 84.

The majority also referred to the Court of Appeals' recent reaffirmation that CPLR 205(a)'s "broad and liberal purpose is not to be frittered away by any narrow construction." *Id*. at 85 (citing to *Malay v. City of Syracuse*, 25 N.Y.3d at 327). It distinguished the decision in *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52 (2007), where the Court of Appeals stated that, outside of the representative context (that is, an executor or administrator, if the plaintiff dies), it had not previously read "'the plaintiff' to include an individual or entity other than the original plaintiff." 9 N.Y.3d at 57. However, in Reliance, the corporate affiliates involved in the two actions sought to enforce different interests. Here, as noted above, the majority found that after assignment of the loan and mortgage, Wells Fargo became Argent's successor in interest during the pendency of the first action. Moreover, both Argent and Wells Fargo sought to enforce the same right to foreclose on the subject property based on the same default on the subject note and mortgage. Thus, this case "may be a rare circumstance in which dismissal of a prior action commenced by a different party plaintiff justifies application of CPLR 205(a) to recommencement by a successor in interest to the prior plaintiff." Wells Fargo Bank at 86. The majority concluded that its decision was consistent with CPLR 205(a)'s intended purpose to remedy a timely action terminated for a technical defect.

The dissent asserted that CPLR 205(a) cannot apply where the second action is commenced by a plaintiff other than the one that brought the first action. It found that, just as in *Reliance*, here the entities are not the same, "Wells Fargo is not Argent in a different capacity," and Wells Fargo is not seeking to vindicate Argent's rights in this action. Moreover, "Wells Fargo is not continuing

Argent's action in Argent's name, and Wells Fargo was not substituted for Argent in that action." *Id*. at 91.

CPLR 207- Absence Toll

CPLR 207 - Absence toll did not apply

Schwartz v. Chan, 75 N.Y.S.3d 31 (1st Dep't 2018) ("Plaintiff's claims are time-barred since they were brought more than a year after the allegedly offending statements were published (citation omitted). Plaintiff argues, for the first time on appeal, that his time to commence the action was tolled by CPLR 207. This argument is unpreserved and in any event unavailing, since plaintiff failed to show that jurisdiction over defendant could not be obtained without personal service to her within the state (citation omitted), i.e., that it was or would have been a 'practical impossibility' for him to serve her while she was outside the state, either in England or in New Jersey (citations omitted). Plaintiff's contention that defendant lied about her address in an effort to evade service is unsubstantiated by the record.").

CPLR 208 - Disability toll

CPLR 208 - Disability toll applies as decedent was under legal disability from day of accident until the disability was removed by his death. K*ealos v. State of New York,* 150 A.D.3d 1211, 55 N.Y.S.3d 411 (2d Dep't 2017).

CPLR 212- Ten year statute of limitations

CPLR 212 - Ten year statute of limitations and adverse possession

Slacer v. Kearney, 151 A.D.3d 1602, 57 N.Y.S.3d 255 (4th Dep't 2017) ("It is well settled that an adverse possessor gains title to occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to CPLR 212 (a) (citations omitted)… Here, plaintiff gained possession of the disputed land when she purchased her property in 1986 and continued to possess the disputed land for 10 years; thus, so long as the other elements of adverse possession have been met, plaintiff acquired legal title to the disputed land in 1996. Defendant contends that plaintiff was required to commence a judicial action after the requisite 10-year period passed, i.e., sooner than 2014, in order to gain title to the disputed land. We reject that contention on the ground that 'RPAPL 501 (2), as amended, recognizes that title, not the right to commence an action to determine title, is obtained upon the expiration of the limitations period' (citation omitted). As we explained in Franza, '[A]dverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests [the owner] of his [or her] estate' . . . Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor . . . Title to property may be obtained by adverse possession alone, and [t]itle by adverse possession is as strong as one obtained by grant *(id.)*. Contrary to defendant's contention, plaintiff had no legal obligation to take any legal action to obtain title to the disputed

land after 1996 inasmuch as title vested with her that year upon the expiration of the 10-year period.").

CPLR 213 – Six-year statute of limitations

CPLR 213 - Plaintiff's challenge is to substance of the Local Law and is therefore subject to six-year statute of limitations

Matter of Weikel v. Town of W. Turin, 2018 NY Slip Op 04876 (4th Dep't 2018) ("Contrary to plaintiff's contention and the court's determination, to the extent that plaintiff seeks a declaration that the presumptively valid Local Law is invalid (citations omitted), plaintiff's challenge is to the substance of the Local Law and is therefore subject to the six-year statute of limitations pursuant to CPLR 213 (1) (citations omitted).").

CPLR 213 - Where mortgage holder accelerates entire debt by a demand, six-year statute of limitations begins to run on the entire debt

Wilmington Sav. Fund Socy., FSB v. Gustafson, 160 A.D.3d 1409 (4th Dep't 2018) ("We agree with plaintiff that defendants failed to meet their initial burden of establishing that the action is time-barred. Where, as here, a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the six-year statute of limitations begins to run on the date that each installment becomes due (citations omitted). If, however, the mortgage holder accelerates the entire debt by a demand, the six-year statute of limitations begins to run on the entire debt (citations omitted). Here, defendants' own submissions in support of the motion establish that, although another entity purported to accelerate defendants' entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt (citations omitted). Although this mortgage foreclosure action therefore is not time-barred, we note that, 'in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [and 90-day] period immediately preceding its commencement of this action' (citations omitted).").

CPLR 213 - Breach of contract claims accrue at the time of the breach, even where damages accrue at a later date

Lebedev v. Blavatnik, 144 A.D.3d 24, 38 N.Y.S.3d 159 (1st Dep't 2016) ("The breach of contract and joint venture claims 'accrue at the time of the breach,' even in the event that the damages do not accrue until a later date (citation omitted). A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation — i.e., once damages are sustained (citation omitted). The statute of limitations on a breach of contract or joint venture cause of action is six years (citations omitted). The statute of limitations on a breach of fiduciary duty claim is three years where (as here) money damages are sought (citations omitted). This action was commenced within both limitations periods, because defendants 'had a recurring obligation to pay plaintiff his

. . . share of the profits generated by' the joint venture (citations omitted). A new claim accrued when the obligation to do so was allegedly breached in 2013.").

CPLR 213-To determine the statute of limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought

Wells Fargo Bank, N.A. v. Burke, 155 A.D.3d 668, 64 N.Y.S.3d 228 (2d Dep't 2017) ("Here, the defendants established, prima facie, that the causes of action seeking declarations that the plaintiff had a mortgage on the property under the doctrines of equitable mortgage and equitable subrogation were barred by the six-year statute of limitations. 'In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' (citations omitted). 'If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action' (citation omitted). A cause of action seeking to establish a lien pursuant to the doctrine of equitable mortgage or the doctrine of equitable subrogation is governed by a six-year statute of limitations (citations omitted). Those causes of action accrued no later than June 16, 1997, when the mortgage and note were made (citation omitted) and, therefore, those causes of action, commenced in 2014, are untimely. In opposition to the defendants' motion, the plaintiff failed to demonstrate the existence of an issue of fact as to whether the relevant statutes of limitation were tolled or were otherwise inapplicable (citation omitted). Accordingly, those branches of the defendants' motion which were pursuant to CPLR 3211(a)(5) to dismiss the causes of action seeking declarations that the plaintiff had a mortgage on the property under the doctrines of equitable mortgage and equitable subrogation should have been granted.").

CPLR 213 - Fraud-issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud involves a mixed question of law and fact

Berman v. Holland & Knight, LLP, 156 A.D.3d 429, 66 N.Y.S.3d 458 (1st Dep't 2017) ("The two-year discovery provision does apply to actual fraud (first cause of action). '[T]he issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud . . . involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact' (citation omitted). One cannot say, as a matter of law, that the Internal Revenue Service's July 2007 deficiency notice, which mentioned only nonparty Derivium, placed plaintiffs on inquiry notice of defendant's alleged fraud (citation omitted). Plaintiffs plausibly allege that, until defendant produced its file on January 8, 2015 in response to a motion to compel in Tax Court, they had no inkling of its purported fraud (citation omitted). Unlike the subprime crisis in Aozora Bank, Ltd. v Deutsche Bank Sec. Inc. (citation omitted) (cited by defendant), Derivium's fraud was not common knowledge.").

CPLR 213(8) - Plaintiff established that he could not, with reasonable diligence, have discovered the fraud until 2013, when he learned for the first time that he was the beneficiary of a structured settlement from which he was entitled to receive millions of dollars in monthly and periodic lump-sum payments

Monteleone v. Monteleone, 2018 NY Slip Op 04317 (2d Dep't 2018) ("Contrary to the defendant's contentions, since the cause of action for conversion is based upon fraud, it is governed by the statute of limitations period for fraud set forth in CPLR 213(8) (citations omitted). The limitations period for fraud under CPLR 213(8) also applies to the breach of fiduciary duty causes of action inasmuch as the allegations of fraud are essential to those claims (citations omitted). . . . Here, the plaintiff established that he could not, with reasonable diligence, have discovered the fraud until 2013, when he learned for the first time that he was the beneficiary of a structured settlement from which he was entitled to receive millions of dollars in monthly and periodic lump-sum payments. The plaintiff initiated this action within a few months of learning this information and confronting the defendant, who refused to share details about the structured settlement with him because she was purportedly bound by a confidentiality agreement not to do so. Contrary to the defendant's contention, she did not raise a triable issue of fact as to whether the plaintiff could have, with reasonable diligence, discovered the alleged misconduct earlier. Accordingly, we agree with the Supreme Court's determinations that the conversion and breach of fiduciary duty causes of action are not time-barred, and to grant the plaintiff's motion for summary judgment on the issue of liability.").

CPLR 213-a - Residential rent overcharge

CPLR 213-a - Court properly looked back beyond the four-year limitations 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, 74 N.Y.S.3d 528 (1st Dep't 2018) ("The court properly looked back beyond the four-year limitations period for plaintiffs' rent-overcharge claim (citation omitted) to establish the proper base rent, in that sufficient indicia of fraud existed (citation omitted). While neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud (citations omitted), here at the same time that the predecessor landlord increased the rent from $949.34 to $1,600 in plaintiffs' initial lease, it also ceased filing annual registration statements for 2007 through 2012. Moreover, plaintiffs' initial lease contained a 'Deregulation Rider for First Unregulated Rent,' which left blank spaces which would have indicated either that the last legal regulated rent or the new legal rent exceeded the $2,000 threshold for deregulation, and may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold. Nevertheless, while the court properly determined that the last legal rent was $949.34, and that the complaint should not be dismissed based on this four-year limitation period, this look back based on such indicia of fraud did not warrant assessing overcharge damages for the entire period. Rather, 'section 213-a merely limits tenants' recovery to those overcharges occurring during the four-year period immediately preceding [plaintiffs'] rent challenge' (citations omitted). Furthermore, the discrepancies in plaintiffs' initial lease, and the lack of any annual

registration statements after the increase, coupled with the fact that the $1,600 did not reach the threshold for deregulation, demonstrate that defendant landlord failed to show by a preponderance of evidence that it did not act willfully (citations omitted). However, '[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed' (citation omitted).").

CPLR 214 - Three year statute of limitations

CPLR 214 / 214-a - Is it malpractice or ordinary negligence? The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached

Bell v. WSNCHS N., Inc., 153 A.D.3d 498, 59 N.Y.S.3d 475 (2d Dep't 2017) ("The sole issue to be determined on this appeal is whether the 2½-year statute of limitations applicable to an action sounding in medical malpractice (citation omitted) or the three-year statute of limitations for an ordinary negligence action (citation omitted) is applicable. The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached. A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety (citations omitted). 'The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts' (citations omitted). Generally, a claim will be deemed to sound in medical malpractice 'when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' (citations omitted). Thus, when the complaint challenges a medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints, the action sounds in medical malpractice (citations omitted). Here, in support of their motion for summary judgment dismissing the complaint as time-barred, the defendants established, prima facie, that this action, commenced on April 12, 2012, was barred by the 2½-year statute of limitations applicable to medical malpractice actions. The defendants' evidence showed that on April 12, 2009, the plaintiff's decedent, Ruby Bell (hereinafter the decedent), was admitted to New Island Hospital with a history of dementia, and placed on 'Fall Prevention Protocol.' After the decedent was found standing at her bedside trying to remove her foley catheter, a physician ordered that she be restrained with a vest and wrist restraints. On the morning of April 18, 2009, the decedent was discovered sitting on the floor next to her bed. The bed's side rails were up and the decedent was not aware of how she came to be on the floor. She had apparently fallen while trying to climb out of her bed. Thereafter, the decedent was diagnosed with a distal radius fracture of the right forearm. The plaintiff alleged that this incident arose out of the failure of the defendants' staff to follow the physician's order to restrain her (citations omitted). In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contentions, the allegations at issue essentially challenged the defendants' assessment of the decedent's supervisory and treatment needs (citation omitted). Thus, the conduct at issue derived from the duty owed to the decedent as a result of the

physician-patient relationship and was substantially related to her medical treatment (citations omitted).").

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*, 691 N.Y.S.L.D. 1-2 (2018).

Majority of Court of Appeals Applies Three-Year Statute of Limitations to No-Fault Claims Against a Self-Insurer

Dissent Advocates Six-Year Limitation Period, Seeing No Reason to Distinguish Between No-Fault Claims Versus a Self-Insurer, as Opposed to an Insurer

Three of the four Appellate Division departments have applied a six-year statute of limitations to no-fault claims asserted by an insured against an insurer under an insurance policy. That issue, however, was not before the Court of Appeals in Contact Chiropractic, P.C. v. New York City Tr. Auth., 2018 N.Y. Slip Op. 03093 (May 1, 2018). The question here was which period should be applied to no-fault claims brought against a self-insurer: a three-year or a six-year statute of limitations. On that issue, the Court of Appeals split.

In Contact Chiropractic, a passenger in a bus owned by the defendant, the New York Transit Authority (NYCT), was injured in a motor vehicle accident. NYCT did not have nofault insurance coverage; it was self-insured. After the plaintiff provided health services to the injured passenger arising out of her injuries in the accident, the passenger assigned her right to the plaintiff to recover first-party benefits from NYCT. Plaintiff brought this action, seeking reimbursement for outstanding invoices.

The defendant moved to dismiss, arguing, among other things, that the action was untimely under CPLR 214(2), which applies a three-year statute of limitations to actions to recover upon a liability created or imposed by statute. Defendant argued that CPLR 213(2), which provides for a six-year statute of limitations in actions based on a contractual obligation or liability, did not apply because it was selfinsured and did not have an insurance policy. Defendant relied on First Department authority providing that a self-insurer's "obligation to provide no-fault benefits arises out of the no-fault statute," and that the three-year statute of limitations applies to actions arising out of the payment of such benefits. The plaintiff countered that a six-year limitation period applied, relying on Second Department authority holding that uninsured motorist benefits claims against a self-insured vehicle owner are contractual in nature, even though they are statutorily mandated.

The Civil Court denied the motion, applying the six-year statute of limitations. The Appellate Term and Appellate Division affirmed. A majority of the Court of Appeals reversed. While acknowledging the Appellate Division's application of a six-year limitation period to no-fault claims against insurers, it noted that the law was unsettled with respect to claims against a self-insurer. In concluding that the three-year limitation period under CPLR 214(2) applied, the Court emphasized that the no-fault law is a creature of statute, unknown at common law, and the no-fault

benefits here were not provided by contract with a private insurer, but by a self-insurer meeting its statutory obligations. The majority assured that "our holding here does not reduce the no-fault liability or obligations of self-insurers, or curtail the substantive no-fault rights of injured parties or their assignees as against such self-insurers." Id. at ∗2.

The dissent was troubled by establishing two sets of limitation periods, one for actions against insurers (six years) and one for actions against self-insurers (three years). It maintained that the no-fault law did not distinguish between insurers or self-insurers and imposed equal liability for the payment of no-fault benefits on both; the accrual date for both types of claims is the same (when payments become overdue); the no-fault law provides no limitation period; there is no dispute in the courts below that a six-year limitation period applies to a no-fault action against an insurer; and the absence of a contract does not necessarily mean that actions against self-insurers are statutory in nature, particularly here where a self-insurer's obligation to provide no-fault benefits is not fundamentally different from that of an insurer.

The dissent argued that public policy considerations and "fundamental fairness" militated against having a different statute of limitation period for actions against a self-insurer and that settled precedent confirmed no meaningful difference between insurers and self-insurers.

The dissent concluded that providing self-insurers with a shorter statute of limitations leads to "arbitrary and inequitable" results:

> Consider the scenario of a private automobile, insured through a policy of insurance, colliding with a public bus, insured through a certificate of self-insurance. The driver of the car and a passenger on the bus suffer relatively minor injuries requiring medical treatment. They both seek payment for first-party medical benefits from those obligated to pay. Under the majority's holding, the injured driver will have six years to file suit based on the failure to pay first-party benefits, but the injured passenger will have only three years. By the mere fortuity that a public bus company is "self-insured," the injured passenger is put at significant disadvantage. From an injured claimant's perspective, however, the right to recover benefits from a self-insurer is no different than the equivalent right under a contract of insurance issued to a private automobile owner. The rule now put forward by the majority raises the troubling appearance that an equally-deserving claimant could be barred from recovering benefits merely because the offending party effectively "bought" self-insured status (citations omitted).

Id. at ∗3.

CPLR 214(6) - Continuous representation doctrine is limited to ongoing representation pertaining specifically to matter in which the attorney committed the alleged malpractice; it is not applicable to a client's continuing general relationship with a lawyer

Davis v. Cohen & Gresser, LLP, 160 A.D.3d 484, 74 N.Y.S.3d 534 (1st Dep't 2018) ("The documentary evidence establishes that following decedent's death, defendant did not represent the

estate in the Devine action. The retainer agreements executed with defendant after the decedent's death were explicitly limited to representing the estate in other litigation and not the Devine litigation. In addition, the evidence demonstrated that following decedent's passing defendant never entered an appearance on the estate's behalf while other law firms were substituted as counsel in the Devine action, made a motion to substitute the estate as plaintiff, and appeared on behalf of the estate, and ultimately settled with the Devine parties in May 2014 (citation omitted). Further, the continuous representation doctrine does not apply where there is only a vague 'ongoing representation' (citation omitted). For the doctrine to apply, the representation must be specifically related to the subject matter underlying the malpractice claim, and there must be a mutual understanding of need for further services in connection with that same subject matter (citation omitted). . . . The fact that defendant represented the estate in related matters is not sufficient to establish continuous representation, as these matters were sufficiently distinct as to not be 'part of a continuing, interconnected representation' (citations omitted). The continuous representation doctrine is limited to ongoing representation 'pertain[ing] specifically to the matter in which the attorney committed the alleged malpractice' and 'is not applicable to a client's ... continuing general relationship with a lawyer' (citation omitted). Nor is the fact that defendant represented decedent's son personally in the Devine action sufficient, as he is a separate client.").

CPLR 214-a - Medical, dental or podiatric malpractice actions – two years and six months

CPLR 214-a

David L. Ferstendig, *Bitter Split in Court of Appeals on Application of Continuous Treatment Doctrine*, 689 N.Y.S.L.D. 1-2 (2018)

Bitter Split in Court of Appeals on Application of Continuous Treatment Doctrine

Majority and Dissent Disagree As To Whether There Was Continuous Treatment, as Opposed to a Continuous Diagnosis, Continuous Relationship, or a Chronic Condition

We have touched on the continuous treatment doctrine on several occasions, most recently in the October 2017 edition of the Digest. Here, we deal with the decision in *Lohnas v. Luzi*, 30 N.Y.3d 752, 71 N.Y.S.3d 404, 94 N.E.3d 892 (2018), in which the Court of Appeals split bitterly on the doctrine's application.

Medical, dental, and podiatric malpractice actions are governed by a two-and-a-half-year statute of limitations, running from the act, omission, or failure. CPLR 214-a. The continuous treatment doctrine, however, defers accrual of the limitation period to the "last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." Id. at ∗2.

In Lohnas, beginning in 1998, the plaintiff received treatment from the defendant for chronic shoulder problems. In 1999, the plaintiff underwent surgery with the defendant, and over the coming year she returned to the defendant for five post-operative visits. After a scheduled one year post-surgery appointment, plaintiff did not return to the defendant until 19 months later, when she

experienced shoulder pain. A second surgery following injections occurred in January 2002; there was a postoperative visit in April 2002; and a September 2003 doctor's appointment after plaintiff's shoulder injury was aggravated. Thirty months then passed without any treatment. Plaintiff returned in April 2006 because of continued pain, even though she "'had gotten discouraged with [defendant]' but ultimately returned to him because defendant 'was all [she] had.'" Id. at ∗1. Following x-rays, defendant referred the plaintiff to his partner for a third surgery, because he was no longer performing shoulder surgeries. Although plaintiff consulted with the defendant's partner, she instead began visiting a new orthopedic surgeon in July 2006.

The plaintiff commenced this action in September 2008, alleging that the defendant negligently performed the 1999 surgery and failed to diagnose the problematic surgery, leading to continued difficulties with her shoulder and the second surgery. The defendant moved for partial summary judgment, seeking dismissal of all claims relating to alleged malpractice occurring before March 2006 on statute of limitations grounds. The trial court denied the motion, finding issues of fact as to whether the continuous treatment doctrine applied. The Appellate Division affirmed.

A narrow majority of the Court of Appeals (4-3) affirmed. It found that there were material issues of fact as to whether the plaintiff and the defendant intended a continuous course of treatment. The majority dismissed the defendant's argument that the gaps between plaintiff's visits and "the 'as needed' basis for scheduling some of those appointments" negated the application of the doctrine. Id. at ∗2. Instead, it stressed that the plaintiff's visits to the defendant over a seven-year period for her shoulder, which included two surgeries, were for the same related illness or injury. Plaintiff accepted defendant's referral for a third surgery. She did not seek a second opinion and continued to see the defendant for care, notwithstanding the fact that she was "feeling discouraged" with defendant's treatment. Finally, the majority noted that with respect to the 30-month gap in treatment,

> we have previously held that a gap in treatment longer than the statute of limitations "is not per se dispositive of defendant's claim that the statute has run." To the extent that lower courts have held to the contrary, those cases should not be followed (citations omitted).

Id.

The dissent insisted that an essential element was missing in order to apply the continuous treatment doctrine: continuing efforts by the doctor to treat a particular condition. Here, the plaintiff was not undergoing continuous treatment; the defendant told the plaintiff to return "as needed." During the 30- month gap, the plaintiff did not seek corrective treat ment from the defendant. The dissent reviewed the public policy concerns behind the continuous treatment doctrine: a doctor's continuous treatment to correct a patient's unresolved problems should not be interrupted by the filing of a lawsuit, and a patient undergoing such treatment should not be forced to sue her doctor in a timely fashion during treatment. The dissent felt that when there is no continuous treatment, as it concluded was the case here, these policy considerations actually cut the other way:

> a plaintiff whose surgery and follow-up appointments have been completed, who has been discharged from the hospital, returns to normal life activities, and still suffers "terrible" pain, is on notice that something may be wrong, and is required to take steps to determine whether she has a claim — including by consulting a different doctor if necessary — and file it within the prescribed period.

Id. at ∗3.

The dissent maintained that the majority opinion undermined prior decisions of the Court, and risked expanding the limitation period indefinitely,

> so long as a plaintiff can establish that she suffers from the same condition or injury and believed she had no other option than to continue to see the same physician. The decision also vitiates the doctrine's timeliness requirement, which bars the toll as a matter of law where, as here, a gap in treatment exceeds any reasonable interpretation of timely (citation omitted).

Id.

It emphasized that the continuous treatment doctrine cannot apply if there is only a continuing diagnosis or a continuous relationship between the doctor and the patient. It requires continuous treatment. The dissent suggested that the majority decision could require a doctor, upon the conclusion of treatment, to send a letter to the patient advising him or her never to return, so as to commence the limitation period (a result the dissent characterizes as "ghastly"). This conclusion was dismissed by the majority as "unwarranted." Moreover, the majority read the dissent as unfairly obligating a plaintiff (particularly one with limited resources) to seek a second opinion, and placing the burden on the plaintiff to "change doctors by a certain time or risk being blamed, as a matter of law, for the extent of her injury." Id. at ∗2.

CPLR 214-a

David L. Ferstendig, *Majority of Court of Appeals Holds That Wrongful Birth Claim Accrues Upon Infant's Birth*, 687 N.Y.S.L.D. 1 (2018)

Majority of Court of Appeals Holds That Wrongful Birth Claim Accrues Upon Infant's Birth

Dissent Believes Majority's Interpretation Contravenes the Plain Meaning of the Statute

In the February 2016 edition of the Law Digest, we reported on the First Department's decision in *B & F v. Reproductive Medicine Assocs. of New York, LLP*, 136 A.D.3d 73 (1st Dep't 2015), holding that a wrongful birth cause of action accrues upon an infant's birth. Recently, a majority of the Court of Appeals affirmed. 2017 N.Y. Slip Op. 08712 (December 14, 2017).

The Court of Appeals was actually dealing with the appeal of two separate cases. However, their fact patterns were essentially the same. They were medical malpractice actions, in which it was

alleged that the defendants failed to do adequate genetic screening of an egg donor in connection with an in-vitro fertilization. The parents did not know that the egg donor was a carrier of Fragile X, a chromosomal abnormality, which produces intellectual disabilities and other deficits, particularly in males. Subsequently, one of the couples gave birth to an infant with the Fragile X mutation. The other gave birth to twins, one of which had Fragile X.

The parents' claim being asserted here was for "wrongful birth," seeking recovery for

> their past and future "extraordinary financial obligations relating to the care" of that child during his or her minority. To recover such damages on a wrongful birth cause of action, "the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible time period, or [as alleged here] that the child would not have been conceived but for the defendant's malpractice" (citations omitted).

136 A.D.3d at 77.

The issue at hand was whether the claims were timely and that hinged on when the cause of action accrued. The defendants argued that the limitation period began to run when the malpractice was allegedly committed (that is, the date the embryos were implanted). The plaintiffs countered that the statute of limitations accrued on the date of birth.

A majority of the Court of Appeals agreed with the plaintiffs that "due to its unique features," the wrongful birth cause of action accrued upon the birth of the child, and was thus timely. The Court found that, until the alleged malpractice results in the birth of a child, there can be no extraordinary expenses claim. Moreover, before birth it cannot be determined whether the plaintiffs will incur such extraordinary expenses. The Court reasoned that

> [d]ue to these unique circumstances, the cause of action accrues upon the birth of an infant with a disability. This date appropriately balances the competing statute of limitations policy concerns—it gives parents a reasonable opportunity to bring suit while at the same time limiting claims in a manner that provides certainty and predictability to medical professionals engaged in fertility treatment and prenatal care (citations omitted).

2017 N.Y. Slip Op. 08712 at ∗4

Responding to the dissent, the majority asserted that nothing in the legislative history of CPLR 214-a— which governs the statute of limitations in medical malpractice actions and contains its own exceptions, including the continuous treatment doctrine and the foreign object rule— "suggests an intent to constrict judicial authority to otherwise define when a cause of action accrues." Id. at ∗5.

It stressed that "this is not the typical medical malpractice" and that in the past it had similarly "confronted a situation that falls outside the contours of CPLR 214-a, and reached a similar result."

Id. at ∗6. The majority was referencing the Court's decision in LaBello v. Albany Med. Ctr. Hosp., 85 N.Y.2d 701 (1995), where it was held that "an infant plaintiff's medical malpractice cause of action, premised on alleged injurious acts or omissions occurring prior to birth, accrues on the earliest date the injured infant plaintiff could juridically assert the claim and sue for relief, that is, the date of being born alive." Id. at 703.

The dissent, written by Judge Garcia, maintained that the majority created a third exception to CPLR 214- a and its "date of birth" accrual contravened the statute's explicit accrual from "the act, omission or failure complained of"; CPLR 214-a did not merely codify the common law, but instead was enacted to "'constrict[] judicial expansiveness towards a more plaintiff friendly … rule'" and, thus, the two exceptions in CPLR 214-a are not to be expanded; the legislature has refused repeatedly to change the accrual date under CPLR 214-a in the nearly 40 years since the Court recognized a wrongful birth cause of action; and the Court's decision in LaBello does not justify its decision here, because in LaBello, the cause of action was being asserted on behalf of an infant and thus could not accrue "before the infant acquired the recognized legal capacity to sue." Here, the plaintiffs' parents had the capacity to sue when the alleged malpractice occurred.

CPLR 214-a / 2221 / 3212(a)

David L. Ferstendig, *First Department Splits on Application of Continuous Treatment Doctrine,* 683 N.Y.S.L.D. 2-4 (2017).

We initially treat *Lewis v. Rutkovsky*, 153 A.D.3d 450 (1st Dep't 2017), for its analysis of the continuous treatment doctrine. But the case also touches on other current important issues, including my nemesis (that's right, it's Brill time again), discussed below.

CPLR 214-a provides for a two-and-a-half-year statute of limitation in medical, dental, or podiatric malpractice actions, running from the act, omission, or failure. The statute contains two exceptions, the foreign object rule (dealt with, for example, in edition 657 of the Digest) and the continuous treatment doctrine. With respect to the latter, it provides that the limitation period will not begin to accrue until the "last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." There has been much litigation in this area, and courts have generally strictly construed the language, sometimes resulting in rather inequitable results. For example, it has been held that the failure to establish a course of treatment cannot satisfy the continuous treatment doctrine. Thus, in Y*oung v. New York City of Health & Hosps. Corp*., 91 N.Y.2d 291 (1998), the continuous treatment doctrine was not applied to toll the filing of a 90-day notice of claim, finding that the plaintiff's allegations that the defendants failed to timely diagnose and treat her cancerous breast condition were "nothing more than defendants' failure to timely diagnose and establish a course of treatment for her breast condition, omissions that do not amount to a 'course of treatment.'" *Id*. at 297.

In *Lewis*, a medical malpractice action, the plaintiff alleged that the defendants failed to detect, diagnose, and treat a benign brain tumor (meningioma) and ignored her repeated complaints of symptoms, including migraine headaches and blurred vision. Eventually, the plaintiff underwent a left frontal parasagittal craniotomy and suffered vision loss.

With respect to defendants' summary judgment motions on statute of limitations grounds, the question was whether there was a continuous course of treatment. A majority of the First Department found there to be an issue of a fact. It focused on the treatment provided for plaintiff's "recurring and sometimes severe headaches—that were traceable to plaintiff's meningioma," which continued until late 2007. Lewis, 153 A.D.3d at 454. The majority rejected the dissent's argument "that there was no evidence of regular appointments or ongoing treatment for plaintiff's headache-related complaints." *Id*. at 455. It stressed that the law does not require that a plaintiff attend "regular" appointments

> for the sole purpose of treating the allegedly misdiagnosed condition. Rather, the inquiry centers on whether the treated symptoms indicated the presence of the condition that was not properly diagnosed — here, a meningioma that gave rise to plaintiff's severe headaches and partial loss of vision, both of which Dr. Rutkovsky undertook to treat by, among other things, prescribing reading glasses (citations omitted).

Id.

The dissent pointed out that some of the plaintiff's visits to the doctor were for routine annual checkups; that there were gaps in treatment (for example, between 1999 and 2004); that there was no evidence during the plaintiff's 2004 and 2006 visits that there was an explicit anticipation by both doctor and patient of further treatment; and that "it appear[ed] plaintiff's complaints of headaches were isolated and not part of a continuous course of treatment." *Id*. at 458.

> In sum, plaintiff complained of headaches and/or vision problems on five separate occasions with long gaps in between during approximately 30 visits to Dr. Rutkovsky and over a period of close to a decade. Clearly, this set of circumstances cannot support a continuous course of treatment for plaintiff's sporadic complaints of headache.

Id.

The dissent maintained that plaintiff's equivocal self-serving deposition testimony, which was contradicted by documentary evidence, did not create an issue of fact -

> Here, plaintiff's bare, equivocal statements of the times she saw Dr. Rutkovsky during this time period concerning complaints of headache, contradicted by the medical records, is insufficient to raise a factual issue concerning continuous treatment. Moreover, plaintiff does not connect these purported visits between January and June 2007 to her documented visit in September 2007, or otherwise raise an issue regarding a continuing course of treatment for headaches.

Id. at 459.

My Good Friend, Mr. Brill (CPLR 3212)

A preliminary issue in Lewis was the timeliness of defendants' summary judgment motions. The relevant PC order provided that: "Motions for Summary Judgment and/or other dispositive motions shall be made by order to show cause no later than 60 (sixty) days from the filing of the Note of Issue, unless the Court directs otherwise." Apparently, the defendants filed their motions via order to show cause with the clerk's office in a timely fashion, but because of Winter Storm Juno the courts closed early and were closed the following day. Thus, the orders were not signed until two to three days after the summary judgment motion deadline. Notwithstanding these circumstances, the trial court found the motions to be untimely, because "neither movant addressed the issue of good cause." *Id*. at 452–53. As the Appellate Division noted, in reversing on this issue:

> No party disputes that, on the day the orders would usually have been processed and timely signed, inclement weather from Winter Storm Juno created a "state of emergency" and caused the early closure of the courts; indeed, because of the storm, the Governor signed an executive order suspending legal deadlines.

Id. at 453.

Moreover, the Appellate Division expressly found that "even if we were to find that the orders were untimely" the weather conditions and court closing provided "good cause" for the minimal delay. *Id*. at 454.

This preliminary issue was ultimately resolved in a favorable manner. However, it again resulted in a waste of resources, time, and money because of the trial court's strict adherence to the well-intended decision in *Brill v. City of New York*, 2 N.Y.3d 648 (2004), with respect to a very short delay beyond the control of the parties. The orders to show cause were delivered to the court in a timely fashion, and there was a weather emergency resulting in court closings and an executive order suspending legal deadlines. That should have been enough for the trial court to go forward and decide the motions on the merits. For those of you unfamiliar with my rant on Brill ("Take a Chill Brill"), I refer you to edition 660 at your peril.

Appeal of Order Denying Leave to Reargue (CPLR 2221)

Practitioners presented with an unfavorable decision sometimes move to reargue. 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. The nomenclature is important. CPLR 2221 talks in terms of a motion for leave to renew or to reargue. That is because these motions are really a two step-process: will the court agree to hear the motion in the first place (and thus grant leave) and, if so, will the court adhere to or reverse its original order? Only an order denying leave to reargue is non-appealable. If the court grants reargument,

but adheres to its original decision, that order is an appealable paper. Some decisions, however, are not crystal clear as to what type of "denial" is involved. In Lewis, the court found that the order determining the defendants' motion to reargue was an appealable paper:

> Here, however, although the motion court purported to deny the motion to reargue, it nonetheless considered the merits of defendants' argument that the inclement weather on the motion's due date provided good cause for the delay. As a result, the court, in effect, granted reargument, then adhered to the original decision (citation omitted).

Lewis, 153 A.D.3d at 453.

Regardless, good practice is always to serve and file your notice of appeal (and any supplementary papers required by the appellate court) from the original order in a timely fashion.

If leave to reargue is denied, you are protected. If leave is granted, and the court adheres to its original decision, you should file another notice of appeal from the order determining the reargument motion. In the rare instance where the motion to reargue is granted, thereby vitiating the need for the original appeal, all you have wasted is the limited amount of time and effort in protecting your rights with respect to the original order. Not a stiff price to pay, especially taking into account the unlikelihood that you will be successful on the motion to reargue. It also will prevent sleepless nights and perhaps a call to your insurance carrier!

CPLR 214-c- Discovery statute of limitations

CPLR 214-c - Statute runs from date condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom

Haynes v. Williams, 2018 NY Slip Op 04626 (3d Dep't 2018) ("We find that defendants' submissions 'were sufficient to demonstrate that plaintiff was cognizant of [his] claimed injuries, or, at a minimum, reasonably should have been, such that the action is barred by the statute of limitations' (citation omitted). Here, if we accept that lead was the causative harmful substance, plaintiff has been aware of his injuries since early childhood, when they were first evident, and then as they continued throughout his school years and to the present day. Plaintiff argues that the statute of limitations did not commence until July 2013 when, after receiving a solicitation letter from his attorney, he became aware of his exposure to lead as a young child. This argument is without merit as 'the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom' (citations omitted). Consequently, defendants' motions were properly granted.").

CPLR 214-c - Discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based

Sullivan v. Keyspan Corp., 155 A.D.3d 804, 64 N.Y.S.3d 82 (2d Dep't 2017) ("'For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based' (citations omitted). Here, the defendants demonstrated that they undertook extensive efforts beginning in 1999 to inform and engage with property owners potentially affected by the contamination and remediation. These efforts included, among other things, door-to-door canvassing, mailing a survey in 2002 inquiring about observable effects of contamination on properties, testing properties for contaminant intrusion, and mailing periodic newsletters and fact sheets detailing the nature and extent of the contamination and providing updates on the remediation. The defendants also held dozens of public meetings, which they advertised in advance in local media and in direct mailers, and conducted highly visible remediation work. The defendants undertook these actions in conjunction with and under the supervision of the New York State Department of Environmental Conservation in accordance with an order on consent dated September 30, 1999. Although the level of the defendants' contact with the appellants varied, the defendants satisfied their burden of establishing, prima face, that each of the appellants had an objective level of awareness of the dangers and consequences of the contamination sufficient to place them on notice of the primary condition on which their claims are based (citation omitted).").

CPLR 217- Four month statute of limitations, "[u]nless a shorter time is provided in the law authorizing the proceeding"

CPLR 217 - Four-month statute of limitations begins to run when the determination to be reviewed becomes final and binding upon the petitioner

Matter of Singleton v. New York State Off. of Children & Family Servs., 161 A.D.3d 1357 (3d Dep't 2018) ("The parties agree that petitioner's challenge to the classification of his injury 'is subject to the four-month statute of limitations set forth by CPLR 217 (1), which begins to run when the determination to be reviewed becomes final and binding upon the petitioner. A determination is final and binding when two requirements are satisfied: first, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' (citations omitted). Supreme Court properly found that the determination that petitioner's injury was not assault-related became binding upon him when he received the letter dated August 25, 2015, because it established the duration of leave to which he was entitled. Moreover, there was no possibility that subsequent agency action would prevent or ameliorate the harm claimed by petitioner inasmuch as the statutory and regulatory scheme at issue did not provide petitioner with any procedure for challenging that determination.").

CPLR 217 - Where a party would expect to receive notification of a determination, but has not, the statute of limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination

Valyrakis v. 346 W. 48th St. Hous. Dev. Fund Corp., 161 A.D.3d 404 (1st Dep't 2018) ("[T]he first cause of action is barred by the statute of limitations. A proceeding challenging an action

taken by a cooperative corporation must be commenced within four months after the action is final (CPLR 217[1]). 'In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination' (citation omitted).").

CPLR 217 - No final determination, no exhaustion of administrative remedies, no actual, concrete injury

David L. Ferstendig, *Once, Twice, Three Times a Maybe*, 677 N.Y.S.L.D. 2 (2017).

The issue in *Matter of East Ramapo Cent. Sch. Dist. v. King*, 2017 N.Y. Slip Op. 02360 (March 28, 2017), related to a challenge brought by a local educational agency, the plaintiff East Ramapo Central School District ("the District"), to a determination of the State Education Department, a state education agency ("the State"). The State regulates the District's compliance with the requirements of the Individuals with Disabilities Education Act (the "IDEA").

To receive IDEA funding, the State must establish policies and procedures to assure that students with disabilities receive "a free appropriate public education in the least restrictive environment and an individualized education program tailored to their unique needs, and that these students and their parents are afforded certain procedural safeguards." *Matter of East Ramapo Cent. Sch. Dist. v. King*, 130 A.D.3d 19, 21 (3d Dep't 2015). The District's receipt of IDEA funding depends on its annual submission of a plan that assures that the District is complying with the State Education Department's policies and procedures. Here, in reviewing various student records, the State determined that the District's dispute resolution practices violated state and federal law and directed the District to take corrective measures. The District brought this Article 78 proceeding challenging the State's determination on the ground that its findings were unsupported by substantial evidence and were based on an erroneous construction of the IDEA.

The trial court dismissed the petition on the merits. The Appellate Division affirmed, but on the ground that Congress did not provide the District with a private right of action under the IDEA to challenge the State's determination. The court found the IDEA did not expressly confer such a private right of action and there was no evidence that Congress intended to create such a right.

The Court of Appeals affirmed, but yet again on a different ground. The Court did not decide the issue as to whether the District had a private right of action. Instead, it assumed it did, but found that the State had not made a final determination, that the District had not established that it had exhausted its administrative remedies, and that the District was "unable to articulate any actual, concrete injury that it has suffered at this juncture." 2017 N.Y. Slip Op. 02360 at ∗2.The Court noted that although the State had advised the District that its failure to comply could result in further enforcement actions, including the withholding of funds, the State had not made a final decision to withhold funds.

So, after three unsuccessful attempts, the District is left with a ruling that it cannot bring the proceeding at this point and with no assurances that if and when those impediments to finality are removed, it has a private right of action under the IDEA.

CPLR 217 - 30-day statute of limitations applies

Matter of Woodworth v. Town of Groveland, 160 A.D.3d 1373 (4th Dep't 2018) ("Contrary to petitioners' contention, the court properly dismissed the amended petition as time-barred, as asserted by respondents in their answer. The 30-day statute of limitations for this proceeding began to run on April 12, 2016, when the ZBA's decision was filed in the Town Clerk's office, and thus the limitations period expired before petitioners commenced this proceeding (citation omitted). We reject petitioners' contention that the statute of limitations began to run on April 18, 2016, when the ZBA filed the draft hearing minutes (citation omitted). We further reject petitioners' contention that respondents are equitably estopped from asserting the statute of limitations as a defense (citation omitted). Finally, we have considered petitioners' remaining contentions and conclude that they do not warrant reversal or modification of the judgment.").

CPLR 217 - 60-day statute of limitations applies

Matter of Sierra Club v. Martens, 156 A.D.3d 454 (1st Dep't 2017) ("The court correctly held that the petition was barred by the statute of limitations contained in ECL 15-0905. That section provides that an article 78 proceeding to review a decision made pursuant to article 15 of the ECL must be commenced within 60 days after service of the decision upon the applicant and others who appeared in the proceedings before DEC (citation omitted). Because this proceeding was commenced on March 23, 2015, approximately four months after DEC made the requisite service and well beyond the 60-day limitations period, it is untimely (citations omitted).").

CPLR 217 - Gravamen of petition was that grading system was implemented in violation of lawful procedure, affected by an error of law, and arbitrary and capricious.

Matter of Broadway Barbeque Corp. v. New York City Dept. of Health & Mental Hygiene, 160 A.D.3d 719, 71 N.Y.S.3d 380 (2d Dep't 2018) ("Here, although the 2015 petition sought injunctive and declaratory relief, the gravamen of the 2015 petition was that the grading system was implemented in violation of lawful procedure, affected by an error of law, and arbitrary and capricious. Therefore, the Supreme Court correctly determined that the four-month statute of limitations set forth in CPLR 217(1) applies to this proceeding (citations omitted).").

CPLR 217 / 2001 - Because petitioner did not submit petition and related documentation in proper form until after the four-month statutory period had expired, trial court properly dismissed the petition as untimely

Matter of Ennis v. Annucci, 160 A.D.3d 1321, 75 N.Y.S.3d 347 (3rd Dep't 2018) ("The four-month statute of limitations period in which to commence this proceeding began to run upon petitioner's notification of the adverse determination on July 20, 2016 (citation omitted). To that end, 'a proceeding such as this is deemed commenced for statute of limitations purposes on the date on which the clerk of the court actually receives the petition in valid form' (citations omitted). Because the record establishes that petitioner did not submit the petition and related documentation in proper form until after the four-month statutory period had expired, Supreme Court properly

dismissed the petition as untimely (citations omitted). Contrary to petitioner's contention, the deficiencies in the initial papers submitted — which included unsigned, undated and non-original documents — are not subject to correction pursuant to CPLR 2001 so as to render the proceeding timely inasmuch as '[t]he failure to file the papers required to commence [a proceeding] constitutes a nonwaivable, jurisdictional defect' (citations omitted). Accordingly, the merits of the disciplinary determination are not properly before us.").

CPLR 217-a - One year and 90 days

CPLR 217-a - Court of Appeals adopts standard on burden of proof in showing whether a municipality or a public corporation has been substantially prejudiced

David L. Ferstendig, *Court of Appeals Finds Lower Court Abused Discretion in Determining That Respondent Would be Substantially Prejudiced*, 675 N.Y.S.L.D. 1-2 (2017).

When suing a municipality or a public corporation in tort, a party must first serve a notice of claim within 90 days after the claim arises. See General Municipal Law § 50-e (GML). That same section provides a mechanism by which a party can seek an extension of time to serve the notice. On such an application, the court is to evaluate whether the public corporation "acquired actual knowledge of the essential facts constituting the claim or within a reasonable time thereafter." GML § 50-e(5). In addition, the court is to consider "all other relevant facts and circumstances." The statute provides a nonexhaustive list of factors. A key factor for a court to address is whether the delay in serving the notice of claim "substantially prejudiced" the public corporation.

In *Newcomb v. Middle Country Central School District*, 2016 N.Y. Slip Op. 08581 (December 22, 2016), the petitioner's son was hit and severely injured by a car, which fled the scene, as he was crossing an intersection near the high school he attended. Within days, the petitioner provided details of the incident to the high school, including the location and nature of his son's injuries. Subsequently, there was a significant delay in the petitioner obtaining the police accident file, which prompted petitioner to have his own investigator take photographs of the scene. Six months after the accident, petitioner's counsel finally received the file, which contained photographs revealing a large sign at the corner of the intersection where the accident occurred. Because of the size of the photographs, however, the lettering on the sign was illegible, resulting in an additional two-month delay in receiving enlargements of the photographs of the sign, which advertised a play at another high school within the district where the accident occurred. The photographs taken by the petitioner's investigator did not reflect the sign, which had apparently been removed after the accident.

The petitioner timely served notices of claim on the state, town and county, but not on the school district. Five months after the expiration of the 90-day period, however, petitioner served the notice of claim on the school district, alleging that the sign obscured the view of the corner, drivers, and pedestrians, creating a dangerous condition. Simultaneously, the petitioner filed an application to serve a late notice of claim or deem the notice timely nunc pro tunc. Petitioner asserted that the school district had actual knowledge because petitioner advised his son's high school within days

of the accident as to its details and location, and the school district had the sign removed from the accident scene within the 90-day statutory period. Moreover, petitioner asserted that because of an ongoing criminal investigation into the hit-and-run driver, the petitioner or his counsel was prevented from obtaining photographs of the accident scene in which the subject sign was readable. Finally, petitioner argued that the school district was not substantially prejudiced by the late notice for several reasons. In addition to reiterating the school district's placement and removal of the sign and its knowledge about the details of the accident shortly after it happened, petitioner asserted

> that the School District had access to the police report and photographs from the police file that would permit the School District to reconstruct the scene and to interview witnesses; and that, except for removal of the sign by the School District, the accident scene was unchanged, and could be inspected and investigated by the School District.

Id. at ∗4.

The school district's opposition consisted solely of an attorney's affirmation (generally a "no-no"), asserting that the police report made no mention of the sign. Significantly, it did not rebut the petitioner's showing of lack of substantial prejudice, other than arguing that the petitioner bore the burden and did not meet it, and that the court should infer that the passage of time created substantial prejudice as a result of fading witness memories.

The trial court examined four of the GML § 50-e (5) factors. It found that there was no nexus between petitioner's son's infancy and the delay, but that the delay was nevertheless justified because of the petitioner's delay in obtaining the photographs of the scene and the severity of the injuries. In addition, the court held that the school district did not have actual knowledge of the essential facts within the statutory period because the police report failed to mention the sign and the school district did not have actual notice that the sign may have contributed to the accident. Finally, the court placed the burden on the petitioner to establish that the school district was not substantially prejudiced by the delay and found that that prejudice "could be 'inferred' because 'the mere passage of time creates prejudice with respect to fading memories of witnesses.'" *Id.* at ∗5. Thus, the trial court held that the school district was substantially prejudiced by the late notice. The Appellate Division affirmed.

The Court of Appeals reversed, holding that the trial court's conclusion on the substantial prejudice issue was based on an inadequate record. The Court found that the trial court had presumed that the matriculation and graduation of students and personnel changes hindered the school district's evidence gathering. In addition, the trial court inferred that the passage of time would cause prejudice. The Court of Appeals held that such mere inferences cannot support a finding of substantial prejudice; there must be evidentiary support.

The Court noted that there was a split in the Appellate Division on the issue of which party carries the burden of proof to demonstrate that a late notice of claim substantially prejudiced the public corporation. The Court held the proper standard to be that the initial burden should be placed on the petitioner to show that late notice did not substantially prejudice the public corporation.

Significantly, that "showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Id.* at *7. Once that initial showing is made, however, the respondent must come back with a particularized evidentiary showing of substantial prejudice.

Here, the trial court improperly placed the burden of proof solely on the petitioner. In addition, the respondent's submission consisted of speculation and inferences that did not meet the particularized showing requirement. The Court concluded that the standard it was adopting struck a proper balance -

> We recognize that a petitioner seeking to excuse the failure to timely comply with the notice requirement should have the initial burden to show that the public corporation will not be substantially prejudiced by the delay…. Requiring the public corporation to come forward with a particularized showing is appropriate in this context given that the public corporation is in the best position to provide evidence as to whether the late notice has substantially prejudiced its ability to defend the claim on the merits.

Id. at *8.

CPLR 217-a - Notice of claim requirement does not apply when litigant seeks only equitable relief, or commences a proceeding to vindicate a public interest

Matter of Fotopoulos v. Board of Fire Commr. of the Hicksville Fire Dist., 161 A.D.3d 733 (2d Dep't 2018) ("In general, '[t]he service of a notice of claim is a condition precedent to the maintenance of an action against a public corporation to recover damages for a tortious or wrongful act' (citations omitted). However, the notice of claim requirement does not apply when a litigant seeks only equitable relief (citations omitted), or commences a proceeding to vindicate a public interest (citation omitted). Moreover, a litigant who seeks 'judicial enforcement of a legal right derived through enactment of positive law' is exempt from the notice of claim requirement (citations omitted). Here, since the petitioner seeks both equitable relief and the recovery of damages in the form of back pay, the filing of a notice of claim within 90 days after his claim arose was a condition precedent to the maintenance of this proceeding (citations omitted).").

CPLR 217-a / 2001 - Failure to file the application with the appropriate clerk (County Clerk) is fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001

Matter of Dougherty v. County of Greene, 161 A.D.3d 1253 (3d Dep't 2018) ("While the Supreme Court or the County Court may convert an improperly brought motion for leave to serve a late notice of claim into a special proceeding (citations omitted), the failure to file the application with the appropriate clerk — the County Clerk — is a fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001 (citations omitted). Indeed, the filing of initiatory papers with the Clerk of the Supreme and County Courts, rather than the County Clerk, 'has been equated to a nonfiling and, thus, 'a nonwaivable jurisdictional defect rendering the proceeding a

nullity' (citations omitted). Here, petitioner mailed her 2013 application to the Greene County Courthouse to the attention of the 'County Lawyer Clerks Office.' Petitioner's papers were promptly rejected by the Chief Clerk of the Supreme and County Courts in Greene County and returned to petitioner with a letter identifying several deficiencies with her papers and directing that they be mailed to the County Clerk's Office. Petitioner's failure to file her 2013 application with the proper clerk amounts to a nonwaivable jurisdictional defect, rendering the proceeding a nullity (citations omitted). Consequently, petitioner's 2015 submissions cannot relate back to her 2013 attempted application. Given that petitioner did not file an application with the Greene County Clerk prior to the expiration of the one year and 90-day statute of limitations, which expired in February 2014, Supreme Court was statutorily prohibited from extending the time in which petitioner had to serve her notice of claim upon respondent (citations omitted).").

JURISDICTION

CPLR 301

CPLR 301

David L. Ferstendig, *Daimler "Doing Business" Standard Revisited*, 680 N.Y.S.L.D. 1-2 (2017).

In *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), Robert Nelson, a North Dakota resident, brought a Federal Employers Liability Act (FELA) action against his employer, BNSF Railway Company, in a Montana state court. He alleged that he sustained personal injuries while working as a BNSF fuel truck driver. Another FELA action was brought on behalf of the deceased, Brent Tyrell, by an administrator appointed in South Dakota. There it was asserted that the deceased contracted cancer from exposure to carcinogenic chemicals while employed at BNSF. Neither plaintiff alleged that the claimed injuries related to work performed in Montana. BNSF is a Delaware corporation with its principal place of business in Texas, operating railroad lines in 28 states. Its connections to Montana include 2,061 miles of railroad track (about six percent of its total track mileage), 2,100 employees (less than five percent of its total work force), about 10 percent of its total revenue is derived from there, and it maintains one of its 24 automotive facilities in the state.

The Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF. It based its decision, in part, on FELA § 56, which it determined permitted state courts to exercise personal jurisdiction over railroads "doing business" in the state. The Montana court found that BNSF was doing business under the FELA provision due to its many miles of tracks and employees within the state. It similarly held that BNSF was "found within" the state under Montana law. Significantly, the court stated that the due process limits set forth in the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), did not apply because Daimler did not involve a railroad defendant or a FELA claim.

The U.S. Supreme Court was unanimous in ruling that the Montana Supreme Court erred in finding that the FELA provision conferred personal jurisdiction over the defendants in state court and that the Due Process Clause was not implicated. However, the majority and the dissent disagreed on the result.

The majority, written by Justice Ginsburg, explained that FELA § 56 does not concern personal jurisdiction, but rather is a federal court venue provision, also conferring subject matter jurisdiction in FELA actions in state courts concurrent with federal courts. With respect to the Montana statute, Mont. R. Civ. P. 4(b)(1), which confers personal jurisdiction over "persons found" in Montana, the majority noted that the defendant did not contest that it was "found within" Montana. Thus, the Court's inquiry related to whether "the Montana courts' exercise of personal jurisdiction under Montana law comports with the Due Process Clause of the Fourteenth Amendment." *Id*. at 1558. The majority concluded that BNSF's activities in Montana did not render it "at home" under the Daimler "doing business" standard (that is, the corporation's affiliations with the forum state are so continuous and systematic as to render it essentially "at home" in the forum state).

Daimler provided only three circumstances that satisfied the "at home" requirement - a domestic corporation, a corporation whose principal place of business is in the forum state, and the "exceptional case" 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." 134 S. Ct. 746, n. 19. The paradigm case referred to in Daimler as being the "exceptional case" was *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437 (1952), where the war had forced the corporation's owner to relocate the operations temporarily from the Philippines to Ohio.

The Court stressed here, as it did in Daimler, that it was required to look at the company's activities in their entirety when it operates in many places -

> [A]s we observed in Daimler, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's 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." In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-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 (citations omitted).

Id. at 1559.

In her dissent, Justice Sotomayor reiterated her disagreement "with the path the Court struck in Daimler." *Id*. at 1560. She stated that the majority was granting

> a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location

> other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States (citations omitted).

Id.

Justice Sotomayor insisted that the focus should be on the quality and quantity of the defendant's contacts in the state. She maintained that the majority opinion, in essence, had read the "exceptional case" exception "out of existence entirely," limiting it only to the "exact facts" in Perkins. *Id*. at 1561.

In addition, the dissent opined that even if the Daimler "doing business" standard applied, the correct procedural decision was to remand the case back to the Montana Supreme Court "to conduct what should be a fact-intensive analysis under the proper legal framework." *Id*. at 1560.

CPLR 301

David L. Ferstendig, *Daimler "At Home" Standard as Applied to Individuals*, 682 N.Y.S.L.D. 2-3 (2017).

Much has been said in this Digest and elsewhere about the impact of the United States Supreme Court decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The discussion has been centered primarily on a corporation's activities in the forum state, that is, whether they are so systematic and continuous as to render it "at home."

But how about an individual "doing business" in New York? Prior to Daimler, there was a conflict in New York State as to whether jurisdiction can be obtained over an individual while "doing business" in New York in connection with causes of action which do not arise there. The First Department holds that jurisdiction can be found in such a circumstance. *See ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 435 (1st Dep't 1976). The Second Department disagrees. See *Nilsa B.B. v. Clyde Blackwell H*., 84 A.D.2d 295 (2d Dep't 1981) (questioning First Department holding in *ABKCO*). See also *Pichardo v. Zayas*, 122 A.D.3d 699, 703 (2d Dep't 2014) lv. denied, 26 N.Y. 3d 905 (2015). ("In contrast to the common-law approach to corporations, the common law, as developed through case law predating the enactment of CPLR 301, did not include any recognition of general jurisdiction over an individual based upon that individual's cumulative business activities within the State. Since the enactment of CPLR 301 did not expand the scope of the existing jurisdictional authority of the courts of the State of New York, that section does not permit the application of the 'doing business' test to individual defendants (citations omitted).").

Recently, in Lebron v. Encarnacion, 2017 U.S. Dist. LEXIS 83261 (E.D.N.Y. May 31, 2017), District Court Judge Arthur D. Spatt addressed the issue of whether an individual's activities can render him or her "at home." In Lebron, the plaintiff, a New York resident, brought tort claims against a Toronto Blue Jays baseball player, Edwin Encarnacion, who is a citizen and permanent resident of the Dominican Republic. The plaintiff met the defendant for the first time following a

baseball game between the New York Yankees and the Blue Jays at Yankees Stadium. Their non-romantic relationship continued for several years, followed by a weekend visit to the Dominican Republic where they had sexual relations. The plaintiff later developed symptoms of sexually transmitted diseases and sued the defendant, claiming he failed to advise her that he had been infected.

The plaintiff argued that, among other things, the court had general jurisdiction over the defendant based on his regular trips to New York to play baseball against the Yankees and Mets and the fact that his agents and representatives promoted the defendant's interests in New York.

The district court stated that while the Daimler decision discussed the "doing business" standard as it applied to a foreign corporation, "[s]imilarly, as it relates to individuals, the new inquiry focuses on whether the defendant may fairly be regarded as 'at home' in the forum state—a location which, according to the Second Circuit, is generally limited to that individual's domicile." *Id*. at ∗4. Noting that the defendant's domicile was clearly not in New York, the court echoed the Daimler decision in stating that "[d]etermining whether the Defendant is 'at home' in this forum 'calls for an appraisal of [his] activities in their entirety, nationwide and worldwide.'" *Id*. at ∗5. The court noted that the defendant was not a U.S. citizen or permanent resident alien; he never lived in New York or owned a bank account or other property here; and he is a citizen and permanent resident of the Dominican Republic with a temporary residence in Toronto during the baseball season. It found that the defendant's occasional visits to New York (for an estimated 9-12 games a year for 12 seasons) and association with a New York-based union and sports management agency did not establish that the defendant was "at home" in New York for jurisdictional purposes. Borrowing from Daimler again, the court focused on the defendant's connections with other states -

> This is especially true given that that the same evidence used to show the Defendant's occasional visits to New York for baseball games also shows that he has, during the same time period, made a comparable number of annual trips to 16 other states and the District of Columbia for the same purpose. Viewing the Defendant's activities "in their entirety, nationwide and worldwide," the Court discerns no principled basis for concluding that his trips to New York are any more substantial or otherwise likely to render him "at home" in this State than any other. On the contrary, to borrow a phrase from Justice Ginsberg, after Daimler it is reasonable to presume that a professional athlete who competes in many places can scarcely be deemed at home in all of them (citations omitted).

Id.

The court rejected the plaintiff's agency theory, finding that the Major League Baseball Players Association and Radegan Sports Management were not "primarily employed by the defendant" and are clearly "engaged in similar services for other clients." *Id*. at ∗6. Thus, it held that this was not one of the "truly 'exceptional' occasions" justifying a finding of general jurisdiction. *Id*. at ∗7.

Finally, the court refused to hold that the defendant was subject to specific jurisdiction in New York under either CPLR 302(a)(2) or CPLR 302(a)(3), because neither the tort (the sexual act, that had occurred in the Dominican Republic), nor the injuries (the original event that caused the injury, the parties' sexual intercourse, occurred in the Dominican Republic, rather than the manifestation of physical symptoms) took place in New York.

CPLR 301 / 302

David L. Ferstendig, *Business Corporation Law § 1314(b) Limits on Subject Matter Jurisdiction*, 680 N.Y.S.L.D. 3 (2017).

Business Corporation Law § 1314(b) (BCL) is an often overlooked limitation on subject matter jurisdiction in state court, something generally of rare concern. It provides that an action against a foreign corporation brought by another foreign corporation or a nonresident may not be maintained unless it falls within one of the five designated exceptions - where the subject contract was made or performed in New York or relates to property situated within New York at the time the contract was made; the "subject matter" of the action is in New York; the cause of action arose in New York; the defendant is subject to jurisdiction under CPLR 302; or the defendant is a foreign corporation doing business or authorized to do business in New York.

Significantly, because "subject matter jurisdiction cannot be conferred by agreement of the parties", the parties' consent to jurisdiction via a forum selection clause, for example, would not suffice. *See Calzaturificio Giuseppe Garbuio S. A. S. v. Dartmouth Outdoor Sports, Inc*., 435 F. Supp. 1209, 1211 (S.D.N.Y. 1997).

In *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 2017 N.Y. Slip Op. 04494 (June 8, 2017), BCL § 1314(b) applied, requiring the Court to determine in this case whether the defendant was subject to jurisdiction under CPLR 302(a)(1). The plaintiff, a Spanish limited liability company based in Pontevedra, Spain, agreed to locate a distributor to import defendant's wine into the United States. The defendant is a winery also located in Pontevedra. The defendant accompanied the plaintiff to New York on several occasions to meet potential distributors and to promote the defendant's wine. Ultimately the plaintiff introduced the defendant to a New York wine importer and distributor. Subsequently, the defendant stopped paying commissions to the plaintiff, prompting this action.

The defendant failed to appear or answer, resulting in a default judgment. The defendant moved to vacate the default judgment and to dismiss for lack of subject matter and personal jurisdiction. The trial court denied the vacate motion, while not considering the motion to dismiss. The Appellate Division reversed, vacated the default judgment, but found that there were issues of fact as to whether the court had personal jurisdiction over the defendant under CPLR 302(a)(1) (transaction of business).

After the matter was remanded to the trial court, the defendant's motion for summary judgment was denied by the court. On appeal, the Appellate Division reversed, holding that there was no jurisdiction because, although the "defendant's visits to New York to promote its wine constitute

the transaction of business," there was "no substantial nexus between plaintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and performed wholly in Spain, and those promotional activities." 128 A.D.3d 486, 487 (1st Dep't 2015).

The Court of Appeals reversed. It agreed with the Appellate Division that there was a transaction of business, in that the defendant "purposefully availed itself of 'the privilege of conducting activities'" in New York. 2017 N.Y. Slip Op. 04494 at ∗2-3. The Court focused on defendant's numerous trips to New York to attend wine industry events, its introduction to a New York-based distributor, its return to New York on at least two occasions to promote its wine, and the fact that it entered into an exclusive distribution agreement with the New York-based company to import wines into the United States.

However, contrary to the Appellate Division, the Court of Appeals found there to be a substantial relationship between the plaintiff's claim and the defendant's business activities in New York. In doing so, it rejected the Appellate Division's finding that the parties' oral agreement was performed "wholly in Spain" -

> Defendant traveled to New York to attend the Great Match Event where plaintiff introduced defendant to Kobrand. Defendant then joined plaintiff in attending two promotional events hosted by Kobrand in New York, which resulted in Kobrand purchasing defendant's wine and, eventually, entering an exclusive distribution agreement for defendant's wine in the United States. Those sales to Kobrand - and the unpaid commissions thereon - are at the heart of plaintiff's claim.

Id. at *3.

CPLR 301 / 302

David L. Ferstendig, *Business Corporation Law § 1314(b) Postscript*, 681 N.Y.S.L.D. 4 (2017).

In the July edition of the Digest, we referred to Business Corporation Law § 1314(b) (BCL), which limits a court's subject matter jurisdiction in actions brought by a nonresident or foreign corporation against a foreign corporation. The statute enumerates five designated exceptions. The case referenced, D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 56 N.Y.S.3d 488, 78 N.E.3d 1172 (2017), found that the defendant was subject to personal jurisdiction under CPLR 302, thereby removing the subject matter jurisdiction infirmity.

While not specifically relevant to our discussion above, practitioners should also be aware of General Obligations Law § 5-1402(1) (GOL), which provides that -

> Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or

> proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

Thus, GOL § 5-1402 expressly provides that where the underlying "contract, agreement or undertaking" involves a transaction "not less" than one million dollars and has a New York forum selection clause and a New York choice of law provision (pursuant to GOL § 5-1401), the BCL § 1314(b) subject matter jurisdiction bar does not apply.

Note also that CPLR 327(b) similarly provides that a court cannot stay or dismiss an action on forum non conveniens grounds, if those conditions are met (e.g., one million dollar transaction and the agreement between the parties has New York forum selection and choice of law provisions). For further discussion and specifically which types of contracts are impacted, *see* Weinstein, Korn & Miller, New York Civil Practice, CPLR ¶ 327.04 (David L. Ferstendig, LexisNexis Matthew Bender, 2d Ed.).

CPLR 302 - Specific Jurisdiction

CPLR 302

David L. Ferstendig, *U.S. Supreme Court Tackles Specific Jurisdiction Issues*, 681 N.Y.S.L.D. 1-2 (2017).

In the last edition of the Digest, we reported on the United States Supreme Court's decision in *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017). There, the Court refused to find general or all-purpose jurisdiction over the railway company, notwithstanding significant contacts in the state.

In *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco County*, 137 S. Ct. 1773 (2017), the issue presented to the Court related to specific jurisdiction, where the claim must arise out of the jurisdictional predicate. BMS, a large pharmaceutical company, is a Delaware corporation with its headquarters in New York. It has substantial operations in New York and New Jersey, with 50 percent of its U.S. workforce there. BMS has business activities in other jurisdictions, including California where it has 160 employees, 250 sales representatives, and a small state government advocacy office. The plaintiffs claimed that they were injured as a result of their ingestion of Plavix, a prescription drug intended to thin the blood and inhibit blood clotting. Significantly, only 86 of the plaintiffs were California residents, while the remaining 592 resided in 33 other states. BMS did not develop Plavix in California, did not create a marketing strategy there, and did not manufacture, label, package, or work on the regulatory approval of the product there. All those activities were performed in New York or New Jersey. BMS did sell 187 million

Plavix pills in California in the period between 2006 and 2012, resulting in $900 million in sales (approximately 1 percent of BMS's nationwide sales revenue). However, none of the nonresident plaintiffs alleged that they had obtained Plavix through California doctors or elsewhere in California, or that they were injured or treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of the summons on the nonresidents' claims, 2017finding there to be general jurisdiction over BMS. The California Court of Appeal found general jurisdiction to be lacking, but held there to be specific jurisdiction. The California Supreme Court affirmed, unanimously agreeing there was no general jurisdiction. However, the Court split on specific jurisdiction. The majority agreed there was, applying a "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." *Id*. at 1778.

A majority of the U.S. Supreme Court (8-1) reversed. The Court noted that it had to consider a variety of factors in assessing whether there was personal jurisdiction, including "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice" (citing to Kulko v. Superior Court of Cal., City and County of San Francisco, 436 U.S. 84, 92 (1978)). *Id*. at 1780. It stressed, however, that the "primary concern" is "the burden on the defendant."

The Court emphasized that

> [a]ssessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." […] "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister States" (citations omitted).

Id. at 1780.

For there to be specific jurisdiction, a court must find there to be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id*. at 1781 (citation omitted).

The majority found that the "sliding scale approach" adopted by the California Supreme Court was inconsistent with the Court's precedents -

> Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for

> this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state … is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'" (citations omitted).

Id. at 1781.

The majority noted that the California Supreme Court did not identify an adequate link between the nonresidents' claims and California. The fact that the resident plaintiffs were prescribed, obtained, and ingested the drug in California, and allegedly shared the same injuries as the nonresidents, did not allow the State of California to assert specific jurisdiction over the nonresidents' claims. As the Court previously stressed in *Walden v. Fiore,* 134 S. Ct. 1115 (2014), a defendant's relationship with third parties in the state is insufficient in and of itself to support a finding of jurisdiction. The Court found lacking here a "connection between the forum and the specific claims at issue." *Bristol-Myers*, 137 S. Ct. at 1776.

In response to the assertion of a "parade of horribles" that could result from its decision, the majority pointed out that there could be consolidated actions in New York or Delaware, where there would be general jurisdiction over BMS, or residents in particular states (e.g., Texas and Ohio) could probably sue together in their home states. The Court concluded, that

> since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court (citation omitted).

Id. at 1783–84.

The sole dissenter, Justice Sotomayor, stated that the majority's decision will make it harder for plaintiffs to aggregate claims in a particular jurisdiction, will result in piecemeal litigation, and will "make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States." *Id*. at 1784.

CPLR 302 - "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, 59 N.Y.S.3d 224 (4th Dep't 2017) ("Contrary to defendants' contention, we conclude that plaintiff made 'a prima facie showing' that the court has personal jurisdiction over Habib (citations omitted). As the principal and sole shareholder of NHJB, which operated a bar in New York, Habib transacted business in New York within the meaning of CPLR 302 (a) (1) (citations omitted), and we conclude that there is a substantial relationship between plaintiff's claims and Habib's activities in New York (citations omitted). In addition, we conclude that the exercise of personal jurisdiction over Habib comports with due process (citations omitted).").

CPLR 302 - Does foreign bank's use of NY correspondent bank account confer personal jurisdiction?

David L. Ferstendig, *Court of Appeals Splits on Whether Foreign Bank's Use of New York Correspondent Bank Account Confers Personal Jurisdiction*, 674 N.Y.S.L.D. 2 (2017).

The maintenance or use of a bank account in New York as a jurisdictional predicate with respect to a foreign defendant has been an issue that courts have grappled with over the years. For example, in *Banco Ambrosiano v. Artoc Bank & Trust*, 62 N.Y.2d 65 (1984), the Court sustained quasi-in rem jurisdiction, where the bank account was closely related to the claim and was the same account through which the defendant effectuated the transaction at issue.

On the other end of the jurisdictional spectrum was the First Department's decision in Georgia-*Pacific Corp. v. Multimark's Int'l*, 265 A.D.2d 109 (1st Dep't 2000), where the court held that a defendant's use of a New York bank account to conduct virtually all of its worldwide business was sufficient to confer general jurisdiction over the defendant. It is doubtful, however, that the Georgia-Pacific holding survives the United States Supreme Court's decision in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), which significantly narrowed the "doing business" basis for general jurisdiction. See What Remains of Doing Business and Consent as Jurisdictional Bases, 661 N.Y. St. Law Digest 4 (2015).

Most recently, in *Al Rushaid v. Pictet & Cie,* 2016 N.Y. Slip Op. 07834 (Nov. 22, 2016), the Court of Appeals was concerned with whether a foreign country bank's use of a New York correspondent bank account conferred specific jurisdiction under CPLR 302, which requires a connection between the cause of the action and the jurisdictional predicate. In Al Rushaid, plaintiffs, two Saudi Arabian companies and a Saudi individual, owner and co-owner of the respective companies, sued a private Switzerland-based bank among others, alleging that they concealed ill-gotten money arising out of a scheme arranged by three of the plaintiffs' employees. The defendants moved to dismiss the amended complaint for lack of jurisdiction and failure to state a cause of action, among other relief. The trial court granted the motion, concluding that the defendants' use of correspondent bank accounts in New York was passive, not purposeful. The Appellate Division affirmed, distinguishing this case from a prior Court of Appeals decision in *Licci v. Lebanese Can. Bank, SAL*, 20 N.Y.3d 327 (2012). The Appellate Division noted that Licci required "deliberate acts" absent in this case because the "defendants merely carried out their clients' instructions and have not been shown to have 'purposefully availed [themselves] of the privilege of conducting activities in New York'." 127 A.D.3d 610, 611 (1st Dep't 2015).

A majority of the Court of Appeals reversed, finding that defendants' "repeated" use of correspondent bank accounts to receive and transfer illicit funds was purposeful and "central" to the bribery and kickback scheme. In addition, the Court held that plaintiffs' aiding and abetting and conspiracy claims arose out of these bank transactions. The Court distinguished between a circumstance where there is a repeated deliberate use of the correspondent account that is approved

by the foreign bank and unintended and unapproved use where the foreign bank "is a passive and unilateral recipient of funds later rejected."

The dissent, written by Judge Pigott, expressed the belief that the majority was ignoring prior precedent, risking "upending over forty years of precedent that holds the mere maintenance of a New York correspondent account is insufficient to assert personal jurisdiction over a foreign bank." *Al Rushaid,* 28 N.Y.3d at 339. It stressed that the Licci decision required something more than mere maintenance of and receipt of funds in a correspondent bank and that purposeful contact is necessary -

> [T]he foreign bank in *Indosuez International Finance B.V. v National Reserve Bank* (98 NY2d 238 [2002]) was subject to personal jurisdiction where the bank itself entered into numerous contracts with the plaintiff and specified that payments under those contracts were to be made into the bank's New York account, for the benefit of the bank. Unlike the foreign bank in Amigo Foods, whose only contact with New York was the maintenance of a correspondent account into which other parties unilaterally chose to deposit funds, the foreign bank in Indosuez was itself a party to the contract that had required payments to be made into its correspondent account. The bank had also expressly designated New York as the place of performance and submitted to New York jurisdiction in six of its agreements (citations omitted).

Id. at *16.

The dissent concluded that here, the defendants had no contacts with New York other than maintaining a correspondent account into which the illicit funds were deposited at the direction of foreign nationals -

> Like the foreign bank in Amigo Foods, Pictet has not wired money through its New York correspondent account, nor has it initiated any other contact with the forum state such as the kind we found dispositive in Licci and Indosuez. Even accepting as true all of the facts alleged in the amended complaint, Pictet was nothing more than an "adventitious" recipient of money that had been transferred into its account at the unilateral direction of foreign nationals, which is insufficient under section 302(a)(1) to exercise personal jurisdiction over a foreign bank.

Id.

COMMENCEMENT

CPLR 304 - Commencing actions or special proceedings

CPLR 304 / 2001 - 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) ("While the Supreme Court or the County Court may convert an improperly brought motion for leave to serve a late notice of claim into a special proceeding (citations omitted), the failure to file the application with the appropriate clerk — the County Clerk — is a fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001 (citations omitted). Indeed, the filing of initiatory papers with the Clerk of the Supreme and County Courts, rather than the County Clerk, 'has been equated to a nonfiling and, thus, 'a nonwaivable jurisdictional defect rendering the proceeding a nullity' (citations omitted). Here, petitioner mailed her 2013 application to the Greene County Courthouse to the attention of the 'County Lawyer Clerks Office.' Petitioner's papers were promptly rejected by the Chief Clerk of the Supreme and County Courts in Greene County and returned to petitioner with a letter identifying several deficiencies with her papers and directing that they be mailed to the County Clerk's Office. Petitioner's failure to file her 2013 application with the proper clerk amounts to a nonwaivable jurisdictional defect, rendering the proceeding a nullity (citations omitted). Consequently, petitioner's 2015 submissions cannot relate back to her 2013 attempted application. Given that petitioner did not file an application with the Greene County Clerk prior to the expiration of the one year and 90-day statute of limitations, which expired in February 2014, Supreme Court was statutorily prohibited from extending the time in which petitioner had to serve her notice of claim upon respondent (citations omitted).").

CPLR 304 / 2001 - Failure to file papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect

Matter of Ennis v. Annucci, 160 A.D.3d 1321, 75 N.Y.S.3d 347 (3rd Dep't 2018) ("The four-month statute of limitations period in which to commence this proceeding began to run upon petitioner's notification of the adverse determination on July 20, 2016 (citation omitted). To that end, 'a proceeding such as this is deemed commenced for statute of limitations purposes on the date on which the clerk of the court actually receives the petition in valid form' (citations omitted). Because the record establishes that petitioner did not submit the petition and related documentation in proper form until after the four-month statutory period had expired, Supreme Court properly dismissed the petition as untimely (citations omitted). Contrary to petitioner's contention, the deficiencies in the initial papers submitted — which included unsigned, undated and non-original documents — are not subject to correction pursuant to CPLR 2001 so as to render the proceeding timely inasmuch as '[t]he failure to file the papers required to commence [a proceeding] constitutes a nonwaivable, jurisdictional defect' (citations omitted). Accordingly, the merits of the disciplinary determination are not properly before us.").

SUMMONS

CPLR 305 - Summons

CPLR 305(c) - There was no misnomer that required correction by amendment

Martin v. Witkowski, 2017 NY Slip Op 09014 (4th Dep't 2017) ("This appeal raises an age-old dilemma: how should the law distinguish between a father and son of the same name? Under the circumstances presented here, we hold that plaintiff properly commenced a single action against Walter Witkowski, Jr. notwithstanding plaintiff's initial and ineffective attempt to serve Witkowski, Jr. at the home of his father, Walter Witkowski, Sr. … In light of the foregoing, we hold that Junior is, and always has been, the only defendant in this case. We emphasize, however, that our conclusion is based in no part on the rule of Stuyvesant v. Weil (citation omitted), which 'has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment [so long as] (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment' (citations omitted). The Stuyvesant rule, which has been codified and subsumed within CPLR 305 (c), applies when there has been a 'misnomer' in describing the defendant in the summons and/or complaint, and that simply did not occur here. Junior was not 'misnamed' as defendant 'Walter Witkowski.' To the contrary, although this description is perhaps an imprecise recitation of the defendant's name, it is not in any sense an inaccurate recitation of Junior's name. Whatever else he might choose to be called, Junior is unquestionably a 'Walter Witkowski.' And as then Chief Justice Kent observed over two centuries ago, the suffix 'junior is no part of the name . . . It is a casual and temporary designation. It may exist one day, and cease the next' (citation omitted). The Stuyvesant rule therefore has no application here; put simply, there was no 'misnomer' that required correction by amendment.").

SERVICE

CPLR 306-b - Service of initiating pleadings

CPLR 306-b - 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, 61 N.Y.S.3d 315 (2d Dep't 2017) ("Under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b for leave to extend its time to serve the summons and complaint upon Saintus in the interest of justice (citation omitted). While the action was timely commenced, the statute of limitations had expired when the plaintiff moved for this relief, the timely service of process was subsequently found to have been defective, there was no identifiable prejudice to Saintus attributable to the delay in proper service, and the complaint appears to be potentially meritorious (citations omitted). Contrary to Saintus's contention, the court did not lack jurisdiction to entertain this branch of the plaintiff's motion. Inasmuch as no judgment was entered dismissing the action, the action was pending when the plaintiff moved to extend the time to serve Saintus with process (citation omitted).").

CPLR 306-b - Failure to demonstrate good cause or entitlement to extension in interests of justice

Encarnacion v. Ogunro, 2018 NY Slip Op 04698 (2d Dep't 2018) ("The plaintiff failed to demonstrate good cause. The attempt to serve the defendant pursuant to CPLR 308(4) was

ineffective as a matter of law because the place where process was affixed was not the defendant's 'actual place of business, dwelling place or usual place of abode' (citations omitted). The plaintiff also failed to establish her entitlement to an extension of time for service of the summons and complaint in the interest of justice in view of the extreme lack of diligence in attempting to effect service, the more than six-year delay between the filing of the summons and complaint and the time the cross motion was made, the plaintiff's failure to move for an extension of time until more than eight months after the defendant moved to vacate the default judgment, the four-year delay between the expiration of the statute of limitations and the defendant's receipt of notice of this action, and the inference of substantial prejudice due to the lack of notice of the plaintiff's causes of action until more than six years after their accrual (citations omitted).").

Zerbi v. Botwinick, 2018 NY Slip Op 04376 (2d Dep't 2018) ("The plaintiffs failed to establish that they exercised reasonably diligent efforts in attempting to effect proper service on Botwinick and, therefore, failed to demonstrate good cause (citations omitted). The plaintiffs also failed to establish that an extension of time was warranted in the interest of justice. The plaintiffs exhibited a lack of diligence in attempting to effect proper service, failed to seek an extension of time until after the defendants' motion was made, did not rebut the evidence that Botwinick did not learn of the action until eight months after the statute of limitations had run, and failed to demonstrate a potentially meritorious cause of action (citations omitted). Accordingly, we agree with the Supreme Court's determination to deny the plaintiffs' cross motion and to grant that branch of the defendants' motion which was to dismiss the complaint insofar as asserted against Botwinick.").

CPLR 306-b - Extension unavailable; claims already time-barred and lacked merit

Schwartz v. Chan, 75 N.Y.S.3d 31 (1st Dep't 2018) ("As plaintiff's claims were already time-barred under the statute of limitations for libel and slander actions (citation omitted) when he filed the summons, CPLR 306–b is unavailable to him to extend his time to serve the complaint (citations omitted). Nor is an extension warranted in the interest of justice, since the claims not only are time-barred but also lack merit (citations omitted). The statements of which plaintiff complains are protected by the litigation privilege, since they were prepared in connection with a threatened litigation, at the direction of a potential defendant, by an individual who, at a minimum, was a potential witness (citation omitted).").

CPLR 306-b - 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, 62 N.Y.S.3d 680 (4th Dep't 2017) ("We agree with plaintiff that Supreme Court properly denied defendant's motion inasmuch as defendant waived his defense of lack of personal jurisdiction based on improper service of process by failing to move to dismiss the complaint on that ground within 60 days of serving his answer (citations omitted). Defendant's contention that his motion was based on the statute of limitations, as opposed to improper service, is belied by the record and, in any event, is without merit because plaintiff filed the summons with

notice prior to the expiration of the limitations period (citations omitted). We likewise conclude that, 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 (citation omitted). In any event, upon consideration of the relevant factors, including the expiration of the statute of limitations, the meritorious nature of plaintiff's cause of action against defendant, and defendant's failure to show any prejudice, we conclude that the court did not abuse its discretion in granting that part of plaintiff's cross motion (citations omitted).").

CPLR 306-b - Extension should be sought via cross-motion

Komanicky v. Contractor, 146 A.D.3d 1042, 43 N.Y.S.3d 761 (3rd Dep't 2017) ("To the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR 306-b, such affirmative relief should have been sought by way of a cross motion on notice (citations omitted). … In addition to plaintiff's lack of diligence in attempting to effectuate service within the time period prescribed by CPLR 306-b (citations omitted), his purported 'request' for an extension of time for service, even if it may be deemed as such, was made more than 15 months after the 120-day period had expired and only after defendants had moved for dismissal (citations omitted).").

CPLR 306-b / CPLR 308(2) - Delivery and mailing must be effected within 120 days

Purzak v. Long Is. Hous. Servs., Inc., 149 A.D.3d 989, 53 N.Y.S.3d 112 (2d Dep't 2017) ("Both the delivery and mailing components of CPLR 308(2) must be performed within 120 days of the filing of process (citations omitted). Here, the affidavits of the plaintiff's process server state that he served the summons with notice on DeGennaro, Santantonio, Bonet, and Roman by delivering copies to Wilder at the LIHS office on December 2, 2011, and by mailing additional copies to those defendants at the LIHS office on December 5, 2011. December 5, 2011, is 122 days after the date of the filing of the summons with notice, and beyond the 120-day period required by CPLR 306-b. Consequently, service of the summons with notice upon the individually named defendants was untimely (citation omitted). Moreover, as to service upon DeGennaro, Santantonio, Bonet, and Roman, the plaintiff failed to demonstrate good cause for an extension of time to effect proper service on those defendants, or that an extension was otherwise warranted in the interest of justice (citations omitted).").

CPLR 308 - Personal service on natural persons

CPLR 308(2) - Failure to file proof of service

Divito v. Fiandach, 160 A.D.3d 1404 (4th Dep't 2018) ("Contrary to plaintiff's initial contention, defendant was not in default in the action because plaintiff never effectuated proper service upon him. Plaintiff attempted personal service pursuant to CPLR 308 (2) by delivering a copy of the summons and complaint to a person of suitable age and discretion at defendant's workplace and

by mailing a copy to his workplace. Plaintiff did not, however, file proof of service in the Monroe County Clerk's Office within 20 days of the delivery or mailing (citation omitted), and he never applied to the court for leave to file a late proof of service (citation omitted). As a result, plaintiff's subsequent late filing of the proof of service was a nullity (citations omitted). Personal service of the summons was not deemed to have occurred until March 14, 2016, when defendant's attorney filed a notice of appearance (citation omitted). Defendant had 20 days from that date to serve an answer or a motion to dismiss (citation omitted), to avoid being in default (citation omitted). Defendant's motion to dismiss the complaint pursuant to CPLR 3211 was made 18 days later, and thus he never defaulted in the action (citation omitted).").

CPLR 308(2) - Person of SAD does not have to reside in premises

Wells Fargo Bank, N.A. v. Decesare, 154 A.D.3d 717, 62 N.Y.S.3d 446 (2d Dep't 2017) ("Here, the affidavit of service contained sworn allegations reciting that service was made upon the defendant Angela Decesare, also known as Angela T. DeCesare (hereinafter the defendant), by leaving the relevant papers with a person of suitable age and discretion, who identified himself as 'John DeCesare,' at the defendant's residence, and by subsequently mailing a second copy of the papers to the defendant at the same address. The affidavit of service included a description of 'John DeCesare.' Contrary to the determination of the Supreme Court, the defendant's submissions failed to rebut the affidavit of service, since they stated that the only person fitting that description who resided at the premises was the defendant's son Richard, and Richard could not have been present at the time of the alleged service since he was at work. The defendant's submissions did not rebut the sworn allegation that a person fitting the physical description of 'John DeCesare' was present at the residence at the time and accepted service on behalf of the defendant (citations omitted). Indeed, '[v]alid service pursuant to CPLR 308 (2) may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property' (citation omitted). Moreover, the defendant did not deny that she received the papers in the mail and thus did not overcome the inference of proper mailing that arose from the affidavit of service (citation omitted). Accordingly, a hearing to determine the validity of service of process was not warranted under the circumstances of this case (citation omitted), and the Supreme Court should have denied that branch of the defendant's cross motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction.").

CPLR 308(4)

David L. Ferstendig, *Court Addresses Affixing and Mailing Provision Under New York City Charter,* 686 N.Y.S.L.D 3 (2018).).

Court Addresses Affixing and Mailing Provision Under New York City Charter

Only Single Prior Reasonable Attempt at Personal Delivery at the Premises Is Required

In Mestecky v. City of New York, 2017 N.Y. Slip Op. 08162 (November 20, 2017), the Department of Buildings' inspectors issued nine Notices of Violation (NOV) in connection with

the petitioner's residential property. Each of the NOVs identified the claimed violation and described a single successful effort by the inspector to personally serve the NOV at the premises. The inspector then utilized "alternative service," that is, affixing the NOV to the premises in a conspicuous place and mailing a copy to the petitioner at the premises address (and, for some of the NOVs, at his home).

The petitioner failed to appear on the hearing dates, resulting in administrative default judgments, fines and penalties. At a hearing challenging the NOVs, the petitioner asserted that he did not receive any of the NOVs and argued that more than a single attempt at personal delivery was required before permitting the affix and mail service.

The relevant provision here is New York City Charter § 1049-a(d)(2), which permits the use of affix and mail service after "a reasonable attempt" has been made to deliver the notice "to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law."

The "generic" nail and mail service that most of us are familiar with is contained in CPLR 308(4). There, the statute expressly states that the resort to nail and mail service can only be made upon a showing that service by personal delivery (CPLR 308(1)) or leave and mail (CPLR 308(2)) could not be effected with "due diligence." The latter requirement has been interpreted to require multiple attempts at different times. See e.g., Sinay v. Schwartzman, 148 A.D.3d 1068 (2d Dep't 2017).

The petitioner here argued that by referencing CPLR Article 3, the relevant charter provision incorporated the "due diligence" requirement of CPLR 308(4), as interpreted by case law. Thus, the petitioner maintained that the single attempt to deliver the NOVs to a person at the premises was insufficient.

The Court of Appeals rejected the argument. It focused on the language of New York City Charter § 1049-a(d)(2), which begins with a general rule that CPLR Article 3 service rules apply, and follows with certain alternative service exceptions, including the one relevant here. Thus, to read the provision in the manner advocated by the petitioner

> would make the exception indistinguishable from the general rule, thereby rendering it superfluous. Considered in context, the only reasonable conclusion is that the cross-reference to CPLR article 3 and Business Corporation Law article 3 in the exception was intended to import the provisions of those articles clarifying the parties or entities who can accept service, such as the clause permitting delivery to "a person of suitable age and discretion" (see CPLR 308[2]). Indeed, this is the most natural reading of section 1049-a(d)(2)(b) given that the phrase containing the statutory cross-references directly follows the clause requiring "a reasonable attempt" to deliver the notice "to a person in such premises upon whom service may be made."

Mestecky, 2017 N.Y. Slip Op. 08162, at ∗4–5.

Moreover, the Court pointed to language in the statute which talks in terms of "a reasonable attempt," that is, the use of the singular "attempt" (as opposed to multiple attempts). As a result, the statutory language supported the conclusion that a single attempt at personal delivery was required. The Court added that the legislative history further supported this interpretation, because it stressed the difficulties encountered in identifying and locating the persons responsible for the violation(s), and frequent amendments have thus sought to liberalize the service rules to deal with the widespread problem of violators avoiding service.

Finally, the Court concluded that the procedure providing for a single attempt to deliver the NOV personally followed by affix and mail "is reasonably calculated to inform owners of violations relating to their properties." *Id*. at ∗5.

CPLR 308(4) - Due diligence requirement met

Nationstar Mtge., LLC v. Dekom, 161 A.D.3d 995 (2d Dep't 2018) ("In this case, the plaintiff submitted affidavits from the process server which demonstrated that four visits were made to the defendant's residence at different times when the defendant could reasonably have been expected to be found at home. The process server also described the means she used to verify the defendant's residential address, and described her unsuccessful attempt to ascertain the defendant's place of employment. We agree with the Supreme Court that the affidavits constituted prima facie evidence that the due diligence requirement was satisfied (citation omitted). The affidavits also constituted prima facie evidence that the process server properly affixed a copy of the summons and complaint to the door of the defendant's residence, and mailed a copy to the residence by first class mail. Contrary to the defendant's contention, he failed to rebut the presumption of proper service arising from the process server's affidavits. Further, the summons contained statutorily mandated language warning the defendant that the failure to serve an answer to the complaint may result in a default judgment and advising him to speak to an attorney (citation omitted).").

CPLR 308(4) - Failure to meet due diligence requirement

Faruk v. Dawn, 2018 NY Slip Op 04307 (2d Dep't 2018) ("Here, the submissions in support of the plaintiff's motion contained numerous inconsistent dates regarding when service was attempted and made upon the defendant. Even accepting the dates of attempted service claimed by the plaintiff, those attempts were 'made on weekdays during hours when it reasonably could have been expected that [the defendant] was either working or in transit to work' (citations omitted). Moreover, there is no indication that the process server made any attempt to locate the defendant's place of employment so he could attempt to effectuate service there (citations omitted). Under these circumstances, the plaintiff failed to establish that he exercised due diligence in attempting to effectuate service pursuant to CPLR 308(1) or (2) before resorting to service pursuant to CPLR 308(4) (citations omitted).").

CPLR 308(4) - General Business Law § 13 - Need 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, 61 N.Y.S.3d 578 (2d Dep't 2017) ("The defendants contend that the plaintiff's counsel was aware that they are observant, Orthodox Jewish persons who adhere to the Sabbath, and thus, the Saturday affixation of process to the door of their residence was invalid. This appears to be an issue of first impression for this Court. We agree with the other courts that have addressed the issue, which have consistently held, for more than a century, that service in violation of General Business Law § 13, or its predecessor statute, is void, and personal jurisdiction is not obtained over the party served (citations omitted). Moreover, we hold that the statute applies not only to personal service upon a defendant, but also to the affixation portion of 'nail and mail' service pursuant to CPLR 308(4) on the door of a defendant's residence, as occurred here (citations omitted). To establish a violation of General Business Law § 13, malicious intent must be shown (citations omitted). 'Service on the Sabbath . . . with knowledge that the person to be served observes the Sabbath . . . constitutes malice' (citations omitted). The knowledge of a plaintiff or its counsel is imputed to the process server by virtue of the agency relationship (citations omitted). In support of their motion, the defendants submitted an August 26, 2013, letter from their counsel which advised the plaintiff's counsel's law firm that the defendants are 'observant, Orthodox Jews,' who cannot be served on a Saturday, together with a fax transmission report indicating a successful transmission. This proof was sufficient to establish, prima facie, that the plaintiff's counsel had knowledge that the defendants were protected from Saturday service by General Business Law § 13 (citations omitted). However, in opposition, the plaintiff submitted a denial by its counsel of receipt of the faxed letter, and an affidavit by the law firm's independent information technology contractor to the effect that there was no indication of receipt in the firm's archive system. These submissions raised a question of fact as to whether the plaintiff's counsel had knowledge that the defendants could not properly be served on a Saturday, necessitating a hearing (citations omitted).").

CPLR 308(5) - Court refuses to permit Facebook service

David L. Ferstendig, *This Time Service of Process by Facebook Is Not Permitted Under CPLR 308(5)*, 674 N.Y.S.L.D. 3-4 (2017).

In the July 2015 edition of the Digest, we discussed *Baidoo v. Blood-Dzroky*, 48 Misc. 3d 309 (Sup. Ct., N.Y. Co. 2015), in which Justice Matthew Cooper permitted Facebook service pursuant to CPLR 308(5) in a divorce action. Critically, Justice Cooper found that the plaintiff had established that the Facebook account she identified actually belonged to the defendant and that the defendant regularly logged into his account. The standard to apply to determine whether a particular method of service is proper is whether the service comports with the fundamentals of due process by being reasonably calculated to provide the defendant with notice. If one walked away from the Baidoo decision with the impression that the floodgates were about to open permitting widespread Facebook or other social media or email service, he or she would have reached the wrong conclusion. In fact, Justice Cooper's meticulously written decision suggests that courts will permit such service in very limited circumstances.

Qaza v. Alshalabi, 2016 N.Y. Slip Op. 26402 (Sup. Ct., Kings Co. December 5, 2016), is a more recent case in which the court refused to permit Facebook service. Qaza was also a divorce case,

in which the plaintiff-wife alleged that the defendant-husband left the marital residence three months after they were married without providing any contact information. The plaintiff believed that the defendant had been deported and was living in Saudi Arabia. She maintained that all attempts to locate the defendant had failed and she could not serve him under the Hague Convention because Saudi Arabia was not a signatory. Finally, the cost of publication in a local newspaper was prohibitively expensive. As a result, the plaintiff was seeking "publication to Facebook" of the summons, pursuant to CPLR 308(5). The court here, however, found that the plaintiff had 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. Thus, it concluded that "plaintiff has not demonstrated that, under the facts presented here, service by Facebook is reasonably calculated to apprise defendant of the matrimonial action." *Id*. at *4.

The court noted the particular due process concerns associated with a divorce action -

> The act for divorce has a multitude of ancillary affects [sic] on the rights and liabilities of parties. The Court must be scrupulous in allowing service by a methodology most likely to give notice not only [to] one's economic responsibilities and rights to pay and receive maintenance and child support but rights to property, inheritance and most importantly the Constitutional right to custody and visitation (citation omitted). If the standard for review of an agreement in any matrimonial action is higher than that in a plenary action certainly the Court must be satisfied that there is some semblance of due process notice (citation omitted).

Id.

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*5.

With the emphasis on communication via email and social media, there has been a push to "update" our service statutes to provide for such service, perhaps as a separate enumerated basis in CPLR 308, for example. However, each of these methods of service has its own problems which raise due process concerns. For example, service by email is complicated by spam folders that may prevent the delivery of emails and the general warning not to open emails from persons you do not recognize. Moreover, as the Qaza court stated, "anyone can create a Facebook profile." *Id*. So while the communications of the future outside of litigation will continue to migrate electronically, it is doubtful that electronic service of process will become an enumerated authorized method of service under CPLR 308 any time soon. Of course, CPLR 308(5) provides the court with an opportunity to use such service in the appropriate case, where the particular defendant's due process rights are properly considered and protected.

CPLR 308(5) - Service via email permitted

Kozel v. Kozel, 161 A.D.3d 700 (1st Dep't 2018) ("Here, Inga left the jurisdiction after the same court and Justice found her in contempt, and offers no evidence that she was at either her residence in London or Lithuania. Under these circumstances, the court properly directed that she be served via email (citation omitted). Since Inga was properly served with the contempt motion, and had knowledge of the terms of the subject orders of which she was in violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding (citation omitted).").

CPLR 311 - Personal service on corporation or governmental subdivision

CPLR 311 / 311-a - Affidavit of compliance' compare BCL 307 and Limited Liability Company Law § 304

Chan v. Onyx Capital, LLC, 156 A.D.3d 1361, 67 N.Y.S.3d 748 (4th Dep't 2017) ("It is well settled that '[s]trict compliance with Limited Liability Company Law § 304 is required, including as to the filing of an affidavit of compliance' (citations omitted). The Court of Appeals in Flick v. Stewart-Warner Corp. (citations omitted) analyzed Business Corporation Law § 307, which is substantively identical to Limited Liability Company Law § 304. The Court explained that "the statute contains procedures calculated to assure that the foreign corporation, in fact, receives a copy of the process" (citation omitted). The Court held that '[t]he proof called for in the affidavit of compliance is that the required actual notice has been given either by personal service or by registered mail . . . These are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice' (citation omitted). In this case, as outlined above, plaintiff failed to comply with step two of Limited Liability Company Law § 304. We reject plaintiff's contention that nothing more was required of her after the registered mail was returned as undeliverable. Inasmuch as plaintiff failed to comply with step two, she necessarily also failed to comply with step three, which would show that a party complied with the service requirements of section 304.").

CPLR 312-a - Service by mail

CPLR 312-a - 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, 72 N.Y.S.3d 912 (4th Dep't 2018) ("Plaintiff commenced this negligence action by serving defendants by mail pursuant to CPLR 312-a (a) and thereafter utilized 'an alternative method' of service of process when 'the acknowledgment of receipt' was not returned by defendants or the other persons set forth in CPLR 312-a (b) within the requisite 30-day period. Plaintiff moved for, inter alia, an immediate judgment in the amount of $110.53, i.e., the amount expended by plaintiff in serving defendants by the alternative method of service of process (citation omitted). We agree with plaintiff that Supreme Court erred in denying that part of plaintiff's motion (citation omitted). Here, plaintiff submitted prima facie evidence that his

attorney mailed the requisite documents to defendants pursuant to CPLR 312-a (a), and defendants failed to raise an issue of fact with respect to that service.").

DEFENDANT'S APPEARANCE

CPLR 320 - Defendant's appearance

CPLR 320 / 3012(b) - Potential trap of serving notice of appearance

David L. Ferstendig, *The Potential Trap of Serving a Notice of Appearance*, 682 N.Y.S.L.D. 3 (2017).

The waiver of defenses can be avoided in most circumstances merely by including them either in an answer or in a pre-answer motion to dismiss. *See* CPLR 3211(e). Jurisdictional objections present additional challenges and requirements. For example, if the defendant moves to dismiss under CPLR 3211(a) on any ground, jurisdictional objections must be included or waived. In addition, if one includes a service defense in the answer, a motion must be made within 60 days thereafter to resolve that issue.

But sometimes an action is commenced via service of a summons with notice. There, the defendant's response is first to serve a demand for a complaint or a notice of appearance. Technically, they are to have the same requisite effect, that is, to compel the plaintiff to serve a complaint. Moreover, reading CPLR 320 together with CPLR 3211(e), there should be no waiver by the defendant of any defense when serving a demand or notice of appearance, because he or she will have an opportunity to assert it in the answer or pre-answer motion to dismiss. *See, e.g., Balassa v. Benteler-Werke A. G.*, 23 A.D.2d 664 (2d Dep't 1965).

Nevertheless, in response to a summons with notice, I always serve a demand for a complaint to avoid any "misunderstandings" that by serving a notice of appearance I have somehow waived something.

However, apparently not all notices of appearance are the same. Sometimes, in very rare instances, defendant's counsel will serve a notice of appearance without having been served with a summons with notice. For example, a defendant may serve a notice of appearance merely to be aware of developments in a case. *See, e.g., Tsionis v. Eriora Corp.*, 123 A.D.3d 694, 696 (2d Dep't 2014) ("Contrary to the plaintiffs' contention, the appellant was not required to serve an answer where the complaint did not set forth any allegations that the appellant was required to defend against. 'A defendant who has no defense, and therefore serves no pleading, might nevertheless serve a notice of appearance so as to be kept apprised of the progress of the proceeding.' Such was the situation here.") (citing Weinstein, Korn & Miller, New York Civil Practice, CPLR 320.03 (David L. Ferstendig, LexisNexis Matthew Bender, 2d Ed.).).

A more recent case presented a different scenario. *American Home Mtge. Servicing, Inc. v. Arklis*, 150 A.D.3d 1180 (2d Dep't 2017) was a mortgage foreclosure action, in which the defendant initially failed to answer, resulting in the entry of a default judgment (over a year-and-a-half after the alleged service) and the appointment of a referee to compute what was due to the plaintiff. Just over two-and-a-half years later, at a foreclosure settlement conference, defendant's attorney executed a form notice of appearance. Almost two years after that, the plaintiff's assignee moved for leave to enter a judgment of foreclosure and sale. The defendant crossmoved to dismiss under CPLR 3211(a)(8) for lack of personal jurisdiction based on improper service, noting specifically that the defendant was not moving to vacate a default judgment under CPLR 5015(a)(1) or CPLR 317. However, the trial court "deemed" the cross-motion to be pursuant to CPLR 5015, and found that the defendant was never served and the default judgment to be a nullity.

The Appellate Division reversed, holding that the defendant waived her jurisdictional defense -

> "By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction." Here, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance on July 25, 2012, and neither the defendant nor her attorney moved to dismiss the complaint on the ground of lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading. Accordingly, the defendant waived any claim that the Supreme Court lacked personal jurisdiction over her in this action (citations omitted).

Id. at 1181–82.

While the above fact pattern may be unusual and perhaps presents itself primarily in mortgage foreclosure actions, defendants should generally stay away from using a "notice of appearance." When served with a summons with notice, respond with a demand for a complaint. And, of course, preserve your defenses in your answer or a pre-answer motion to dismiss.

The Commercial Division of the Supreme Court continues to adopt rules designed to streamline and improve the litigation process.

CPLR 320 / 3012 - Serving demand for complaint

A defendant cannot demand a complaint before being served with a summons with notice. *See Micro-Spy, Inc. v. Small*, 9 A.D.3d 122, 778 N.Y.S.2d 86 (2d Dep't 2004) (service of demand for complaint after filing of summons but before service was premature). However, a defendant can serve a demand after the plaintiff serves the defendant pursuant to CPLR 308(2), but before the plaintiff has filed the proof of service and service is complete. *See Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgt. LLC*, 150 A.D.3d 427, 55 N.Y.S.3d 1 (1st Dep't 2017) ("Plaintiff commenced this securities fraud action against 26 defendants by filing a summons with notice on October 16, 2015, and served defendant Manley pursuant to CPLR 308(2) twelve days later. On November 3, 2015, before plaintiff had filed proof of service, defendant served a demand for a complaint pursuant to CPLR 3012(b). Plaintiff, taking the position that the demand was a nullity,

asked defendant to agree to accept a complaint served by the end of December. Defendant refused, and instead moved to dismiss the action on November 24, the 21st day after service of its demand. Plaintiff served a complaint on December 24, 2015. We agree with the motion court that under CPLR 3012(b), defendant was permitted to serve a demand for a complaint after being served, notwithstanding that service was not technically 'complete.' The time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates (citations omitted). In the cases relied on by plaintiff, the defendants' demands were ineffective to trigger plaintiff's time to serve a complaint pursuant to CPLR 3012(b) because the defendants had not yet been served with a summons with notice, and the CPLR makes no provision for an appearance or a demand for a complaint before the summons is served (citations omitted).").

CPLR 321- Attorneys

CPLR 321(a) - Compliance with section does not implicate subject matter jurisdiction

Hamilton Livery Leasing, LLC v. State of New York, 151 A.D.3d 1358, 58 N.Y.S.3d 624 (3d Dep't 2017) ("Here, defendant does not point to any service or filing provision — or any other provision — of the Court of Claims Act that prohibits claimant from pro se representation. Instead, defendant relies on CPLR 321 (a), which provides that, subject to express exceptions, a 'corporation or voluntary association shall appear by attorney' to 'prosecute or defend a civil action,' and 'like a corporation or a voluntary association, [an] LLC may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the state of New York' (citation omitted). Thus, as an initial matter, we conclude that compliance with CPLR 321 (a) does not implicate subject matter jurisdiction, as compliance with that provision is not a prerequisite to the waiver of sovereign immunity pursuant to the Court of Claims Act (citation omitted)…Accordingly, we hold that, under these circumstances, the irregularity of claimant's initial filing was one that the Court of Claims could have disregarded, given counsel's subsequent appearance on behalf of claimant, by granting so much of claimant's motion to amend the claim as added counsel's signature (citations omitted).").

REMOVAL

CPLR 325 - Grounds for removal

CPLR 325(b) - Motion must be accompanied by a request for leave to amend the ad damnum clause of the complaint

Hart v. New York City Hous. Auth., 161 A.D.3d 724 (2d Dep't 2018) ("A motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the ad damnum clause of the complaint pursuant to CPLR 3025(b) (citation omitted). Here, the amount stated in the ad damnum clause was within the jurisdictional limits of the Civil Court, and no request for leave to amend the ad damnum clause was made. In the absence of an application to increase the ad damnum clause, the plaintiff's motion to remove

the action to the Supreme Court should have been denied (citations omitted). Accordingly, we remit the matter to the Supreme Court, Kings County, to restore the matter to the Civil Court, Kings County.").

FORUM NON CONVENIENS

CPLR 327 - Defendant did not waive FNC objection by participating in action

Aina v. American Univ. of Antigua, 161 A.D.3d 508, 73 N.Y.S.3d 430 (1st Dep't 2018) ("This action, where plaintiff, a former student of defendant's medical school, alleges that he was discriminated against, was properly dismissed on the ground of forum non conveniens (citations omitted). Neither party is a New York resident and the underlying conduct took place in Georgia or Antigua, where the vast majority of witnesses and documents are located. Plaintiff does not contend that New York law applies to his claim, or that Georgia or Antigua are not adequate alternative fora. The fact that defendant retains a New York firm to provide administrative support is not sufficient to render New York an appropriate forum. Defendant did not waive its right to challenge the New York forum by participating in the instant litigation, as its participation has been minimal. Defendant filed this motion shortly after filing its amended answer, and before plaintiff had replied to its counterclaims. Although defendant served discovery demands and participated in a scheduling conference, no discovery had yet been exchanged and there were no prior motions. It is further noted that defendant made clear in both its answer and amended answer that it intended to assert forum non conveniens as an affirmative defense, and expressly agreed to dismissal of its counterclaims on that basis.").

CPLR 327 - FNC motion denied; plaintiff NY resident; defendants have substantial connections to NY; delay in bringing motion

Bacon v. Nygard, 160 A.D.3d 565, 76 N.Y.S.3d 27 (1st Dep't 2018) ("It is true that the alleged defamation related to events occurring in the Bahamas, and that some of the nonparty witnesses and documents are likely to be located in the Bahamas. However, this is not dispositive (citations omitted). Plaintiff is a New York resident. While also not dispositive, this is generally 'the most significant factor in the equation' (citation omitted). In addition, only one of the defendants is a resident of the proposed alternative forum (the Bahamas), and all of the defendants have substantial connections to New York (citations omitted); and although defendants claim that Nygard International Partnership's principal place of business is in Canada, its website identifies New York as its 'World Headquarters.' Because defendants have a substantial presence in New York, as well as 'ample resources,' it would not be a hardship for them to litigate here (citation omitted). The burden on the New York courts is also minimal. There is no need to translate documents or witness testimony from a foreign language. Plus, defendants effectively conceded that New York law applies by relying on it in their prior motion to dismiss and in their counterclaims (citation omitted). By contrast, plaintiff would suffer hardship if required to litigate in the Bahamas, which has no jury trial right and no mechanism to obtain pre-trial deposition testimony from Bahamian witnesses (citations omitted). The fact that defendants waited fourteen months before bringing the instant motion, until after discovery began, their prior motion to partially dismiss the complaint

was granted and affirmed on appeal, and plaintiff's motion to dismiss their counterclaims was granted, also counsels against dismissal (citations omitted). The parties have since exchanged several thousand pages of documents and completed five depositions. The fact that there are currently twelve related actions pending in the Bahamas cuts the other way (citations omitted). However, only one of these involves any of the instant defendants, and it is not for defamation and was instituted after the instant action.").

CPLR 327 - FNC motion denied; various factors considered

Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d 452 (1st Dep't 2018) ("Defendant failed to meet the heavy burden of establishing that New York is an inconvenient forum and that there is no substantial nexus between New York and this action (citation omitted). It is true that the agreements at issue in this breach of contract action concern a Chinese real estate development project and that most (although not all) of them were negotiated and executed in Hong Kong or China. However, while defendant is a Chinese citizen, he has resided in New York for the past two years and is seeking asylum here (citation omitted). Moreover, although Hong Kong is a potential alternative forum, it is not a suitable or adequate alternative, because defendant cannot return there due to his pending asylum claim and fugitive status (citations omitted). Defendant has not shown that it will be a hardship for him to litigate in New York. He lives here, has brought suit against others here, and has invited others to sue him here. The agreements at issue, which are written in English, are available here, and, although plaintiff is a foreign corporation, its employees are willing to travel here at no expense to defendant (citation omitted). While defendant alleges broadly that his former employees and relevant documents are located in Hong Kong or China, he has not identified any specific witnesses or documents that will be necessary (citation omitted). He does not purport to know the witnesses' whereabouts with certainty, and he has not made any showing with respect to their materiality (citation omitted). The fact that Hong Kong law governs the instant dispute, pursuant to the choice of law provisions in the agreements, is not dispositive, since 'our courts are frequently called upon to apply the laws of foreign jurisdictions' (citation omitted). Moreover, Hong Kong law is the only foreign jurisdiction's law at issue (citations omitted).").

ARTICLE 4 - SPECIAL PROCEEDINGS

CPLR 403 - Notice of petition; order to show cause

CPLR 403[a] / 2001

David L. Ferstendig, *Court's Ability to Correct or Disregard Mistakes, Omissions, Defects or Irregularities*, 685 N.Y.S.L.D. 3-4 (2017)

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

Generally, CPLR 2001 provides that the court can correct procedural mistakes, omissions, defects or irregularities, "upon such terms as may be just." Moreover, "if a substantial right of a party is not prejudiced," the error "shall" be disregarded.

Thus, for example, courts have relied on CPLR 2001 to correct various kinds of defects in a pleading, order or judgment, to correct the names of parties set forth in the summons or other papers if the party was fairly apprised that it was the party intended to be named, to disregard technical defects in motion papers, the failure to include the certificate authenticating the authority of a notary who administered an oath in connection with an affidavit signed outside of New York State, the delay in filing a request for judicial intervention in a residential foreclosure action, the defendant's failure to include the answer in its initial summary judgment motion papers, but only with its reply affirmation, and to consider CPLR 317 as a basis to vacate a default even where the defendant did not cite to that section. For an exhaustive list of mistakes, omissions, defects, and irregularities that can be corrected or disregarded under CPLR 2001, see Weinstein, Korn & Miller, New York Civil Practice, CPLR ¶ 2001.03 (David L. Ferstendig, LexisNexis Matthew Bender, 2d Ed.).

One of the thornier issues has been mistakes in commencement, and particularly the filing of the initiating pleadings. In Harris v. Niagara Falls Bd. of Educ., 6 N.Y.3d 155 (2006), after making two successful applications to serve late notices of claim, the plaintiff failed to purchase a new index number for a subsequent personal injury action, instead using the same index number as from the prior special proceeding. The Court of Appeals held that the defect did not implicate subject matter jurisdiction, but instead was a waivable defect. Since the defendant had objected in a timely fashion, the action was dismissed.

In response, CPLR 2001 was amended in 2007 (L. 2007, ch. 529, eff. August 15, 2007) to enable a court to correct or ignore mistakes in the commencement process. The amendment specifically referred to filing errors and provided that where the error was a failure to pay the index number fee, the court is to condition the denial of a motion to dismiss on the payment of the applicable fee.

However, the sponsor's memorandum explained that the amendment was not intended to excuse a complete failure to file the initiating pleadings within the statute of limitations or the failure to file the proper pleadings, for example, filing a "bare summons" (that is, one served without the requisite notice or a complaint). "The 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." Sponsor's Mem, Bill Jacket, L 2007, ch. 529. The "failure to file" defect has been interpreted to include both the failure to file initiating pleadings at all, and the failure to file with the proper (county) clerk. See, e.g., Matter of Peterkin v. Marcy Houses, 87 A.D.3d 649 (2d Dep't 2011) (failure to file a petition constituted non-waivable jurisdictional defect, rendering the proceeding a "nullity"); Matter of Miller v. Waters, 51 A.D.3d 113 (3d Dep't 2008) (finding failure to file with the proper clerk to be a defect impacting the court's subject matter jurisdiction). In addition, in Goldenberg v. Westchester County Health Care Corp., 16 N.Y.3d 323, 328 (2011), the Court of Appeals referred to the legislative history of CPLR 2001 and stated that,

> [h]ere, plaintiff 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. Given the absence of a summons, there was "a complete failure to file within the statute of limitations," which CPLR 2001 does not allow a trial judge to disregard.

For some time, the Third Department had held that the failure to include a return date in a notice of petition was not a "mere irregularity", but instead was fatal, precluding a court's resort to CPLR 2001. See, e.g, Matter of Lamb v. Mills, 296 A.D.2d 697, 698 (2002), lv. denied, 99 N.Y.2d 501 (2002); Matter of Oates v. Village of Watkins Glen, 290 A.D.2d 758, 759 (2002); Matter of Hawkins v. McCall, 278 A.D.2d 638, 638 (2000), lv denied, 96 N.Y.2d 713 (2001); Matter of Vetrone v. Mackin, 216 A.D.2d 839, 840–41 (1995); Matter of Kalinsky v. State Univ. of N.Y. at Binghamton, 188 A.D.2d 810, 811 (1992). However, recently in Matter of Oneida Pub. Lib. Dist. v. Town Bd. of the Town of Verona, 153 A.D.3d 127 (3d Dep't 2017), the Third Department reversed course, overruling its prior holdings. It found that the 2007 amendment to CPLR 2001, discussed above, was specifically enacted to permit courts to correct or disregard technical commencement-type defects, like the omission of the return date in a notice of petition in this action:

> We now hold that the omission of a return date in a notice of petition does not constitute a jurisdictional defect so as to deprive the court from assessing whether such omission may be excused under CPLR 2001, and our prior decisions stating to the contrary should no longer be followed for such proposition. . . . "[T]he primary purpose of a petition is to give notice to the respondent that the petitioner seeks a judgment against [a] respondent so that it may take such steps as may be advisable to defend the claim." A return date accomplishes this purpose by notifying the responding party when responsive papers must be served and when the petition will be heard. Here, the record reflects that respondents had sufficient notice of the petition. Indeed, respondents' counsel conceded at oral argument before Supreme Court that they had "plenty of time to respond" and, on appeal, they do not contend that they suffered any prejudice. As such, the omission of a return date should have been disregarded as a mere technical infirmity (citations omitted).

Id. at 130.

Shortly, thereafter, the Fourth Department followed suit. See Matter of Kennedy v. New York State Off. for People With Developmental Disabilities, 154 A.D.3d 1346 (4th Dep't 2017). See also Matter of Bender v. Lancaster Cent. Sch. Dist., 2017 N.Y. Slip Op. 07853 (4th Dep't Nov. 9, 2017) ("[S]uch a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission.").

ARTICLE 5 - VENUE

CPLR 503(c) - Residency for venue purpose of domestic or authorized foreign corporation determined by designation of principal office in application for authority. But how about if a different office is designated in the biennial statement?

David L. Ferstendig, *Residency for Venue Purposes of Domestic or Authorized Foreign Corporation Determined by Designation of Principal Office in Application for Authority,* 678 N.Y.S.L.D. 3, 4 (2017)

CPLR 503(c) provides that, for the purposes of venue, the residency of a domestic corporation or foreign corporation authorized to transact business in New York is the county of its "principal office." Much of the case law interpreting this section deals with circumstances in which a corporation conducts its business activities in a county other than the one designated in its application for authority. The courts have (generally) held that the designation in the application controls. *See, e.g., American Bldrs. & Contrs. Supply Co., Inc. v. Capitaland Home Improvement Showroom*, 128 A.D.3d 870, 871 (2d Dep't 2015). ("Notwithstanding the plaintiff's assertions to the contrary, it is a resident of New York County for venue purposes. Indeed, the law is clear that '[f]or purposes of venue, the sole residence of a foreign corporation is the county in which its principal office is located, as designated in its application for authority to conduct business filed with the State of New York,' regardless of where it transacts business or maintains its actual principal office (citations omitted).").

A recent trial court decision raises a different and interesting issue. Business Corporation Law § 408 (BCL) provides that a domestic or foreign corporation must set forth in its biennial statement "[t]he street address of its principal executive office." What if that office address conflicts with the information provided in any prior original or amended certificate of incorporation? Which county should control for venue purposes? In *Astarita v. Acme Bus Corp.*, 2017 N.Y. Misc. LEXIS 657 (Sup. Ct., Nassau Co. Feb. 14, 2017), a Nassau County judge opined that the biennial statement's designation should prevail. The court pointed to the Court of Appeals decision from 1859 in Western Transp. Co. v. Scheu, 19 N.Y. 408 (1859), where the Court looked to the certainty of relying on the principal office designation in the certificate of incorporation as a means to "avoid disputes" on the issue. The *Astarita* court noted that the legislative history behind the adoption of BCL § 408 to "streamline the procedure for making simple changes to corporate information" was consistent with the rationale of Western Transport to provide certainty. It pointed to "the advances in technology and ready internet access," permitting up to date access to the information contained in the Department of State official database.

Moreover, the court asked that the dissenting opinion in *Discolo v. River Gas & Wash Corp.,* 41 A.D.3d 126 (1st Dep't 2007) be "revisited." There, Justice Saxe cited to the similarity between CPLR 503's use of the term "principal office" and BCL's § 408 use of "principal executive office," concluding that to ignore the BCL § 408 designation would appear to be a case of "willful ignorance." *Id*. at 128.

> The majority relies on the often-cited rule that the sole legal residence of a corporation for venue purposes is the county designated in its certificate of incorporation. I do not dispute that this is the prevailing rule. But, I find it difficult to accept that the law requires an unthinking, automatic application of this rule where a more recent document, which the law requires a corporation to file every two years with the Department of State, lists the corporation's "principal executive office" at a location other than the "principal office" listed in the certificate of incorporation. Under these circumstances, the continued automatic application of the rule that we may look only at the certificate of incorporation, and must ignore documents that as a practical matter serve to update the information in that certificate, seems like willful ignorance. It is particularly offensive to permit a defendant to use this rule as a shield to avoid a lawsuit in the only county where its only business is located, and to both select and forever fix the county of venue where it must be sued merely by virtue of the county named years earlier in its certificate of incorporation (citations omitted).

Id. at 127-28.

CPLR 503(c) - Residence of a domestic corporation for venue purposes is the county designated in certificate of incorporation, regardless of fact that corporation maintains offices or facilities in another county

Villalba v. Brady, 2018 NY Slip Op 04518 (1st Dep't 2018) ("In any event, plaintiff properly placed venue in New York County based upon defendant DM Carpentry Corp.'s certificate of incorporation, filed in 2011, which designated New York County as the location of its corporate office (citations omitted). Although the Brady defendants provided a 2017 printout of information from the Department of State showing that DT Carpentry's initial filing date was 2011 and that its principal executive offices are in Suffolk County, absent any indication that the 2011 certificate of incorporation was ever amended, the residence designated in that certificate controls for venue purposes (citations omitted).").

Janis v. Janson Supermarkets LLC, 161 A.D.3d 480, 73 N.Y.S.3d 419 (1st Dep't 2018) ("Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as '[t]he county within this state where its office is to be located' (citation omitted). Wakefern's designation of New York County in its application is controlling for venue purposes, even if it does not actually have an office in New York County (citations omitted).").

CPLR 506(b)(1) - Venue for action against judge with multiple judicial positions is determined by capacity in which judge was serving when taking challenged action

Matter of Tonawanda Seneca Nation v. Noonan, 27 N.Y.3d 713, 715, 37 N.Y.S.3d 36, 38, 57 N.E.3d 1073, 1075 (2016) ("The Nation argues that because Judge Noonan also serves as a County Court Judge, CPLR 506 (b) (1) requires that the proceeding be commenced in the Appellate Division. We reject this argument and hold that the determination of venue for an article 78

proceeding against a multi-bench judge turns on the capacity in which the judge was serving when taking the challenged action. Here, where Judge Noonan was acting as Surrogate with respect to the probate of the will, the Nation's suit challenging those actions should have been brought in Supreme Court (see CPLR 7804 [b]).").

CPLR 510 / 511[d] / 503(a) - Once plaintiff is wrong on choice of venue, he or she forfeits right and defendant gets to choose proper venue. Plaintiff did not cross-move to retain venue

Nunez v. Yonkers Racing Corp., 153 A.D.3d 1355, 61 N.Y.S.3d 600 (2d Dep't 2017) ("The plaintiff placed venue of the action in Kings County based on his purported residence but the defendant, in support of its motion, demonstrated that the plaintiff actually resided in Bronx County, not Kings County, at the time of commencement of the action. Thus, the plaintiff's choice of venue was improper (citation omitted). By selecting an improper venue in the first instance, the plaintiff forfeited the right to choose venue (citations omitted). Contrary to the plaintiff's contention, the defendant's motion pursuant to CPLR 510(1) to change venue of the action from Kings County to Westchester County was addressed to the Supreme Court's discretion (citations omitted), and was timely as the defendant promptly moved to change venue after ascertaining the plaintiff's true county of residence (citations omitted). Further, the plaintiff failed to demonstrate that Westchester County, the county specified by the defendant, was improper, and he did not cross-move to retain venue in Kings County or to change venue to a county other than that urged by the defendant (citations omitted).").

CPLR 510(3) / 511- Motion to change venue granted; it was proper for the trial court to consider police officers' convenience, because their testimony regarding their investigation as to how the accident happened bears on liability

Kochan v. Target Corp., 161 A.D.3d 499 (1st Dep't 2018) ("Supreme Court did not improvidently exercise its discretion in granting Target's motion to change venue to Suffolk County even though plaintiff properly placed venue in New York County based upon Target's principal place of business at the time the action was commenced (citation omitted). The motor vehicle accident happened in Suffolk County, plaintiffs and codefendants live in that county, the decedent received her medical treatment there (citation omitted). Target also submitted the affidavits of two Suffolk County police officers, who averred that they were involved in the investigation including interviewing witnesses at the accident location and that they would be inconvenienced by having to travel to New York County because it would cause them to be absent from their police duties for a full day (citation omitted). That the police officers signed affidavits in favor of the motion to change venue establishes that they were aware of the action and demonstrates that they are willing to testify at trial. It was proper for the motion court to consider the police officers' convenience, because their testimony regarding their investigation as to how the accident happened bears on liability (citation omitted). Furthermore, the police officers' affidavits are not insufficient because they do not set forth their home addresses, since it is undisputed that they work in Suffolk County (citations omitted).").

CPLR 510(3) / 2212 - Venue on discretionary motion placed "in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county"; after implementation of IAS system, latter choices (other than where action pending) generally unavailable

Fensterman v. Joseph, 2018 NY Slip Op 04532 (2d Dep't 2018) ("It is undisputed that, pursuant to CPLR 503(a), venue of the Ulster County Action is properly in Ulster County, where Bacci, one of the Ulster plaintiffs, resided at the time the action was commenced (citation omitted). A motion to change venue on discretionary grounds, unlike motions made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county (citations omitted). The Fenstermen parties, therefore, were required to make a motion pursuant to CPLR 510(3) either in Ulster County, where the Ulster County Action was pending, in another county in the 3rd Judicial District, or in a county contiguous to Ulster County (citations omitted). Since Ulster County and Nassau County are not contiguous, and Nassau County is not in the 3rd Judicial District, the Fensterman parties' motion to change venue pursuant to CPLR 510(3) based on discretionary grounds was improperly made in the Supreme Court, Nassau County (citations omitted). Although not argued by the parties in the Supreme Court, Nassau County, but argued on appeal, we reach this issue in the exercise of our discretion because it appears on the face of the record and could not have been avoided or explained if raised in the Supreme Court (citations omitted).").

ARTICLE 9 – CLASS ACTIONS

CPLR 908 – Dismissal, discontinuance or compromise

David L. Ferstendig, *Divided Court of Appeals Holds That CPLR 908 Applies to Pre-Certified Class Actions*, 687 N.Y.S.L.D. 1 (2018)

Divided Court of Appeals Holds That CPLR 908 Applies to Pre-Certified Class Actions

Thus, Court Approval and Notice to Putative Class Members of Proposed Dismissal, Discontinuance or Compromise Is Required

CPLR 908 requires court approval before a class action is dismissed, discontinued or compromised. In addition, it provides that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The question presented in Desrosiers v. Perry Ellis Menswear, LLC., 2017 N.Y. Slip Op. 08620 (December 12, 2017), was whether CPLR 908 only applies to certified class actions or if it also applies to class actions settled or dismissed before the class is certified. A split Court of Appeals held that CPLR 908 applies to pre-certified actions.

The majority noted that CPLR 908 is ambiguous as to whether a "class action" means only a certified class or could include an action from the moment the complaint containing class action

allegations is filed. Furthermore, the fact that the statute required that notice be provided to "all members of the class" is "inconclusive" because it is not clear whether there are "class members" before a class is certified.

The majority then looked at other principles of statutory interpretation and sources beyond the text. CPLR Article 9 was modeled on a similar federal law. The majority of federal circuit courts interpreting the relevant (earlier) version of FRCP 23(e), which was virtually identical to CPLR 908, concluded that it applied to pre-certified actions, but that the notice was discretionary. Moreover, the only New York State appellate case dealing with the issue (prior to this case)—Avena v. Ford Motor Co., 85 A.D.2d 149 (1st Dep't 1982)—concluded that CPLR 908 applied to settlements before certification. The Court of Appeals never overruled Avena, and no other Appellate Division department has reached a contrary conclusion. The majority ascribed persuasive significance to legislative inaction, that is,

the fact that the legislature has not amended CPLR 908 in the decades since Avena has been decided is particularly persuasive evidence that the court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted in light of developments occurring in the years after Avena was decided.

Derosiers, 2017 N.Y. Slip Op. 08620 at ∗6.

FRCP 23(e) was amended in 2003 to make notice required only for certified classes, and proposals to amend CPLR 908 to provide for discretionary pre-certification notice where necessary to protect putative class members (as opposed to the mandatory requirement enunciated in Avena) have never been adopted or acted upon by the State Legislature. The majority concluded that the practical difficulties and policy concerns arising out of this issue should be addressed by the legislature,

especially considering that there are also policy reasons in favor of applying CPLR 908 in the precertification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced. The balancing of these concerns is for the legislature, not this Court, to resolve (citations omitted).

Id. at ∗7–8.

The dissent, written by Judge Stein, asserted that the majority found there to be ambiguity in CPLR 908 where there was none and placed too much weight on the First Department's decision in Avena. CPLR 908 requires notice in a "class action" and here plaintiffs did not "transform the purported class action into an actual class action." Moreover, prior to class certification, there are no "members of the class" to whom notice could be provided; a court, "not a would-be class representative, has the power to determine whether an action 'brought as a class action' may be maintained as such"; and notice to putative class members here would lack practical significance, because "the notice would essentially inform putative class members that an individual claim— of which they received no prior notice—was being resolved by an agreement that was not binding on them." *Id*. at ∗11.

The dissent concluded that the appellate courts' and legislature's inactions after Avena, a decision characterized by the dissent as flawed and questioned by many, should not impact "our adherence to the statutory text." Finally, federal case law interpreting the pre-2003 version of FRCP 23(e) held that notice in pre-certified cases was discretionary. They did not address the issue here: that is, whether the notice is mandatory.

ARTICLE 14- A – CONTRIBUTORY NEGLIGENCE

CPLR 1412 - Burden of proof

CPLR 1412 / 3212

David L. Ferstendig, *Majority of Court of Appeals Holds Plaintiffs Need Not Establish the Absence of Their Own Comparative Negligence to Obtain Partial Summary Judgement on Liability Only*, 690 N.Y.S.L.D. 1-2 (2018)

Majority of Court of Appeals Holds Plaintiffs Need Not Establish the Absence of Their Own Comparative Negligence to Obtain Partial Summary Judgement on Liability Only

Court Resolves Conflict and Confusion in This Area

In the November 2016 Edition of the Digest, we discussed the confusion within the First Department as to whether a plaintiff must establish that he or she is free from comparative negligence in order to be successful on a partial summary judgment motion on liability only. In Rodriguez v. City of New York, 142 A.D.3d 778 (1st Dep't 2016), a First Department panel joined the Second Department in finding that the plaintiff had such an obligation.

Recently, on appeal, a narrow majority of the Court of Appeals reversed. Rodriguez v. City of New York, 2018 N.Y. Slip Op. 02287 (April 3, 2018). The Court noted that placing such a burden on the plaintiff is inconsistent with CPLR Article 14-A, which codified comparative negligence principles. CPLR 1412 provides that "[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense." Thus, the majority insisted that requiring the plaintiff to prove the absence of comparative fault here would "flip" the burden.

The defendant argued that CPLR 3212(b), which requires that a summary judgment motion establish that "there is no defense to the cause of action," supported its position. The majority rejected this argument because comparative negligence "is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence," and, as noted above, does not bar plaintiff's recovery, but only serves to reduce the damages. Id. at ∗4.

The majority maintained that the legislative history of CPLR Article 14-A supported its approach. Moreover, it also addressed the elephant in the room, that is, the Court of Appeals' prior decision

in Thoma v. Ronai, 82 N.Y.2d 736 (1993), where, in upholding the First Department's order, the Court stated that:

> The submissions to the nisi prius court on plaintiff's motion for summary judgment, consisting of her affidavit and the police accident report, demonstrate that she may have been negligent in failing to look to her left while crossing the intersection. Plaintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care. Accordingly, plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact and the lower courts correctly denied summary judgment.

Thoma, 82 N.Y.2d at 737.

The majority in Rodriguez insisted that, notwithstanding the language in the Thoma case and reliance by numerous appellate courts on it, Thoma never addressed the precise question here (that is, whether the plaintiff bears the burden to show the absence of comparative negligence) or considered the impact of Article 14-A.

Finally, the majority rejected defendant's contention that granting plaintiff's motion would serve no practical purpose:

> A principal rationale of partial summary judgment is to narrow the number of issues presented to the jury. In a typical comparative negligence trial, the jury is asked to answer five questions:
> 1. Was the defendant negligent?
> 2. Was defendant's negligence a substantial factor in causing [the injury or the accident]?
> 3. Was plaintiff negligent?
> 4. Was plaintiff's negligence a substantial factor in causing (his or her) own injuries?
> 5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff? (PJI 2:36). Where plaintiff has already established defendant's liability as a matter of law, granting plaintiff partial judgment eliminates the first two questions submitted to the jury, thereby serving the beneficial purpose of focusing the jury on questions and issues that are in dispute (citations omitted).

Rodriguez, 2018 N.Y. Slip Op. 02287 at ∗6.

The dissent rejected the majority's position that the Court's decision in Thoma did not settle the issue here, and, in fact, it maintained that subsequent Court of Appeals' decisions followed the "Thoma rule."

In addition, the dissent noted that, for the most part, the Appellate Division Departments have held that a plaintiff cannot obtain partial summary judgment where there are issues of fact concerning comparative fault. Moreover, there have been failed legislative proposals to place the burden on a defendant opposing a summary judgment motion to produce evidence of plaintiff's comparative fault to raise issues of fact. Thus, such attempts to amend the statute "would be unnecessary if plaintiffs were entitled to summary judgment despite the existence of issues of fact concerning comparative fault." Id. at ∗8. In addition, the dissent insisted that the "Thoma rule" is a "fairer outcome"; determinations of the degree of fault should be made as a whole; assessing one party's fault with a preconceived idea of the other party's liability is inherently unfair; the Pattern Jury Instructions advise that a jury is to consider both parties' liability together; and the issue of the defendant's liability and comparative fault are intertwined.

Regardless of whether you agree or disagree with the Court of Appeals' ruling, its benefits are manifest in finally resolving this issue and avoiding confusing intra and inter Appellate Division Department conflicts. Yet another conflict resolved!

CPLR 1412 / 3212 - But the issue of a plaintiff's comparative negligence can be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence

Poon v. Nisanov, 2018 NY Slip Op 04365 (2d Dep't 2018) ("Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (citation omitted), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (citation omitted).").

ARTICLE 20- MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2001 - Considered out of state affidavit subscribed and sworn to out of state and not accompanied by a certificate of conformity

American Cas. Co. of Reading, Pa. v. Motivated Sec. Servs., Inc., 148 A.D.3d 521, 48 N.Y.S.3d 591 (1st Dep't 2017) ("The motion court properly considered the out-of-state affidavit of SBF's president, even though it lacks a certificate of conformity (CPLR 2309[c]). The lack of such certification is not a fatal defect and the irregularity may be corrected later (citations omitted).").

CPLR 2001 - But where plaintiff's affidavit of purported service lacked certificate of conformity, trial court finds defect is not excusable under CPLR 2001

JPMorgan Chase Bank, N.A. v. Diaz, 56 Misc. 3d 1136, 57 N.Y.S.3d 358 (Sup. Ct. Suffolk Co. 2017) ("Generally, although a defective out-of-state affidavit, which is defective because it is not accompanied by a certificate of conformity, may be waived or cured under CPLR §2001, such defect waiver or cure may occur only after jurisdiction has been established (citations omitted). Indeed, personal jurisdiction over a defendant is not obtained until service is properly effected, and while correction of mistakes, omissions, defects or irregularities is generally permitted under CPLR §2001, irregularities or defects related to personal jurisdiction are not among those that are correctable (citations omitted)….. Accordingly, the legislative intent of CPLR §2001 was to excuse non-prejudicial defects in court filings, not defects pertaining to jurisdiction. Here, the affidavit at issue is plaintiff's affidavit of purported service. Therefore, contrary to plaintiff's contentions, CPLR §2001 is not curative of plaintiff's failure to comply with CPLR §2309(c). If an out-of-state affidavit of service is defective for failure to comply with the certificate of conformity requirements of CPLR §2309(c), such defect may be waived or cured only by a subsequent affidavit that corrects such defect (citations omitted). Since the plaintiff has again failed to submit a certificate of compliance with the out-of-state affidavit of service as required by CPLR §2309(c), and has failed to submit an affidavit curing such defect, jurisdiction over the defendant has not been properly established. Based upon the foregoing, the plaintiff's motion for a default order of reference is denied. Plaintiff is afforded one final opportunity to establish proper jurisdiction and compliance with the requirements of CPLR §2309(c) regarding plaintiff's out-of-state affidavit of purported service. Failure to do so shall result in dismissal plaintiff's complaint."). *But see* Federal Natl. Mtge. Assn. v Chiusano, 2018 N.Y. Misc. LEXIS 1646, 2018 NY Slip Op 28143 (Sup. Ct. Sufolk Co. 2018).

CPLR 2001 - Disregard failure to attach pleadings on summary judgment motion

Wade v. Knight Transp., Inc., 151 A.D.3d 1107, 58 N.Y.S.3d 458 (2d Dep't 2017) ("We also disagree with the contention of Wade and the infant plaintiff that the Supreme Court should have denied the Knight defendants' motions for summary judgment on the ground that they failed to submit copies of certain pleadings concerning the defendant Daniel Freudenberg with their motion papers. Freudenberg was a witness to the accident and was made a defendant in these actions after giving deposition testimony that revealed that his actions may have contributed to the accident. Notwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to 'disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced' (citations omitted). The record here is sufficiently complete, Freudenberg was not a party to the instant motions, and Wade and the infant plaintiff do not argue that they were prejudiced in any way by the Knight defendants' failure to include those pleadings (citations omitted).").

CPLR 2001 – But Failure to file remains jurisdictional defect not curable by CPLR 2001

Matter of Dougherty v. County of Greene, 161 A.D.3d 1253 (3d Dep't 2018) ("While the Supreme Court or the County Court may convert an improperly brought motion for leave to serve a late notice of claim into a special proceeding (citations omitted), the failure to file the application with the appropriate clerk — the County Clerk — is a fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001 (citations omitted). Indeed, the filing of initiatory papers with the Clerk of the Supreme and County Courts, rather than the County Clerk, 'has been equated to a nonfiling and, thus, 'a nonwaivable jurisdictional defect rendering the proceeding a nullity' (citations omitted). Here, petitioner mailed her 2013 application to the Greene County Courthouse to the attention of the 'County Lawyer Clerks Office.' Petitioner's papers were promptly rejected by the Chief Clerk of the Supreme and County Courts in Greene County and returned to petitioner with a letter identifying several deficiencies with her papers and directing that they be mailed to the County Clerk's Office. Petitioner's failure to file her 2013 application with the proper clerk amounts to a nonwaivable jurisdictional defect, rendering the proceeding a nullity (citations omitted). Consequently, petitioner's 2015 submissions cannot relate back to her 2013 attempted application. Given that petitioner did not file an application with the Greene County Clerk prior to the expiration of the one year and 90-day statute of limitations, which expired in February 2014, Supreme Court was statutorily prohibited from extending the time in which petitioner had to serve her notice of claim upon respondent (citations omitted).").

ARTICLE 21 - PAPERS

CPLR 2103 - Service of papers

CPLR 2103(b) - Cannot serve party, where represented by counsel

Deutsche Bank Natl. Trust Co. v. Lamontanaro, 150 A.D.3d 680, 53 N.Y.S.3d 685 (2d Dep't 2017) ("The Supreme Court properly granted that branch of Lamontanaro's motion which was to strike Jack Anthony's cross claims insofar as asserted against him. Jack Anthony attempted to serve its answer, including its cross claims, upon Lamontanaro at his residence. However, since Lamontanaro was represented by counsel during the relevant time period, Jack Anthony's answer was required to have been served upon Lamontanaro's attorney pursuant to CPLR 2103(b) (citation omitted). Furthermore, Jack Anthony's answer was untimely (citation omitted). Contrary to Jack Anthony's contention, under the circumstances of this case, the court providently exercised its discretion in declining to disregard the above-mentioned defects pursuant to CPLR 2001 (citation omitted).").

ARTICLE 22- STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2212 - Where motion made

CPLR 2212(a) / 510[3] / 511 / 511(b) - Even under IAS system, there can be a very limited circumstance where a motion can be made in a court other than the one in which the action is pending

CPLR 511(b) permits a motion to change venue based on improper county grounds to be made in the county in which the action is pending or in the county specified in the motion as being proper, if certain prerequisites are met (e.g., the defendant serves the demand to change venue with or prior to serving the answer and the plaintiff does not serve an affidavit showing that the county chosen by the plaintiff is correct or the county proposed by the defendant is incorrect). Otherwise, under the IAS system, generally motions are to be made in the court in which the action is pending. However, CPLR 2212(a) (which was enacted before the adoption of the IAS system) provides that a "motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable." This provision would seem to have very limited applicability after the adoption of the IAS System, perhaps restricted to rural or upstate courts, where there may be no available motion terms. However, some cases have suggested that the provision remains viable even downstate. See e.g., Schwartz v. Yellowbook, Inc., 118 A.D.3d 691, 986 N.Y.S.2d 840 (2d Dep't 2014) ("A motion to change venue on discretionary grounds, unlike motions made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county (citations omitted). Schwartz was therefore required to make a motion pursuant to CPLR 510(3) in Nassau County, where the action was pending, in another county in the 10th Judicial District, or in a county contiguous to Nassau County (citation omitted). Since Nassau County and Richmond County are not contiguous, and Richmond County is not in the 10th Judicial District, the Supreme Court, Richmond County, erred in granting that branch of the motion which was pursuant to CPLR 510(3) (citations omitted)."). See also Minenko v. Swinging Bridge Camp Grounds of N.Y., Inc., 155 A.D.3d 1413, 63 N.Y.S.3d 914 (3d Dep't 2017) ("It is well-settled that a motion to change venue on a discretionary ground, such as the convenience of material witnesses pursuant to CPLR 510 (3), 'must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county' (citations omitted). Here, it is undisputed that the action is pending in Kings County and that Sullivan County is not in the same judicial district as Kings County nor is it an adjoining county. In light of this, we find that defendants failed to bring their motion in a proper county and, thus, Supreme Court should not have entertained the motion (citations omitted).").

CPLR 2214- service of motion papers

CPLR 2214(d) - Method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with

People ex rel. Strong v. Warden Griffin, 75 N.Y.S.3d 540 (2d Dep't 2018) ("'The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with' (citations omitted). Here, we agree with the Supreme Court's determination to dismiss the proceeding for lack of personal jurisdiction due to the petitioner's failure to follow the directive of the order to show cause to serve the respondent and the Attorney General with a copy of the papers upon which the order to show cause was based. Given the petitioner's failure to comply with the service requirements of the order to show cause, dismissal of the proceeding was warranted (citations omitted).").

CPLR 2219/2220 - Time, form, entry and filing of order

CPLR 2219 / 2220 - Where there is a conflict between an order and decision, the decision controls

Where there is a conflict between an order and a decision, the decision controls. *See Matter of Esposito v. Magill*, 140 A.D.3d 1772, 32 N.Y.S.3d 802 (4th Dep't 2016) ("As a preliminary matter, we note that where, as here, there is a conflict between the decision and order, the decision controls (citation omitted), and the order 'must be modified to conform to the decision' (citations omitted). We therefore modify the order by granting the motion seeking to dismiss the first petition."); *Wilson v. Colosimo*, 101 A.D.3d 1765, 1766, 959 N.Y.S.2d 301, 303 (4th Dep't 2012). *See also Austin Harvard LLC v. City of Canandaigua*, 141 A.D.3d 1158, 36 N.Y.S.3d 335 (4th Dep't 2016) ("With respect to the declaratory judgment action, it is well settled that 'parties to a civil dispute are free to chart their own litigation course' (citation omitted), and 'may fashion the basis upon which a particular controversy will be resolved' (citation omitted). Here, the record establishes that the parties charted a summary judgment course, and Supreme Court's bench decision reflects that the court denied plaintiff's motion for summary judgment seeking a declaration in the second cause of action. The judgment, however, recites that the complaint 'is in all respects denied and the matter is dismissed,' and '[w]here, as here, there is a conflict between [a judgment] and a decision, the decision controls' (citations omitted). We therefore modify the judgment to conform to the court's bench decision.").

CPLR 2219 / 2220 - Once notice and proposed order filed in a timely fashion, "events that may have transpired thereafter to delay settlement of the order did not implicate 22 NYCRR 202.48"

HSBC Bank USA, N.A. v. Yonkus, 154 A.D.3d 643, 62 N.Y.S.3d 132 (2d Dep't 2017) ("Here, the initial order granting the motion for summary judgment, dated September 30, 2010, directed the plaintiff to '[s]ettle order.' Thus, pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed order within 60 days thereafter, i.e., by the end of the day on November 19, 2010. In fact, the plaintiff filed the notice and proposed order on November 17, 2010, two days before the expiration of its time to do so pursuant to 22 NYCRR 202.48(a), as evidenced by a copy of the notice, stamped by the Queens County Clerk as received at 3 -06 p.m. that day. Any events that may have transpired thereafter to delay settlement of the

order did not implicate 22 NYCRR 202.48. Moreover, it is apparent from the procedural history that the delay in entry of the judgment of foreclosure and sale was due to procedural irregularities, and not abandonment by the plaintiff (citations omitted).").

CPLR 2219 / 2220 - Appeal not properly before court because order was neither filed nor entered

Matter of Merrell v. Sliwa, 156 A.D.3d 1186 (3d Dep't 2017) ("As a threshold matter, and as petitioner's counsel acknowledged at oral argument, an appeal is not properly before this Court if the order appealed from 'was not "entered and filed in the office of the clerk of the court where the action is triable"' (citation omitted). The order at issue was neither entered nor filed. Accordingly, the appeal must be dismissed (citations omitted). . . . Footnote 1 - After oral argument, petitioner provided us with a copy of the order that reflects that it was 'received' by the Albany County Clerk's office. However, there is no indication that the order was filed or entered as required by CPLR 2220. We note that Supreme Court's order explicitly stated that it was transferring the papers to the Albany County Clerk and returning the original order to counsel for respondents. Significantly, Supreme Court notified the parties that the signing of the order did not constitute entry or filing or relieve them of the obligation to do so pursuant to CPLR 2220.").

CPLR 2221 - Motions to reargue or renew

CPLR 2221 - Law office failure constitutes reasonable justification

Trigoso v. Correa, 150 A.D.3d 1041 , 55 N.Y.S.3d 130 (2d Dep't 2017) ("'CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form' (citation omitted). Here, Danu's failure to provide signed copies of the deposition transcripts with the original summary judgment motion was tantamount to law office failure, which constituted a reasonable justification (citations omitted). Thus, the Supreme Court properly granted that branch of Danu's motion which was for leave to renew.").

CPLR 2221 / 2214(c) - Failure to include copy of original motion did not violate CPLR 2214©, because original motion had been filed electronically

Leary v. Bendow, 161 A.D.3d 420 (1st Dep't 2018) ("Although plaintiffs failed to include a copy of defendants' original motion to strike with the renewal motion, this did not violate CPLR 2214(c) because the original motion had been electronically filed and therefore was available to the parties and the court (citation omitted). There is no evidence that the record was not sufficiently complete to allow the court to render a decision on the renewal motion and to exercise its discretion in considering any improperly submitted document (citations omitted).").

CPLR 2221 / 5015 - Proper vehicle to challenge order on default is motion to vacate under CPLR 5015(a)(1), and not CPLR 2221 motion to renew or reargue

Hutchinson Burger, Inc. v. Bradshaw, 149 A.D.3d 545, 50 N.Y.S.3d 267 (1st Dep't 2017) ("The proper vehicle for defendant to challenge the October 2012 order, which was granted on her default, was a motion to vacate a default order under CPLR 5015(a)(1), and not a motion for renewal or reargument under CPLR 2221(d) and (e) (citations omitted). Accordingly, the motion court should have denied defendant's motion to renew or reargue.").

ARTICLE 23 - SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2303-a - Service of a trial subpoena

CPLR 2303-a / 2103(b) - Trial subpoena properly served upon defendant's attorneys

Chicoine v. Koch, 161 A.D.3d 1139 (2d Dep't 2018) ("A court of record generally has the power 'to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court' (Judiciary Law § 2-b[1]). 'Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with [CPLR 2103(b)] to the party's attorney of record' (citation omitted). Here, the trial subpoena was properly served upon the defendant's attorneys pursuant to CPLR 2303-a and 2103(b)(2). Contrary to the defendant's contention, because he is a party to this action, over whom personal jurisdiction had been obtained, he is 'found in the state' within the meaning of Judiciary Law § 2-b(1) (citations omitted).").

ARTICLE 30 – REMEDIES AND PLEADINGS

CPLR 3011 - Kinds of pleadings

CPLR 3011 / 3211 / 3211(a)(1) - The assertion of affirmative causes of action in a reply to a counterclaim is procedurally improper.

MLB Constr. Servs., LLC v. Lake Ave. Plaza, LLC, 156 A.D.3d 983, 66 N.Y.S.3d 568 (3d Dep't 2017).

CPLR 3012- Service of pleadings and demand for complaint

CPLR 3012(d) - Majority and dissent disagree as to whether lower court properly denied motion for extension of time under CPLR 3012(d),

Emigrant Bank v. Rosabianca, 156 A.D.3d 468, 67 N.Y.S.3d 175 (1st Dep't 2017) (Majority and dissent disagree as to whether lower court properly denied motion for relief under CPLR 3012(d),

in applying the factors adopted in the First Department, that is, the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense. In affirming, the majority noted that: "Of these five factors, three — the lack of a potential meritorious defense, which is the most notable, the length of the delay, and the willfulness of the default — weigh against granting the motion. The remaining factors, whether the delay was excusable and whether there was any possibility of prejudice to an adverse party, are arguably neutral. Therefore, considering and weighing the five Artcorp/Guzzetti factors, we conclude that Supreme Court properly denied the Rosabiancas' motion"; The dissent disagreed: "The record before us supports a finding that defendants Carmelo and Vivian Rosabianca should have been granted permission to interpose a late answer, upon consideration of every applicable factor. Most notably, the motion court failed to consider 'the strong public policy in favor of resolving cases on the merits,' which we have held normally weighs in favor of granting such motions (citation omitted). That is particularly appropriate here, where the movants demonstrated, although 'not essential' on this pre-judgment request to file a late answer, that they have at least two meritorious defenses to this foreclosure proceeding (citations omitted). First, in accepting the mortgage executed by Luigi Rosabianca on his parents' home, plaintiff's predecessor improperly relied on powers of attorney that did not give Luigi Rosabianca actual authority, or necessarily apparent authority, to mortgage his parents' home. In addition, plaintiff fails to state a cause of action to foreclose the mortgage signed in the names of Carmelo and Vivian Rosabianca, because the mortgage states that it secures a note signed by them, but plaintiff bases its foreclosure action only on a note signed by their son, and no note signed by the senior Rosabiancas has been produced.").

CPLR 3012(d) / 2005 - Brief delay in answering

Naber Elec. v. Triton Structural Concrete, Inc., 160 A.D.3d 507, 75 N.Y.S.3d 152 (1st Dep't 2018) ("The motion court providently exercised its discretion in denying plaintiffs' motion and granting defendants' cross motion to compel plaintiffs to accept their answer (citation omitted), which was served two weeks late. Defendants' attorney explained that the brief delay in answering resulted from his mistake in calendaring the date the response was due, after he mistakenly requested an extension of time to April 7, rather than May 7. Since defendants' time to answer, without any extension, was April 17th, his mistake should have been apparent to plaintiffs' attorney, who agreed to the requested extension. Defense counsel's inadvertent mistake in calendaring his deadline provided a reasonable excuse for the minimal delay in answering (citations omitted).").

CPLR 3013 - Particularity of statements, generally

CPLR 3013 / 3211 - Majority and dissent disagree as to whether or not legal malpractice claim was properly pleaded

Mid-Hudson Val. Fed. Credit Union v. Quartararo & Lois, LLC, 155 A.D.3d 1218, 64 N.Y.S.3d 389 (3d Dep't 2017) (**Compare majority** - "Absent from the amended complaint is any mention of an instance of deficient representation or any example of erroneous advice by defendants. Merely alleging the elements of a legal malpractice claim in a general fashion, without more, does not satisfy the liberal pleading standard of CPLR 3211. … The statements in the amended

complaint fail … in that they do not allege a single transaction where defendants were retained to provide legal services or a single occurrence of negligent legal representation forming the basis of the legal malpractice claim, let alone the specific underlying foreclosure action or actions in which defendants allegedly committed legal malpractice. Other than stating that defendants represented plaintiff in foreclosure actions, the amended complaint does not allege, and, more critically, it cannot reasonably be inferred from such pleading, what defendants allegedly did or did not do in a negligent fashion. The amended complaint is not just sparse on factual details — rather, it is wholly devoid of them. Given the absence of detailed facts, the legal malpractice cause of action should have been dismissed (citations omitted).”; **and dissent** - “Here, the allegations of legal malpractice in plaintiff’s complaint — although lacking detail — state factual allegations that provide the degree of notice necessary to satisfy this generous standard. We therefore respectfully dissent from the majority as to that cause of action. … The majority objects to the lack of specific details as to the particular foreclosure and debt collection actions that defendants allegedly handled inadequately. However, that analysis focuses incorrectly on whether plaintiff has properly stated a claim, rather than on whether it has one (citation omitted). The CPLR provides remedies for such a lack of detail, much less drastic than dismissal. When the complaint ‘is so vague or ambiguous that [the defendant] cannot reasonably be required to frame a response,’ the defendant may move for a more definite statement (citation omitted). Where, as here, the issue is lack of detail, so that ‘what [a defendant] really wants is an amplification of the allegations rather than their clarification,’ the ready remedy is to demand a bill of particulars (citations omitted). The majority rejects the remedy provided by the CPLR on the ground that defendants chose not to avail themselves of it. However, our determination of this appeal does not turn on defendants’ choice of procedure, but upon the governing law. We are charged with determining whether Supreme Court acted properly in denying defendants’ motion to dismiss plaintiff’s cause of action for legal malpractice. That court applied the standards of the CPLR and many years of precedent in finding that, when treated as true and granted the benefit of every favorable inference, the factual allegations in this complaint are sufficient to make out a cognizable case of legal malpractice. We cannot find any error of law in this determination.”).

CPLR 3016 - particularity in specific actions

CPLR 3016 / 3211 - Failure to plead properly

Rssm CPA LLP v. Bell, 2018 NY Slip Op 04645 (1st Dep’t 2018) (“The parts of the breach of fiduciary duty and breach of the duty of loyalty causes of action based on allegations that defendant used plaintiff's confidential information to solicit clients and personnel away from plaintiff and that defendant improperly wrote off billable hours for clients and/or capped their bills are insufficiently particularized to raise an issue of fact, since they do not identify any of the clients or personnel referred to (citations omitted). The parts of the cause of action for tortious interference with contract not based on the other individual defendants' contracts do not identify the contracts that were interfered with and therefore fail to raise an issue of fact as to their existence (citation omitted). The parts of the cause of action for tortious interference with prospective economic relationships based on relationships with potential clients or unidentified former personnel of

plaintiff are insufficient to show that plaintiff would have obtained those contracts but for defendant's tortious interference (citation omitted).").

Golia v. Vieira, 2018 NY Slip Op 04538 (2d Dep't 2018) ("However, we agree with the Supreme Court's determination to grant that branch of LICH's motion which was pursuant to CPLR 3211(a)(7) to dismiss the fourth cause of action insofar as asserted against it. The allegations in the fourth cause of action did not satisfy the special pleading requirements of CPLR 3016(a), as they did not set forth the actual words complained of, and they also failed to specify the particular persons to whom LICH allegedly published the alleged defamatory statements (citations omitted).").

Carlyle, LLC v. Quik Park 1633 Garage LLC, 160 A.D.3d 476, 75 N.Y.S.3d 139 (1st Dep't 2018) ("The actual fraudulent conveyance claims, under the common law and Debtor and Creditor Law (DCL) § 276, should be dismissed because plaintiff failed to allege fraudulent intent with the particularity required by CPLR 3016(b) (citations omitted). The key allegations were made '[u]pon information and belief,' without identifying the source of the information (citation omitted). Moreover, the timing of the allegedly fraudulent transfers - beginning two years before the judgment debtors incurred the subject debts - undermines the claim of fraudulent intent (citations omitted). The constructive fraudulent conveyance claims pursuant to DCL 273, 274, and 275 should be dismissed because plaintiff failed to sufficiently allege that the transfers were made without fair consideration, as the relevant allegations were all made '[u]pon information and belief' (citation omitted). Because the viability of the claims under DCL 276-a, 278, and 279 depends on the viability of the other fraudulent conveyance claims, these claims should likewise be dismissed. The tortious interference claim should be dismissed because plaintiff failed to sufficiently allege that the contract 'would not have been breached but for' the defendant's conduct' (citations omitted). The relevant allegations were vague and conclusory and supported by 'mere speculation' (citations omitted). In light of the dismissal of all of plaintiff's substantive claims, its claims for piercing the corporate veil and a permanent injunction must likewise be dismissed, as they do not constitute independent causes of action (citations omitted).").

CPLR 3018- Responsive pleadings

CPLR 3018 - Non jurisdictional defenses can be raised in answer amended via motion in the absence of prejudice

Charles v. William Penn Life Ins. Co. of N.Y., 75 N.Y.S.3d 36 (1st Dep't 2018) ("Plaintiff's argument that defendant waived the proposed affirmative defenses, is unavailing because the defenses are not jurisdictional defenses and can be raised in an amended answer in the absence of prejudice (citations omitted), and here, all three defenses were based on the decedent's medical records, which plaintiff had prior to the commencement of the action (citations omitted).").

CPLR 3018 - Defense is not waived on ground that it was too conclusory

Matter of Part 60 RMBS Put-Back Litig., 155 A.D.3d 482, 65 N.Y.S.3d 133 (1st Dep't 2017) ("Nor should the affirmative defense be deemed waived on the ground that it is too conclusory (citation omitted). It 'would be an excessively severe result' to 'treat[] the defense as waived' (citation omitted), especially since plaintiff has known since at least April 29, 2016 that defendant was disputing the effectiveness of Computershare's appointment. Moreover, '[i]f the [capacity] defense is meritorious, a determination of that issue would result in a speedy and less expensive conclusion to otherwise protracted litigation' (citation omitted).").

CPLR 3018 / 3211(e) - Preserving affirmative defenses in pre-answer motion or in responsive pleading

Outdoors Clothing Corp. v. Schneider, 153 A.D.3d 717, 60 N.Y.S.3d 302 (2d Dep't 2017) ("Initially, we reject the plaintiffs' contention that the defendants waived the affirmative defense of release. As with the other defenses and objections listed in CPLR 3211(a)(5), the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading (citations omitted). Here, the defendants avoided waiving the affirmative defense of release by raising it in their pre-answer motion to dismiss, and they were thereafter entitled to seek summary judgment based on that defense despite its absence from the answer (citations omitted).") (**citing Weinstein, Korn & Miller**).

CPLR 3019 - Counterclaims and cross-claims

CPLR 3019 - Counterclaims survive despite dismissal of petition

Matter of Eshaghian, 144 A.D.3d 1163, 43 N.Y.S.3d 393 (2d Dep't Nov. 30, 2016) ("Despite the dismissal of the petition itself by the Surrogate's Court, the coexecutrices' counterclaims remained viable (citations omitted). 'A counterclaim is in essence a complaint by a defendant against the plaintiff and alleges a present viable cause of action upon which the defendant seeks judgment' (citations omitted). In properly asserting their counterclaims (citations omitted), the coexecutrices were, in substance, petitioners. Further, since the court had already directed the dismissal of David Eshaghian's petition, the coexecutrices were the only remaining 'petitioners' in the proceeding. In denominating themselves as 'petitioners' in their proposed amended pleading, the executrices were merely recognizing this circumstance. Moreover, there is no indication that the coexecutrices' proposed amended pleading was palpably insufficient or patently devoid of merit, or that David Eshaghian would be unfairly surprised or prejudiced as a result of the coexecutrices' delay in seeking to serve an amended pleading (citation omitted). Accordingly, the court improvidently exercised its discretion in denying that branch of the coexecutrices' motion which was for leave to serve an amended pleading.").

CPLR 3019 - Counterclaims need to be appended to answer; cannot be "standalone"

Rubin v. Napoli Bern Ripka Shkolnik, LLP, 151 A.D.3d 603, 58 N.Y.S.3d 320 (1st Dep't 2017) ("As to the proposed defamation counterclaims, defendant initially sought to assert them as standalone counterclaims within the one-year limitations period. However, the counterclaims were

dismissed as procedurally improper, since they were not appended to an answer (citations omitted). Because the motion for leave to amend was made less than six months later, the proposed counterclaims could be saved by CPLR 205(a)'s six-month grace period (citations omitted).").

CPLR 3025 – Amended and supplemental pleadings

CPLR 3025

David L. Ferstendig, *Further Appellate Division Conflicts, and One Resolved*, 689 N.Y.S.L.D. 4 (2018)

Agreement on Standard to Apply On a Motion to Amend

Fortunately, I can report that the Departments are now in agreement as to the standard a court is to apply when considering a party's motion to amend its pleadings pursuant to CPLR 3025(b). The issue was whether a proponent of such a motion is required to make an evidentiary showing that the proposed amendment has merit. Three of the four Departments had held that no such showing was required.

Instead, the standard to apply is that "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." Lucido v. Mancuso, 49 A.D.3d 220, 222 (2d Dep't 2008). See also *Cruz v. Brown*, 129 A.D.3d 455, 456 (1st Dep't 2015); *Holst v. Liberatore*, 105 A.D.3d 1374, 1374–75 (4th Dep't 2013).

The Third Department had bucked the trend, and continued to require an evidentiary showing of merit, until its recent decision in *NYAHSA Servs., Inc. Self-Insurance Trust v. People Care Inc*., 156 A.D.3d 99 (3d Dep't 2017). There, in establishing unanimity among the Departments, the Third Department noted that

> [t]he rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. "If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing" (citation omitted).

Id. at 102.

CPLR 3025 / 3211 - Original complaint no longer viable, as amended complaint takes the place of original pleading

Golia v. Vieira, 2018 NY Slip Op 04537 (2d Dep't 2018) ("The original complaint was superseded by the amended complaint. 'The original complaint is no longer viable, inasmuch as the amended complaint takes the place of the original pleading' (citations omitted). Thus, the appeal from the order entered August 20, 2015, which granted LICH's motion pursuant to CPLR 3211(a) to dismiss the original complaint, has been rendered academic (citation omitted).").

CPLR 3025 - Motion denied; proposed amendment is palpably insufficient

762 Park Place Realty, LLC v. Levin, 161 A.D.3d 1135 (2d Dep't 2018) ("While leave to amend the pleadings shall be freely given (citation omitted), leave should not be granted when the proposed amendment is palpably insufficient or devoid of merit (citation omitted). Here, the proposed breach of contract cause of action must fail on the ground that the purported transfer provision of the 2008 agreement allegedly breached is unenforceable for lack of consideration. The proposed cause of action for dissolution of the LLC also must fail because an application for dissolution of an LLC must be made by or for a member of the LLC (citation omitted). Ayala failed to demonstrate that she was a member of the LLC and she did not interpose the intervenor complaint on behalf of a member of the LLC. Accordingly, that branch of the cross motion which was for leave to amend the intervenor complaint should have been denied.").

CPLR 3025 - Motion to amend granted; prejudice not established

Central Amusement Intl. LLC v. Lexington Ins. Co., 75 N.Y.S.3d 35 (1st Dep't 2018) ("The motion court did not abuse its discretion in granting defendant's motion to amend its answer (citations omitted). Plaintiff's argument that it was prejudiced at the time of the amendment because it was time-barred from pursuing a professional malpractice claim against its engineer, is unavailing. The motion court correctly observed that plaintiff had the opportunity and duty to perform its own investigation to uncover potential culpable conduct by its contractors, engineers, or any other party that may have contributed to the loss, but it chose not to do so. Plaintiff has also not established the validity of its prejudice claim, as it never attempted to sue its engineer (or other third party) following the disclosure of defendant's expert report. The claim that defendant's production of the expert report was delayed finds no support since it was timely produced during expert discovery.").

CPLR 3025 - Motion granted; there was delay, but no prejudice

Wojtalewski v. Central Sq. Cent. Sch. Dist., 161 A.D.3d 1560 (4th Dep't 2018) ("Defendants argued in opposition to the cross motion that plaintiff failed to proffer any excuse for her delay in seeking leave to amend the complaint, but '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side' (citations omitted). Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay (citation omitted). We further reject defendants' contention that the proposed amendment was

patently insufficient on its face (citations omitted). To the extent that defendants raise on appeal an alternative ground for affirmance (citation omitted), we conclude that it lacks merit.").

CPLR 3025 - 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, 73 N.Y.S.3d 420 (1st Dep't 2018) ("[A]s we have stated, to support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit 'competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff' (citation omitted). The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants (citations omitted). Plaintiff's submission of the expert's affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply.").

CPLR 3025 - Prejudice is not merely alleged exposure to increased liability; instead, there must be some indication that the party has been hindered in the preparation of his or her case or has been prevented from taking some measure in support of his or her position'

NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc., 156 A.D.3d 99, 64 N.Y.S.3d 730 (3d Dep't 2017) ("Defendants have not demonstrated that they will be prejudiced by, or suffer undue surprise attributable to, the delay in requesting that the trustees be permitted to join the identical claims raised by plaintiff, which would not subject defendants to new liability or new theories of recovery (citation omitted). Likewise, defendants cannot credibly claim surprise or prejudice from plaintiff's request to supplement its claims to include the unpaid adjustment bills that accrued subsequent to the filing of the amended complaints. The added claims are premised upon the same legal theories and a common factual basis. Initially, defendants did not dispute that they had not paid the adjustment bills that accrued and were sent by plaintiff during the pendency of these actions. Defendants' argument that they would be prejudiced because the proposed amendments would subject them to increased liability is unavailing, as '[p]rejudice is more than the mere exposure of the [opposing parties] to greater liability' (citation omitted). In this context, a party's burden of showing prejudice requires 'some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position' (citations omitted). Defendants made no such showing and, indeed, they did not argue that they were hindered by the delay or prevented from taking measures to support their positions.").

ARTICLE 31 - DISCLOSURE

CPLR 3101- Scope of disclosure

CPLR 3101

David L. Ferstendig, *Disputes Over Scope of Social Media Discovery Are Governed by Well-Established Discovery Rules*, 688 N.Y.S.L.D. 1 (2018)

Disputes Over Scope of Social Media Discovery Are Governed by Well-Established Discovery Rules

Court of Appeals Rejects Appellate Division's Heightened Standard

In *Forman v. Henkin*, 2018 N.Y. Slip Op. 01015 (February 13, 2018), the plaintiff alleged that she sustained physical and cognitive injuries limiting her ability to participate in recreational and social activities as a result of her fall from a horse owned by the defendant. The plaintiff testified at her deposition that prior to the accident she had posted to a Facebook account numerous photographs depicting her active lifestyle, but deactivated the account some six months after the accident.

The defendant sought an unlimited authorization to obtain the plaintiff's Facebook account, including her private postings. The defendant argued that these materials were relevant to plaintiff's injuries, her credibility, and her claims that she could no longer perform certain activities. The plaintiff failed to provide the authorization.

The trial court granted the defendant's motion to compel, but only to the extent of directing the plaintiff to produce all privately posted photographs prior to the accident that she intended to introduce at trial, all photographs of herself privately posted after the accident that did not show nudity or romantic encounters, and an authorization for Facebook records showing every time after the accident that the plaintiff posted a private message and the number of characters or words in the messages.

Only the plaintiff appealed to the Appellate Division, which modified the trial court's order. It limited disclosure to posted photos (whether before or after the accident) that the plaintiff intended to introduce at trial and eliminated the authorization to obtain post-accident message information.

The Court of Appeals reversed. It stated that disclosure in all civil actions is governed by the "material and necessary" standard enunciated by CPLR 3101(a), which requires that the discovery sought be relevant to the prosecution or defense of an action. Significantly, "[w]hile Facebook — and sites like it — offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute." Id. at ∗3. The Court rejected the Appellate Division's heightened standard for the production of social media, which required the defendant to establish "'a factual predicate for their request by identifying relevant information in plaintiff's Facebook

account — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims' (citation omitted)." Id. In fact, some courts had only permitted discovery of information in the private portion of a Facebook account where the party seeking discovery first established that material in the "public" portion contradicted the plaintiff's allegations.

The Court found that such a threshold rule would permit the account holder to obstruct discovery "by manipulating 'privacy' settings or curating the materials on the public portion of the account." Id. The Court stressed that New York law does not condition the receipt of discovery on a showing that the items sought actually existed.

> [R]ather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

Id. at ∗4.

The Court acknowledged that the mere commencement of a personal injury action does not automatically render a party's entire Facebook account discoverable. In fact, discovery in the social media context is governed by "well-established" rules, that is, first to determine whether relevant information is likely to be found on Facebook. Then, the Court should tailor the order

> to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate — for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]).

Id.

In this action, the Court held that the defendant "more than met" his burden:

> At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations.

> The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive….
>
> In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages.

Id. at ∗5.

Thus, the Court reversed the Appellate Division order and reinstated the trial court's order.

CPLR 3101

David L. Ferstendig, *Freedom of Information Law Exempts From Disclosure Records Relating to Municipalities' Plans for Auditing Special Education Preschool Provider Costs*, 685 N.Y.S.L.D. 2-3 (2017)

Freedom of Information Law Exempts From Disclosure Records Relating to Municipalities' Plans for Auditing Special Education Preschool Provider Costs

Court Finds Records Were Compiled for "Law Enforcement" Purposes, Which Includes Civil Enforcement

New York State's Freedom of Information Law (FOIL) generally requires government agencies to provide access to public documents and records, subject to certain exemptions. In *Matter of Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67 (2017), the relevant exemptions were contained in Public Officers Law § 87(2)(e) (POL), denying public access to records "compiled for law enforcement purposes and which, if disclosed," would: (i) "interfere with law enforcement investigations or judicial proceedings" or (iv) "reveal criminal investigative techniques or procedures, except routine techniques and procedures." Id. at 73. School district boards are required to provide disabled preschool-age children with special education services and programs. Many times, these programs are offered by approved private providers, and the tuition charged is set by the New York State Education Department (Department). Municipalities are then reimbursed by the State for a statutory percentage of the costs paid to the providers. The State Comptroller had carried out a series of audits of approved special education programs, which uncovered widespread fraud and abuse in the reporting of allowed costs. Several criminal prosecutions and professional disciplinary investigations ensued. As a result, Education Law § 4410 was amended to try to increase fiscal oversight. Petitioner then made a FOIL request seeking

> any and all [Education Law § 4410(11)(c) and 8 NYCRR 200.18] audit standards in [the Department's] possession, including any audit program and audit plan submitted by a municipality or school district . . . , whether approved, not approved, disapproved, pending or such other status.

Id. at 72.

The Department denied the request in its entirety, relying on the exemption under POL § 87(2)(e), and arguing that disclosure "'would interfere with investigations of compliance with the provisions of the reimbursable cost manual and the preschool special education rate setting system.'" Id. Petitioner then brought this Article 78 proceeding, seeking to vacate the denial, and directing the Department to provide the records and requesting attorneys' fees under POL § 89(4)(c). Before it answered the petition, the Department released 55 responsive, partially redacted pages. The Department then answered and sought dismissal of the petition. The trial court granted the petition only to the extent of requiring the Department to produce two previously redacted pages. The Appellate Division affirmed.

The Court of Appeals rejected the Department's reliance on POL § 87(2)(e)(iv), concerning non-routine criminal investigative techniques, because in its denial of the FOIL request the Department did not refer to that particular exemption. Thus, the Court focused on the exemption in POL § 87(2)(e)(i), which requires that the records be compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations or judicial proceedings.

With respect to the first requirement, the Court concluded that the records were compiled for law enforcement purposes. It found that the phrase "law enforcement purposes" is not limited to criminal enforcement, and includes civil enforcement. While the phrase is not defined in FOIL, for support the Court referred to Black's Law Dictionary, which provides that the phrase "law enforcement" is "not limited to the enforcement of criminal laws"; two subdivisions of POL § 87(2)(e), expressly applying the exemptions to criminal matters only, which limitation would be unnecessary if "law enforcement" was limited to criminal matters; and the federal counterpart of FOIL, the Freedom of Information Act, where case law has interpreted the law enforcement exemption to include both civil and criminal law enforcement matters.

The Court stressed that while all audits do not necessarily serve "law enforcement purposes," the audits here were not "routine":

> The statutory scheme of Education Law § 4410, as amended in 2013, and the Department's regulations pertaining to municipal audit plans and audit programs, indicate that these audits are specifically targeted at ferreting out the improper and potentially illegal or fraudulent reporting of costs by preschool special education providers. The goal of the statutory and regulatory scheme and, in particular the 2013 amendments, is not only to ensure the establishment of an accurate tuition rate, but also to encourage compliance with the applicable reporting rules and curb existing fraud and abuse. Thus, the obvious inference arising from the statutory requirement that the Department issue guidelines for municipalities in conducting these audits, is that the legislature sought to increase the efficacy of audit procedures in an effort to strengthen enforcement measures. Under these circumstances, we conclude that the records sought by petitioner were compiled for law enforcement purposes (citation omitted).

Id. at 76–77.

With respect to the second requirement, the Court agreed with the courts below that the Department redactions were necessary to prevent interference with a law enforcement investigation. Specifically, releasing the information concerning the auditor's specific methods and procedures in particular counties would permit violators to "evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." Id. at 77.

The Court rejected petitioner's argument that POL § 87(2)(e)(i) was inapplicable because there were no ongoing audits at the time the FOIL request was submitted:

> While an agency may not rely on section 87(2)(e)(i) to refuse disclosure of records upon a wholly speculative claim of potential interference with an unspecified future investigation to which the documents may or may not be relevant, that is not the case here. Rather, the municipal audits of special education preschool providers were expressly encouraged by statute and were plainly contemplated in the near future (citation omitted).

Id.

Petitioner Substantially Prevailed Within the Meaning of Public Officers Law § 89(4)(c)

A subsidiary issue in *Madeiros* was whether petitioner was entitled to recover her attorneys' fees under POL § 89(4) (c). That statute provides for an award of legal fees "where the petitioner 'has substantially prevailed' in the FOIL proceeding and the agency either lacked a reasonable basis for denying access to the requested records or 'failed to respond to a request or appeal within the statutory time.'" Id. at 78.

The Appellate Division held that the petitioner had not substantially prevailed because the majority of the Department's challenged redactions were appropriate. The Court of Appeals reversed on this issue. It noted that the Department did not make any disclosures, redacted or otherwise, until after the petitioner brought this proceeding, at which time the Department produced substantial unredacted FOIL disclosure. In holding that the petitioner met the statutory requirements, the Court stressed that to conclude otherwise

> would be to permit agencies to circumvent section 89(4)(c) because "only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter—however dilatorily." We, therefore, must remit for Supreme Court to exercise its discretion in relation to petitioner's fee request (citations omitted).

Id. at 79–80.

CPLR 3101(b) - "Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured."

Advanced Chimney, Inc. v. Graziano, 153 A.D.3d 478, 60 N.Y.S.3d 210 (2d Dep't 2017) ("'[T]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding [whether to pay or reject a claim] are made in the regular course of its business' (citations omitted). Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured (citations omitted). Here, the Supreme Court properly compelled disclosure, as the material sought by GNY was prepared by KBR as part of Tudor's investigation into the claim, and was not primarily and predominantly of a legal character (citations omitted). Nor was the file protected as the work product of KBR (citation omitted).").

CPLR 3101(d) - Late expert disclosure

Washington v. Trustees of The M.E. Church of Livingston Manor, 2018 NY Slip Op 04622 (3d Dep't 2018) ("Supreme Court did not abuse its discretion in relying on plaintiff's expert affidavit. CPLR 3212 (b) provides that, '[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the affidavit.' Defendant contends that, regardless of this statute, the court erred in considering the affidavit because plaintiff violated both a November 2016 order directing plaintiff to serve expert discovery by a certain date and the Third Judicial District Expert Disclosure Rule — requiring an opposing party to file its expert disclosure, at the latest, within 60 days after the note of issue was filed, subject to preclusion of the expert unless the court directs otherwise. Because the court's November 2016 order and the note of issue are not included in the record, we cannot adequately review whether plaintiff actually violated the order or rule. In any event, Supreme Court was vested with broad discretion in addressing this expert disclosure issue (citations omitted), and we find no abuse of that discretion.").

CPLR 3101(d) - In 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, 2018 NY Slip Op 04060 (3d Dep't 2018) ("In any event, plaintiff's 'undifferentiated aggregation of the claimed negligent acts and omissions of all defendants' did not serve the purpose of either a bill of particulars or an expert disclosure (citation omitted).

Plaintiff's expert disclosure did not serve its purpose or comply with the statute because it did not contain reasonable detail concerning each expert's opinion, considering that the disclosure essentially alleged the same acts of negligence as to each defendant, even though some of those allegations could not possibly apply to every defendant. The nature of the disclosure here 'essentially tell[s] the defendants nothing about what they are supposed to be defending' (citation omitted). It is unfair to require one defendant to prepare to defend against allegations that plaintiff only intends to assert against the codefendants. Instead of a blended aggregation of claims, as plaintiff provided, each defendant was entitled to a disclosure specific to him, her or it (citations omitted). Thus, Supreme Court did not abuse its discretion by requiring plaintiff to revise her expert disclosure 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.").

CPLR 3101(d) - Conflict as to whether responding party in medical, dental or podiatric malpractice action can withhold expert's qualifications for fear of revealing expert's identity

The omission of the identity of the proposed expert in medical, dental and podiatric malpractice actions was apparently motivated by a concern that medical experts could be discouraged by colleagues from testifying. One of the concerns raised is that a party's compliance with the required disclosure, other than the identity of the expert (that is, providing the expert's qualifications), would permit the demanding party, with access to a computer and appropriate search engines, to learn the identity of the expert. This has provoked parties to request that they be permitted to limit their disclosure of the expert's qualifications. The result has been a conflict in the Appellate Division Departments, with respect to their responses to this dilemma. The Second Department, joined recently by the Third Department, has ruled that

> parties in medical malpractice cases "will ordinarily be entitled to full disclosure of the qualifications of [an opponent's] expert, [except for the expert's name,] notwithstanding that such disclosure may permit such expert's identification," but a party may obtain a protective order under CPLR 3103 (a) by making a factual showing that there exists a reasonable probability, "under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial" (citation omitted). Stated otherwise, parties "in medical malpractice actions are presumptively entitled to a statement of the [opponents'] expert's qualifications in 'reasonable detail' (citation omitted), as the statute commands, and [parties opposing disclosure] in such cases may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' (citation omitted)" (citation omitted).

Kanaly v. DeMartino, 2018 N.Y. App. Div. LEXIS 4018, 2018 NY Slip Op 04060 (3d Dep't June 7, 2018) (quoting *Thomas v. Alleyne*, 302 A.D.2d 36, 752 N.Y.S.2d 362 (2d Dep't 2002)) (which court originated this rule).

The Fourth Department has carved out its own rule, permitting a responding party to withhold information concerning the expert's medical school education and the location of his or her internships, residencies and fellowships. *Thompson v. Swiantek*, 291 A.D.2d 884, 736 N.Y.S.2d 819 (4th Dep't 2002).

CPLR 3101(d) - Late disclosure

Lasher v. Albany Mem. Hosp., 161 A.D.3d 1326 (3d Dep't 2018) ("Here, plaintiffs first notified defendants of their intention to call a GIS expert more than three years after defendants' respective demands for expert disclosure and during the midst of the trial. Notably, Stark's cell phone number was provided to plaintiffs during a pretrial deposition more than a year and a half earlier and, thus, plaintiffs possessed the essential facts necessary to investigate the matter — and, if necessary, to retain an expert — long before trial. Plaintiffs' claim that they did not realize the significance of the calls, and thus the need to subpoena the phone records, until shortly before trial did not, as Supreme Court found, constitute good cause for the delay (citations omitted). Moreover, we agree with Supreme Court that, given the complex and technical issues presented by the proposed GIS testimony, the mid-trial disclosure of this expert would have prejudiced defendants (citations omitted). Under these circumstances, we cannot conclude that Supreme Court abused its discretion in precluding plaintiffs from offering the testimony of their GIS expert (citations omitted).").

CPLR 3101(d) / 4515 - Frye and general acceptance

Dovberg v. Laubach, 154 A.D.3d 810, 63 N.Y.S.3d 417 (2d Dep't 2017) ("'The long-recognized rule of Frye v. United States [293 F. 1013] is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has "gained general acceptance" in its specified field' (citations omitted). '[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions' (citations omitted). General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert (citations omitted). The burden of proving general acceptance rests upon the party offering the disputed expert testimony (citations omitted). 'Broad statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance' (citation omitted). Furthermore, even if the proffered expert opinion is based on accepted methods, it must satisfy 'the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case' (citation omitted). Here, the defendants did not sustain their burden of establishing that Bowles's opinion that the force generated by the accident could not have caused the plaintiff's knee injuries was based on generally accepted principles and methodologies (citations omitted), or that there was a proper foundation for the admission of that opinion (citation omitted). The expert disclosure notice simply stated that Bowles analyzed 'the

medical and engineering aspects of the accident.' While the defendants cited to three works in opposition to the motion in limine, they did not identify the authors, years of publication, and contents of those works, or any explanation as to their relevance in evaluating the cause of knee injuries. Moreover, the defendants provided no description of the methodology Bowles utilized to determine the force of the accident, and the biomechanical engineering principles he relied upon in reaching his conclusion that the force generated by the accident could not have caused the plaintiff's knees to come into contact with the vehicle dashboard. Under these circumstances, the Supreme Court should have granted the plaintiff's motion to the extent of precluding Bowles from offering his opinion testimony that the force generated by the accident could not have caused the plaintiff's knee injuries (citations omitted). Accordingly, we reverse the judgment and remit the matter to the Supreme Court, Suffolk County, for a new trial on the issue of damages.").

CPLR 3101(d)(1) - Conflict among Appellate Division Departments as to whether treating physician who testifies at trial as expert must provide CPLR 3101(d)(1) expert disclosure

David L. Ferstendig, *Another Conflict Among Appellate Division Departments,* 680 N.Y.S.L.D. 4 (2017)

One of my pet peeves has been the relative abundance of circumstances in which the Appellate Division departments are in conflict on basic procedural issues. *See, e.g*., "The CPLR - A Practitioner's Perspective," remarks from the New York University School of Law March 2013 Symposium entitled "The CPLR at Fifty - Its Past, Present, and Future." Because of the nature of the issues involved, many times discovery-related, the opportunity for the Court of Appeals "to clear things up" is not readily available. This leaves counsel in sometimes difficult positions, complicating practice.

Schmitt v. Oneonta City Sch. Dist., 2017 N.Y. Slip Op. 04527 (3d Dep't June 8, 2017), involved the issue of whether a CPLR 3101(d)(1)(i) expert disclosure is required for a treating physician who is expected to testify as an expert at trial. The First, Second, and Fourth Departments do not have such a requirement, concluding that the disclosure of a doctor's records and reports pursuant to CPLR 3121 and 22 N.Y.C.R.R. § 202.17 is sufficient. See Hamer v. City of New York, 106 A.D.3d 504, 509 (1st Dep't 2013); Jing Xue Jiang v. Dollar Rent a Car, Inc., 91 A.D.3d 603, 604 (2d Dep't 2012); Andrew v. Hurh, 34 A.D.3d 1331, 1331 (4th Dep't 2006), lv. denied, 8 N.Y.3d 808 (2007). However, the Third Department does require a CPLR 3101(d)(1)(i) disclosure. In Schmitt, the defendant served a demand for expert disclosure, and plaintiffs' multiple responses did not identify a medical expert. The plaintiffs noticed a deposition of the treating physician for trial purposes. During the deposition, the plaintiffs attempted to offer the witness as an "expert in the field of orthopedic surgery." The defendant objected immediately because the witness was not identified in the plaintiffs' expert disclosure. Plaintiffs' counsel maintained that no expert disclosure was required and the deposition continued over defendant's objection. The plaintiffs then moved, seeking a determination that they had "effectively complied" with CPLR 3101(d)(1)(i), or in the alternative, that the expert disclosure they had attached to their motion was sufficient. The trial court granted the motion "finding that a fair reading of [the expert] Cico-ria's testimony provided defendant with Cicoria's qualifications, as well as the facts and opinions upon which he could be expected to testify at trial." *Schmitt*, 2017 N.Y. Slip Op. 04527 at ∗2.

On appeal, the Third Department reiterated its conflict with the other Departments requiring an expert disclosure for a treating physician. It found that the transcript of the deposition could not serve as a substitute for the CPLR 3101(d)(1)(i) disclosure. The majority opinion then tried to frame a proper remedy for the non-compliance. Significantly, it noted that "[p]laintiffs' counsel candidly conceded that he was unaware of this Court's interpretation of CPLR 3101(d)(1)(i) and the corresponding need to file an expert disclosure for a treating physician" (perhaps because of the conflict among the departments!). *Id*.

The court further noted that there was no showing of willfulness in the plaintiffs' nondisclosure. However, it conceded that the defendant suffered prejudice. Thus, the court ruled that if the plaintiffs sought to call the witness as an expert, they would need to provide a complete CPLR 3101(d)(1)(i) disclosure and produce him for an expert deposition, at their expense. If the plaintiffs chose to use him as a fact witness only, however, then plaintiffs could either introduce the videotape deposition at trial (CPLR 3117(a)(4)), subject to any objections under CPLR 3115(a) or a CPLR 3103(a) protective order, or could call him as a witness at trial, in which case the prior deposition could be used for impeachment purposes only (CPLR 3117(a)(1)).

In a concurring opinion, Judge Lynch took a different approach as to a remedy - there would be no need for a CPLR 3101(d)(1)(i) disclosure. However, he opined that the plaintiffs should be bound by the format they selected, that is, the videotape deposition, and should not be allowed to call the witness at trial. Moreover, the defendant should be allowed to cross-examine the witness via a videotape deposition, at the plaintiffs' expense.

CPLR 3101(d)(1) - "[D]efendant's objections to that line of questioning were properly sustained inasmuch as defendant did not receive sufficient notice that the treating physician relied on his engineering background to support his opinions and conclusions about plaintiff's injuries."

Harris v. Campbell, 155 A.D.3d 1622 (4th Dep't 2017) ("We address first plaintiffs' contentions concerning the court's allegedly erroneous rulings at trial that contributed to the jury's verdict that plaintiff did not sustain a serious injury. Contrary to plaintiffs' contention, the court properly limited the testimony of one of plaintiff's treating physicians. 'CPLR 3101 (d) (1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses' (citation omitted). 'Where . . . a plaintiff's intended expert medical witness is a treating physician whose records and reports have been fully disclosed . . . , a failure to serve a CPLR 3101 (d) notice regarding that doctor does not warrant preclusion of that expert's testimony on causation, since the defendant has sufficient notice of the proposed testimony to negate any claim of surprise or prejudice' '(citation omitted). Here, one of plaintiff's treating physicians did not provide any expert disclosure, and during trial he indicated that, in addition to being a medical doctor, he received a Ph.D. in biomechanical engineering and he often relies on his engineering background in his medical practice. Subsequently, that treating physician was asked some questions pertaining to biomechanics, and specifically was asked about the amount of force needed to cause a lumbar injury. We conclude that defendant's objections to that line of questioning were properly sustained inasmuch as defendant did not receive sufficient notice

that the treating physician relied on his engineering background to support his opinions and conclusions about plaintiff's injuries (citation omitted). Indeed, plaintiffs made no attempt in response to defendant's objections to point to any medical records or other documentation that would establish that defendant had such notice.").

CPLR 3101(d)(1) - Objecting to inadequate expert disclosure

David L. Ferstendig, *Plaintiff's Motion at Trial Seeking to Preclude Defense Expert's Testimony on Causation Denied as Untimely*, 672 N.Y.S.L.D. 1-2 (2016).

Rivera v. Montefiore Medical Center, 2016 N.Y. Slip Op. 06854 (October 20, 2016), concerned the adequacy of a CPLR 3101(d) expert disclosure and the obligation to object timely to its content, and specifically to the lack of specification. Rivera was an action against the defendant-hospital arising out of the death of plaintiff's son there. The decedent arrived at the hospital with symptoms of pneumonia, and died early the next morning. He had been admitted to an area of the hospital that did not have continuous monitoring of a patient's vital signs. The autopsy report concluded that the cause of death was bronchopneumonia complicated by diabetes.

The defendant-hospital's CPLR 3101(d) statement revealed, among other things, that its expert would testify "on the issue of causation" and "as to the possible causes of the decedent's injuries and contributing factors." Plaintiff did not object to the general nature of the disclosure, specifically relating to causation; instead, she objected that the statement failed to provide the dates of the expert's medical residency. That objection was cured by the defendant.

The defendant-hospital's treating physician testified at trial that decedent's death was caused in part by pneumonia. On cross, however, he stated instead that it was caused by acute cardiac arrhythmia. Plaintiff's expert agreed that the death was caused in part by pneumonia, but acknowledged that cardiac arrest was a possible cause. Plaintiff moved to preclude defendant's expert testimony as to the possible cause of the decedent's death on the ground that its CPLR 3101(d) disclosure gave no detail as to the possible cause. The trial court denied the application as untimely. The defense expert then testified that the cause of the decedent's death was sudden, lethal cardiac arrhythmia, disputing the autopsy report suggested cause of death. The jury found the defendant liable for its failure to put the decedent in an area of the hospital where there was continuous monitoring. However, although the jury awarded damages for past and future economic losses, it rejected the conscious pain and suffering claim, suggesting that the jury believed the decedent died suddenly, perhaps caused by a heart ailment. The plaintiff then moved pursuant to CPLR 4404(a) to strike all testimony regarding cardiac arrhythmia as a cause of decedent's death and to set aside the $0 award for conscious pain and suffering on the ground that the CPLR 3101(d) expert disclosure failed to include the theory as to cardiac arrhythmia and was thus deficient. The trial court denied the motion as "untimely made at the time of trial."

The Appellate Division affirmed, holding that plaintiff did not timely object to the lack of specificity in defendant's CPLR 3101(d) disclosure and the plaintiff could not assume that the defense expert would agree with the autopsy report's conclusion as to the cause of death.

The Court of Appeals affirmed. The Court noted that the trial court had the discretion to deny plaintiff's motion to preclude. Significantly, it rejected plaintiff's argument that it had no reason to object to defendant's CPLR 3101(d) statement at the time it was served because it did not indicate that the defendant would dispute plaintiff's theory of the cause of decedent's death. The Court stated that to the extent defendant's CPLR 3101(d) disclosure might have been objectionable, its insufficiency was obvious. Thus, it was not misleading; it simply did not indicate a theory or basis for the expert's opinion. The Court held that the trial court did not abuse its discretion in finding that the plaintiff's time to object had passed, since "the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised – and potentially cured – before trial." *Id*. at *3.

This decision is both troubling and instructive. In most cases (outside of the Commercial Part), expert disclosure is limited to the CPLR 3101(d) written responses. The deposition of an expert is generally not permitted or taken. Not infrequently, the written disclosures can be generalized and lacking in detail. The *Rivera* decision is a cautionary tale and should provoke parties to review closely their opponent's expert disclosure to assure that all objections are preserved in a timely fashion. Conversely, a party should make sure its disclosure is sufficiently detailed. The decision also highlights the danger of a system that generally limits the inquiry of a party's expert by not permitting depositions and relying solely on a written response.

CPLR 3101(i) - Plaintiff failed to properly authenticate the video excerpt

Torres v. Hickman, 2018 NY Slip Op 04372 (2d Dep't 2018) ("The plaintiff moved to enter into evidence a 30-second portion of a surveillance video recording of the accident taken by a security camera at a business adjacent to the accident scene. A 'tech supervisor' employed by the business testified that he installed and maintained the security camera, but that he did not record the original video, nor did he copy the relevant portion of that video on to the disc that was proffered as evidence. He similarly did not know how the master recording was edited to produce the 30-second excerpt on the disc, and he did not testify that the excerpt was a true and accurate depiction of a portion of the master recording or that it depicted the entire recorded event in question. He also lacked any firsthand knowledge of who prepared the subject disc, or of how and when it was supplied to the plaintiff's attorneys. The Supreme Court precluded the video evidence, citing problems with its authentication and chain of custody. . . . Contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in precluding the proffered surveillance video excerpt. 'Testimony from [a] videographer that he [or she] took the video, that it correctly reflects what he [or she] saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape' (citation omitted). Where the videographer is not called as a witness, the video can still be authenticated with testimony that the video 'truly and accurately represents what was before the camera' (citations omitted). Furthermore, '[e]vidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering' (citations omitted). Here, given the inability of the witness to testify regarding the editing of the master recording and the accuracy of the video excerpt, and his lack of personal knowledge as to the creation of the proffered disc and how it came into the possession of the plaintiff's attorneys, we agree with the court's determination that the plaintiff failed to properly authenticate the video excerpt (citation omitted).").

CPLR 3116 - Signing Deposition

CPLR 3116 - Substantive changes to errata sheet without providing sufficient explanation

Carrero v. New York City Hous. Auth., 2018 NY Slip Op 04660 (1st Dep't 2018) ("Supreme Court correctly struck plaintiff's errata sheet purporting to correct the transcript of her General Municipal Law § 50-h hearing testimony, because plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them (citations omitted).").

CPLR 3116 / 2101(b) - Translator's affidavit die not accompany errata sheets

Gonzalez v. Abreu, 2018 NY Slip Op 04309 (2d Dep't 2018) ("Here, the defendant testified at her deposition through a Spanish language interpreter. However, the errata sheets annexed to the transcript of the defendant's deposition testimony and the defendant's affidavit, which were both written in English, were not accompanied by a translator's affidavit executed in compliance with CPLR 2101(b). Therefore, those evidentiary submissions were facially defective and inadmissible (citations omitted). While the defendant submitted a translator's affidavit with her reply papers, that affidavit was unnotarized, and thus was not in admissible form (citation omitted). The defendant's remaining evidentiary submissions were insufficient to establish her prima facie entitlement to judgment as a matter of law on the applicability of the homeowner's exemption under the Labor Law (citation omitted).").

CPLR 3116 - Signing deposition transcript; plaintiff's unsigned admissible because certified and because it was provided to plaintiff's counsel more than 60 days prior to defendant's motion; 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) ("Plaintiff's deposition transcript, which defendant submitted with his initial motion papers, is admissible, because, although it is unsigned, it is certified (citations omitted). In addition, defendant submitted evidence that his lawyer mailed the transcript to plaintiff's counsel more than 60 days before the date of defendant's motion. The transcript of the deposition of Hsian Fang Chao (not a party to this action) is not admissible, because defendant did not mail it until after the date of his motion (citations omitted).").

CPLR 3119 - Uniform interstate depositions and discovery

CPLR 3119 - Applies to out of state subpoena issued in connection with investigation by California Attorney General

Matter of Harris v. Seneca Promotions, Inc., 149 A.D.3d 1508, 53 N.Y.S.3d 758 (4th Dep't 2017) ("Nevertheless, we agree with petitioner that CPLR 3119 applies to this out-of-state subpoena issued in connection with an investigation undertaken by petitioner as Attorney General of the

State of California (citation omitted). Contrary to the contention of NWSC, nothing in the language of the statue limits its scope to subpoenas issued in civil litigation, and NWSC may not rely upon the title of the bill and statements of its sponsor to create ambiguity where the statutory language is clear and unambiguous. 'Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation' . . . , and the intent of the Legislature must be discerned from the language of the statute . . . without resort to extrinsic material such as legislative history or memoranda' (citation omitted). The record does not support NWSC's contention that it was not afforded an opportunity to challenge the subpoena, inasmuch as the court considered NWSC's position when it entertained NWSC's application for a protective order pursuant to CPLR 3119 (e). We reject NWSC's further contention that it had no obligation to specify the information that it sought to protect from disclosure in making that application. To the contrary, as the entity resisting compliance with the subpoena, NWSC had the burden of demonstrating that the information sought was irrelevant to petitioner's investigation (citation omitted), and NWSC made no attempt to meet that burden.

CPLR 3121 - Physical or Mental Examination

CPLR 3121 - Trial court did not abuse discretion in ordering plaintiff to provide medical authorizations for a 10-year period

Kanaly v. DeMartino, 2018 NY Slip Op 04060 (3d Dep't 2018) ("Supreme Court did not abuse its discretion in ordering plaintiff to provide unrestricted authorizations for defendants to obtain decedent's medical records for 10 years preceding her death. '[A] litigant is deemed to have waived the physician-patient privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue' (citation omitted). Plaintiff alleged that defendants committed medical malpractice by prescribing decedent fentanyl when she was opiate naive. The parties dispute the definition of that term, with a possible definition espoused by one of the defense experts requiring knowledge of the patient's medical history for at least a 10-year period prior to death. Defendants have noted that decedent suffered for many years from medical conditions for which pain medication would typically be prescribed. One medical record reveals that decedent received fentanyl — the drug alleged to have caused her death — for a surgical procedure in 2005. Additionally, plaintiff alleged that defendant Wendy Anne DeMartino was negligent for failing to read and use decedent's full medical history, and plaintiff's expert witness disclosure suggested that plaintiff's experts would rely on and testify to decedent's full medical history, but the disclosure did not delineate the extent or time period of that history. Inasmuch as plaintiff placed at issue decedent's full medical history for an extended but unspecified period of time, Supreme Court did not abuse its discretion in ordering plaintiff to provide medical authorizations for a 10-year period (citations omitted).").

CPLR 3121 - Nonlegal representative's presence at IME

Martinez v. Pinard, 160 A.D.3d 440, 71 N.Y.S.3d 345 (1st Dep't 2018) ("Defendants concede that, under this Court's recent decision in Santana v Johnson (154 AD3d 452 [1st Dept 2017]), they can no longer argue that plaintiff was required to show 'special and unusual circumstances' to be

permitted to have a nonlegal representative present at a physical examination conducted on their behalf pursuant to CPLR 3121. There is no basis for finding that defendants waived their right to conduct a physical examination of plaintiff by including unreasonable restrictions in their notice of examination. Defendants' conduct was supported by a good faith interpretation of applicable case law (citations omitted).").

CPLR 3121(a) / 4504(a) - Placing medical condition in controversy waives privilege

O'Brien v. Village of Babylon, 153 A.D.3d 547, 60 N.Y.S.3d 92 (2d Dep't 2017) ("'While physician-patient communications are privileged under CPLR 4504, [a] litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue' (citations omitted). To this end, ' a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR (citation omitted) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue' (citations omitted). 'In addition, the defense is entitled to review records showing the nature and severity of the plaintiff's prior medical conditions [which] may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life' (citations omitted). Here, contrary to the plaintiffs' contention, they affirmatively placed the entire medical condition of the plaintiff Donald O'Brien (hereinafter the injured plaintiff) in controversy through the broad allegations in their bill of particulars (citation omitted). Further, the plaintiffs expressed their intention to prove exacerbation of preexisting injuries at trial and claimed damages for loss of enjoyment of life. Accordingly, the Supreme Court properly granted that branch of the defendants' cross motion which was pursuant to CPLR 3124 to compel the injured plaintiff to provide them with authorizations for the release of medical records relating to his treatment for acoustic neuroma and back issues (citations omitted). Under the circumstances of this case, the Supreme Court's directive to provide medical authorizations as to these conditions, unrestricted as to date, was not an improvident exercise of discretion (citations omitted).").

CPLR 3126- Penalties for refusal to comply with order or to disclose

CPLR 3126 - Plaintiff acted with gross negligence in destroying ESI-tailored adverse inference charge ordered

Douglas Elliman LLC v. Tal, 156 A.D.3d 583, 65 N.Y.S.3d 697 (1st Dep't 2017) ("The record demonstrates that plaintiff acted with gross negligence in destroying ESI not only after commencement of the action triggered a duty to preserve, but after defendant Tal's deposition, in which she referenced an email exchange in which she allegedly advised plaintiff that she had started working at Itzhaki Properties, and requested dual licensure, which plaintiff approved (citation omitted). Accordingly, the court properly exercised its discretion in presuming the

relevance of the email exchange and imposing spoliation sanctions (citation omitted). Further, the court engaged in "an appropriate balancing under the circumstances" by ordering a tailored adverse inference charge limited to the alleged contents of the email exchange regarding defendant's Tal's work at Itzhaki Properties, and precluding plaintiff from presenting contrary evidence (citation omitted).").

CPLR 3126 - 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, 63 N.Y.S.3d 723 (2d Dep't 2017) ("The plaintiff contends that Me-Me's answer should be stricken for its spoliation of the video recording or, in the alternative, that an adverse inference charge should be given at trial with respect to the lost recording. Since Me-Me's loss of the video recording was negligent rather than intentional, and the loss of the recording does not completely deprive the plaintiff of the ability to prove her case, the appropriate sanction is to direct that an adverse inference charge be given at trial with respect to the unavailable recording (citations omitted).").

CPLR 3126 - Willful and contumacious conduct merits striking pleadings

Rosengarten v. Born, 161 A.D.3d 515 (1st Dep't 2018) ("The motion court's decision to strike, based on a finding that defendants' conduct with respect to its discovery obligations was willful and contumacious and without reasonable excuse, was a proper exercise of its discretion (citations omitted). The record amply demonstrates that from the start of the discovery process defendants engaged in a pattern of willful and contumacious conduct by, inter alia, disregarding court orders despite being repeatedly warned of the ramifications of doing so, providing discovery responses that were unduly burdensome and without reviewing them, and otherwise failing to meaningfully comply with the discovery requests.").

CPLR 3126 - The trial court abused its discretion in striking defendants' answer and granting plaintiff partial summary judgment on liability based on defendants' destruction of stairway. Instead, appropriate sanction is adverse inference charge.

Burke v. Queen of Heaven R.C. Elementary Sch., 151 A.D.3d 1608, 58 N.Y.S.3d 757 (4th Dep't 2017) ("Defendants concede that the original condition of the stairway was relevant. Furthermore, an obligation to preserve the condition of the stairs existed because litigation had begun at the time the stairs were replaced (citations omitted). We agree with plaintiff that she met her burden of establishing that defendants destroyed the stairs with a culpable state of mind. As Supreme Court properly concluded, defendants' culpable state of mind was evidenced by their destruction of the stairs during the parties' ongoing debate about whether plaintiff had to disclose the name of her expert to defendants before defendants would agree to the inspection (citations omitted). We thus

agree with plaintiff that the imposition of a sanction against defendant for spoliation of evidence was warranted here (citation omitted). Nevertheless, we conclude that the court abused its discretion in striking defendants' answer and granting plaintiff partial summary judgment on liability based on defendants' destruction of the stairway (citation omitted)…Here, the record does not demonstrate that plaintiff has been left 'prejudicially bereft' 'of the means of prosecuting her action (citations omitted), given that plaintiff has in her possession, among other evidence of the condition of the stairs, photographs of the stairs taken after the commencement of this action. Thus, we conclude that an appropriate sanction is that an adverse inference charge be given at trial with respect to any now unavailable evidence of the condition of the stairs (citations omitted), and we modify the order accordingly.").

CPLR 3126 - Adverse inference charge

Lilavois v. JP Morgan Chase & Co., 151 A.D.3d 711, 54 N.Y.S.3d 664 (2d Dep't 2017) ("Here, contrary to the plaintiffs' contention, the Supreme Court properly determined that the affidavit of Chase's employee raised a triable issue of fact as to whether spoliation of the surveillance video occurred (citations omitted). Accordingly, the court providently exercised its discretion in granting that branch of the plaintiffs' cross motion which was to strike Chase's answer on the ground of spoliation of evidence only to the extent of directing that an adverse inference charge be given against Chase at trial with respect to surveillance video of the underlying incident if the jury does not credit testimony of Chase's witness that no surveillance video existed for the subject location (citations omitted).").

CPLR 3126 - Order of preclusion of testimony or evidence at trial concerning the injured plaintiff's mental health

Patino v. Carlyle Three, LLC, 148 A.D.3d 1177, 50 N.Y.S.3d 481 (2d Dep't 2017) ("A conditional order of preclusion requires a party to provide stated discovery by a date certain, or face the sanctions specified in the order (citations omitted). As a result of the plaintiffs' failure to comply with the conditional order of preclusion dated July 10, 2014, that conditional order became absolute (citations omitted). To avoid the adverse impact of the conditional order of preclusion, the plaintiffs were required to demonstrate a reasonable excuse for their failure to comply with the order and a potentially meritorious cause of action (citations omitted). Here, the plaintiffs failed to proffer any excuse for their noncompliance and failed to demonstrate a potentially meritorious cause of action (citations omitted). Accordingly, the Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was pursuant to CPLR 3126 to preclude the plaintiffs from offering testimony or evidence at trial concerning the injured plaintiff's mental health.").

CPLR 3126 - Penalty of striking pleading versus monetary sanction

Lucas v. Stam, 147 A.D.3d 921, 48 N.Y.S.3d 150 (2d Dep't 2017) (**Majority of court finds trial court improvidently exercised its discretion by imposing monetary sanctions on the defendants as opposed to striking their answers**. "The Supreme Court properly inferred the willful and contumacious character of the defendants' conduct from their repeated failures over an

extended period of time, without an adequate excuse, to comply with the plaintiff's discovery demands and the court's discovery orders (citations omitted). This conduct included - (1) misrepresenting that the surgical booker Marcia Barnaby was no longer employed by the Hospital; (2) failing to disclose Anthony Pastor as a surgical booker; and (3) failing to timely and fully comply with the court's order to produce an affidavit from Schiff in the form required by the court. '[P]arties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands' (citations omitted). … The striking of a pleading is a drastic remedy that may only be warranted upon a clear showing that the failure to comply with discovery demands or court-ordered discovery was willful and contumacious (citations omitted). Although not expressly set forth as a sanction under CPLR 3126, we have held that the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure (citations omitted). Here, contrary to the Supreme Court's determination, we find that the imposition of monetary sanctions was insufficient to punish the defendants and their counsel for their willful and contumacious conduct in failing to timely and fully respond to discovery demands and court orders. Accordingly, the court should have granted that branch of the plaintiff's motion which was to strike the defendants' answers." **The dissent**, **citing Weinstein, Korn & Miller**, 3126.23, stated that dismissal is a harsh penalty to impose on a client as a result of an attorney's failures. "and in certain cases, it may be appropriate to impose a penalty upon the attorney for his or her conduct while saving the action for the client (citations omitted).").

CPLR 3126 - 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, 2018 NY Slip Op 04526 (2d Dep't 2018) ("In light of Koonin's failure to comply with multiple court orders and so-ordered stipulations directing him to appear for the EBT, the Supreme Court properly concluded that Koonin engaged in willful and contumacious conduct (citations omitted). However, under the circumstances, it was an improvident exercise of discretion to grant those branches of the motion and cross motion which were to strike Koonin's answer in light of the fact that the court also granted those branches of the motion and cross motion which were to preclude Koonin from offering any evidence at the time of trial (citations omitted).").

CPLR 3126 - Failure to preserve surveillance footage merits negative inference charge

SM v. Plainedge Union Free Sch. Dist., 2018 NY Slip Op 04370 (2d Dep't 2018) ("Here, the plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff's accident at the time of its destruction, but negligently failed to do so. Given the nature of the infant plaintiff's injuries and the immediate documentation and investigation into the cause of the accident by the defendant's employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation (citations omitted). The defendant failed to meet this obligation. The defendant acted negligently in unilaterally deciding to preserve only 24 seconds of

footage and passively permitting the destruction of the remaining footage, portions of which were undisputedly relevant to the plaintiffs' case. Under the circumstances of this case, the Supreme Court providently exercised its discretion in imposing a sanction of a negative inference charge against the defendant at trial with respect to the unavailable surveillance footage (citations omitted).").

CPLR 3126 - 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) ("'Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126' (citation omitted). 'A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' (citations omitted). '[I]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices' (citations omitted). Here, the plaintiff failed to establish that the defendant intentionally or negligently failed to preserve the video after being placed on notice that the evidence might be needed for future litigation (citation omitted).").

CPLR 3126 - Significant award of attorneys' fees for willful and contumacious conduct

Jackson v. OpenCommunications Omnimedia, LLC, 147 A.D.3d 709, 49 N.Y.S.3d 389 (1st Dep't 2017) (Affirming order awarding $40,994.80 in attorneys' fees and costs associated with forensic examination of plaintiff's laptop computer. "The court's grant of relief under CPLR § 3126 was proper. Contrary to the court's conclusion, we find that plaintiff's pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct, which further justifies imposition of sanctions (citations omitted). Here, a forensic examination of plaintiff's laptop, which was conducted pursuant to a court-ordered stipulation entered into after plaintiff's repeated refusals to produce all requested discovery, revealed numerous pages of documents that should have been turned over to defendants, as well as privileged attorney-client communications improperly accessed through defendant John Morris' email account (citation omitted). Further, plaintiff failed to produce a flash drive, which he himself admitted existed at the time of his deposition, now claiming that the transcript of his testimony was inaccurate. We decline to reduce the amount of the award. Any challenge by plaintiff to the amount awarded has been waived, as he never objected to the proposed order and bill of costs submitted by defendants. His order to show cause sought only to reargue the order granting CPLR § 3126 relief, and did not dispute the specific amount of fees and costs sought by defendants. In any event, even if the order to show cause were deemed an objection, it was untimely, as plaintiff filed it less then two days prior to the notice date of defendants' notice of settlement (citation omitted).").

CPLR 3126 - Appellate court modifies trial court order striking answer and imposes costs instead

Woloszuk v. Logan-Young, 2018 NY Slip Op 04176 (4th Dep't 2018) ("On the merits of the motion, although we agree with the court that plaintiff established that a discovery violation occurred, we conclude that the sanction of striking the answer of the Clinic was too severe under the circumstances of this case (citation omitted). This case is not similar to a spoliation case because the CAD structured reports were never destroyed but, rather, were not generated and produced in a timely manner (citation omitted). We conclude that the Clinic should be sanctioned by imposing costs upon it for any additional expenses plaintiff incurred as a result of the delay in disclosure (citation omitted). We therefore modify the order in appeal No. 3 by vacating that part of the first ordering paragraph striking the answer of the Clinic, and we modify the order in appeal No. 4 by vacating the third ordering paragraph and substituting therefor a provision directing the Clinic to reimburse plaintiff for expenses incurred as a result of the delayed disclosure of the CAD structured reports.").

CPLR 3126 - Monetary sanction

Maxim, Inc. v. Feifer, 161 A.D.3d 551 (1st Dep't 2018) (**Compare Majority**: "Here, a monetary sanction of $10,000 is warranted because plaintiffs, without seeking a protective order, intentionally did not produce documents and did not properly respond to a notice to admit based on an unfounded assertion that they feared defendants would make the documents public (citations omitted)."; **and Dissent**: "I dissent solely on the issue of the imposition of sanctions and would affirm the portion of the motion court's order that denied defendant's request, pursuant to CPLR 3126, for attorneys' fees and expenses, 'at this juncture of the litigation.' 'Although the determination of an appropriate sanction pursuant to CPLR 3126 lies in the trial court's discretion and should not be set aside absent a clear abuse of discretion' (citation omitted), I acknowledge that this Court is 'vested with its own discretion and corresponding power to substitute its own discretion for that of the [motion] court' (citation omitted). However, I do not believe that in this instance and on this record we should do so.").

ARTICLE 32- ACCELERATED JUDGMENT

CPLR 3211- Motion to Dismiss

CPLR 3211(a)(1) - Documentary evidence establishes a defense to plaintiff's claims as a matter of law

REEC W. 11th St. LLC v. 246 W. 11th St. Realty Corp., 75 N.Y.S.3d 32 (1st Dep't 2018) ("The documentary evidence establishes a defense to plaintiff's claims as a matter of law (citations omitted). The complaint alleges that plaintiff worked diligently and in good faith to close title to

the property that was the subject of the parties' contract of sale and that defendant breached the contract and the covenant of good faith and fair dealing by its unreasonable conduct. These allegations are utterly refuted by the contract of sale, the amendment to the contract, defendant's 'Time Is of the Essence' letter, and plaintiff's conduct in failing to close by any of the time of the essence dates.").

CPLR 3211(a)(1) - What is "documentary evidence"?

Feldshteyn v. Brighton Beach 2012, LLC, 153 A.D.3d 670, 61 N.Y.S.3d 60 (2d Dep't 2017) ("'[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' (citations omitted). 'At the same time, [n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)' (citations omitted). Here, the letters submitted by the defendant did not constitute documentary evidence within the meaning of CPLR 3211(a)(1), and should not have been relied upon by the Supreme Court as a basis for granting the defendant's motion to dismiss the complaint. The only documentary evidence submitted in support of the defendant's motion was the purchase agreement, which did not 'utterly refute' the plaintiffs' allegations or conclusively establish a defense as a matter of law. Contrary to the defendant's contention, the issue of whether the letters constitute documentary evidence within the intendment of CPLR 3211(a)(1) can be raised for the first time on appeal because it is one of law which appears on the face of the record and could not have been avoided if it had been raised at the proper juncture (citations omitted).").

CPLR 3211(a)(1) - Documentary evidence established a defense to plaintiff's claims as a matter of law

REEC W. 11th St. LLC v. 246 W. 11th St. Realty Corp., 75 N.Y.S.3d 32 (1st Dep't 2018) ("The documentary evidence establishes a defense to plaintiff's claims as a matter of law (citations omitted). The complaint alleges that plaintiff worked diligently and in good faith to close title to the property that was the subject of the parties' contract of sale and that defendant breached the contract and the covenant of good faith and fair dealing by its unreasonable conduct. These allegations are utterly refuted by the contract of sale, the amendment to the contract, defendant's 'Time Is of the Essence' letter, and plaintiff's conduct in failing to close by any of the time of the essence dates.").

CPLR 3211(a)(3) / 3211(e) - Waiving standing objection

HSBC Bank USA, N.A.. v. Szoffer, 149 A.D.3d 1400, 52 N.Y.S.3d 721 (3rd Dep't 2017) ("In opposition, defendants submitted an attorney's affidavit, together with case law and proof of mortgage assignments that were unrelated to the property at issue, and argued that plaintiff lacked standing. However, the record makes clear — and defendants readily concede — that they failed to raise lack of standing in their answer or in the context of a timely pre-answer motion to dismiss, thereby waiving this defense (citations omitted). To the extent that defendants argue that Supreme Court could — and should — have raised this issue sua sponte and dismissed the underlying

complaint, courts have been consistent in holding that 'a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the [trial] court' (citations omitted). Finally, while defendants assert that, consistent with the provisions of CPLR 3025 (b), they could have sought leave to amend their answer to raise lack of standing as an affirmative defense, nothing in the record suggests that they attempted to do so. Indeed, it does not appear that defendants made any effort to raise this issue until confronted with plaintiff's motion for summary judgment — some 5½ years after this action was commenced. Under these circumstances, defendants waived the affirmative defense of standing.").

CPLR 3211(a)(3) - Lack of capacity – dismissal under BCL § 1312(a)

G.P. Exports v. Tribeca Design, 147 A.D.3d 655, 46 N.Y.S.3d 881 (1st Dep't 2017) ("Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 28, 2016, which, insofar as appealed from as limited by the brief, denied, without prejudice, that portion of defendants Tribeca Design Ltd. and Tribeca Design Showroom LLC's motion seeking to dismiss the complaint pursuant to Business Corporation Law § 1312(a) and CPLR 3211(a)(3) based upon lack of capacity to maintain the action, and directed plaintiff to comply with Business Corporation Law § 1312(a), unanimously reversed, on the law, without costs, and defendants' motion denied in its entirety. Defendants failed to meet their burden of demonstrating that plaintiff was a foreign corporation and that its 'activities [were] so systematic and regular as to manifest continuity of activity in New York' that it was required to comply with Business Corporation law § 1312(a) (citations omitted). Evidence of a single business transaction is insufficient to establish that a foreign corporation is doing business in the State within the meaning of the statute (citation omitted). In addition, plaintiff alleges in its complaint that it is an Indian partnership, not a corporation. Defendant failed to prove otherwise.").

CPLR 3211(a)(3)

David L. Ferstendig, *Court Holds ELANY Lacks Capacity to Sue for Unpaid Stamping Fees*, 684 N.Y.S.L.D. 1,2 (2017).

Court Holds ELANY Lacks Capacity to Sue for Unpaid Stamping Fees

The Statutory Structure, Legislative History, and ELANY's Plan of Operation Suggest It Is a Record Keeper and Reporter, Not a Regulator

When a New York-licensed insurer will not insure a particular risk, an insured may resort to foreign insurers not authorized to do business in the state. Excess line brokers place this type of excess line or surplus line insurance and are required to pay to the Department of Financial Services (DFS) any taxes due on excess line insurance premiums. In addition, they are to submit to the Excess Line Association of New York (ELANY) a document setting forth basic information for each brokered excess line policy and to pay it a "stamping fee" based on the policy's premium.

ELANY is an "advisory" association created under Insurance Law § 2130(a), whose purpose is to facilitate compliance with excess line brokers' filing and record-keeping requirements. All excess line licensees are deemed to be members of ELANY. ELANY is supervised by DFS and it is empowered to receive, record and stamp all excess line insurance documents filed by the brokers. The stamping fees are ELANY's sole source of funding, and its plan of operation specifies that a member who is 30 days late in paying those fees may be reported to DFS, while a delinquency of more than 60 days shall be reported to DFS.

In Excess Line Assn. of N.Y. (ELANY) v. Waldorf & Assoc., 2017 N.Y. Slip Op. 07301 (October 19, 2017), the issue was whether ELANY could sue its members to recover stamping fees and to compel an examination and an accounting. The trial court granted defendants' motion to dismiss, finding that ELANY lacked the capacity to sue. The Appellate Division affirmed, concluding that "[c]ontrary to ELANY's contention, none of the provisions of the [ELANY enabling] statute confers upon it by necessary implication the capacity to sue to enforce the provisions of the Insurance Law." *Id*. at ∗2 (citing to 130 A.D.3d 563, 565). A unanimous Court of Appeals affirmed. The Court initially noted that

> "[c]apacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review." Capacity is examined with a view towards the relief sought, and is often at issue where, as here, governmental entities seek to bring suit. "Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." However, while the right must be derived from statute, "[a]n express grant of authority is not always necessary," and "capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity, 'provided, of course, that there is no clear legislative intent negating review'" (citations omitted).

Id.

Here, the Court found that the relevant enabling statute did not expressly authorize ELANY to sue for the relief sought. Moreover, the legislative history did not reveal any "affirmative suggestion" that the legislature intended to give ELANY the capacity to sue. In fact, the statutory scheme supported the conclusion that the legislature intended that DFS be the "primary enforcer" of the Insurance Law and applicable regulations. Thus, DFS is empowered to suspend or revoke licenses and can impose statutory monetary penalties which, if unpaid, can be enforced in a civil action.

Conversely, ELANY's "principal role is to act as a record keeper for excess line transactions." *Id*. at ∗3. The Court rejected ELANY's argument that since it was empowered to receive the stamping fees, its right to sue for their recovery was a "necessary implication" from its responsibilities -

> Critically, ELANY is both supervised by DFS and required to "perform its functions" pursuant to a plan of operation approved by DFS (Insurance Law § 2130). That plan expressly establishes a method of enforcing the payment of

> stamping fees — the relief that ELA-NY seeks here — by providing that, when such fees go unpaid, ELANY's remedy is to report the matter to DFS. In other words, DFS has not authorized ELANY to seek recovery of unpaid stamping fees through a plenary action. Instead, the plan of operation — which governs the scope of ELANY's authorized activities — limits ELANY's remedy to reporting violations to DFS, further supporting the conclusion that ELANY does not have implied capacity to sue for the relief sought.

Id. at ∗3–4.

Finally, the legislative history for the enabling statute (creating ELANY) characterized ELANY not as a regulator but as an "advisory association" -

In short, the authority that ELANY urges this Court to recognize is negated by the nature of the responsibilities conferred upon ELANY, as established by the statutory structure, legislative history, and ELANY's plan of operation. Therefore, the courts below correctly concluded that capacity to sue cannot be inferred here.

Id. at ∗4.

CPLR 3211(a)(4) - Another action pending

Cooper v. Thao, 2018 NY Slip Op 04697 (2d Dep't 2018) ("'Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same' (citations omitted). 'The critical element is that both suits arise out of the same subject matter or series of alleged wrongs' (citation omitted). Here, at the time the plaintiff commenced this action, there was a mortgage foreclosure action pending between the plaintiff and HSBC in the Supreme Court, Queens County. The relief sought in that action implicated the same issues raised by the plaintiff in this action. Thus, the Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was to dismiss the complaint insofar as asserted against HSBC.").

CPLR 3211(a)(5) / 3019/ 5011 - The Court of Appeals holds that subsequent assertion in a state court action of a claim that constituted a compulsory counterclaim in an earlier federal action between the same parties was barred by the doctrine of res judicata

Paramount Pictures Corp. v. Allianz Risk Transfer AG, 31 N.Y.3d 64, 73 N.Y.S.3d 472, 96 N.E.3d 737 (2018) (Majority of Court holds claim not asserted in prior federal court action as (compulsory) counterclaim was barred in subsequent state action under doctrine of res judicata. Court finds that plaintiff's claim in state court action based on covenant not to sue was sufficiently related to investors' claim in the federal action. "Indeed, in its ruling, the district court reached issues that would likely prove dispositive to Paramount's instant claim: the court noted that the waiver provision of the Subscription Agreement also contained 'an agreement by

provisions were ‘binding’ on the investors. This overlap of essential facts is exemplified most poignantly by Paramount’s offensive assertion of collateral estoppel in the instant case with respect to the district court’s factual and legal findings concerning the Subscription Agreement. At bottom, Paramount’s covenant not to sue claim is based on the ‘same transaction’ as the federal action (the Melrose investment); it involves much of the ‘same evidence’ (the Subscription Agreement and surrounding negotiations); and its essential facts (the scope and validity of the Subscription Agreement’s provisions) were present in the first action (citation omitted).”).

CPLR 3211(a)(5) / 5011 - Where a litigant's individual interests are affected by prior litigation in which he or she participated in a representative capacity, res judicata will apply to a subsequent action commenced in the individual's personal capacity

Seidenfeld v. Zaltz, 2018 NY Slip Op 04585 (2d Dep’t 2018) (“The doctrine of res judicata, or claim preclusion, provides that ‘a valid final judgment bars future actions between the same parties on the same cause of action’ (citations omitted). In general, a judgment for or against a person in his or her representative capacity is not res judicata against that person in his or her personal capacity (citations omitted). However, where a litigant's individual interests are affected by prior litigation in which he or she participated in a representative capacity, res judicata will apply to a subsequent action commenced in the individual's personal capacity (citations omitted).”).

CPLR 3211(a)(5) / 5011 - Collateral estoppel

Li v. Peng, 161 A.D.3d 823, 76 N.Y.S.3d 230 (2d Dep’t 2018) (“‘As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations’ (citation omitted). Here, however, Feng Li previously challenged the jurisdiction of the New Jersey court, and the New Jersey court found that it had jurisdiction over the fee dispute. As a result, the plaintiffs are barred from relitigating that issue in the Supreme Court (citations omitted). The Supreme Court properly determined that the judgment entered in the New Jersey action had conclusively disposed of all of the plaintiffs' claims and, therefore, the plaintiffs are collaterally estopped from maintaining the instant action(citation omitted).”).

CPLR 3211(a)(5) / 5011 - Election of Remedies

Luckie v. Northern Adult Day Health Care Ctr., 161 A.D.3d 845, 73 N.Y.S.3d 454 (2d Dep’t 2018) (“‘Pursuant to the election of remedies doctrine, the filing of a complaint with [the Division] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts’ (citations omitted). The election of remedies doctrine does not implicate the subject matter jurisdiction of the court, but rather deprives a plaintiff of a cause of action (citation omitted). Here, the plaintiff’s causes of action are based on the same allegedly discriminatory conduct asserted in the proceedings before the Division. Therefore, the plaintiff is barred from asserting those claims under the NYCHRL in this action (citations omitted).”).

CPLR 3211(a)(7)

David L. Ferstendig, Complaint Dismissed for Failure to Allege Damages for Out-of-Pocket Expenses, 679 N.Y.S.L.D. 3, 4 (2017).

The CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action can address the sufficiency of the complaint or, in limited circumstances, can establish "conclusively" that the plaintiff has no cause of action.

The recent decision in Connaughton v. Chipotle Mexican Grill, Inc., , 2017 N.Y. Slip Op. 03445 (May 2, 2017), dealt with the more traditional use of a CPLR 3211(a)(7) motion – that is, whether the pleading stated a cause of action and asserted all of the material elements of the claim. Here, the plaintiff, a well-known chef, sued the defendants Chipotle Mexican Grill and its Chief Executive Officer, Steven Ells. Plaintiff developed a business plan for a concept for a ramen restaurant chain, and approached Chipotle to tailor the ideas specifically for the Chipotle platform. Ells offered to purchase the concept, and the plaintiff, through counsel, negotiated an at-will contract to work as Culinary Director for Chipotle in New York to develop the restaurant design. Apparently, a significant amount of work was done over the next year and a half, and the plaintiff received the agreed-upon compensation and benefits. However, the plaintiff then learned that Ells had years before entered into a confidentiality agreement with another well-known chef, David Chang, to develop a similar ramen restaurant concept. That agreement fell apart, however, when the parties were unable to agree on financial terms. Yet, the non-disclosure provisions remained in effect, and a Chipotle executive stated that Chang would sue if Chipotle opened a ramen restaurant. Nevertheless, Ells told the plaintiff to continue with his work. When plaintiff refused, he was fired.

Plaintiff sued the defendants for, inter alia, fraudulent inducement, alleging that the defendants fraudulently induced him to work for them by failing to advise him of the earlier agreement with Chang and the nondisclosure agreement. Plaintiff asserted that he would never have accepted employment with the defendants had he known about the prior agreement; that the Chipotle staff communicated concepts that originally came from the prior chef, whose design ultimately became the defendants' flagship ramen restaurant in Washington, D.C.; and that going forward would subject plaintiff to legal action. Plaintiff claimed damages for "the value of his Chipotle equity and lost business opportunities in connection with his ramen concept," compensatory and punitive damages, and attorneys' fees and disbursements. Id. at *3.

Defendants moved for dismissal under CPLR 3211(a)(1) and 3211(a)(7). As is relevant here, defendants argued that a fraudulent inducement claim can be pursued only where a party has suffered "out of pocket" pecuniary loss, not alleged here. The trial court granted the motion, and a divided Appellate Division affirmed.

The Court of Appeals also affirmed. It noted at the outset the fairly obvious, that if "the fraud causes no loss, then the plaintiff has suffered no damages." Id. at *4. The question presented here related to the measure of damages. The Court stated that in New York, like many other states,

> [t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the "out-of-pocket" rule. Under that rule, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained …. [T]here can be no recovery of profits which would have been realized in the absence of fraud." Moreover, this Court has "consistent[ly] refus[ed] to allow damages for fraud based on the loss of a contractual bargain, the extent, and indeed … the very existence of which is completely undeterminable and speculative" (citations omitted).

Id.

Here, the complaint did not allege compensable damages resulting from the alleged fraud. While the complaint claimed that the plaintiff stopped soliciting potential buyers in reliance on defendants' "fraudulent omissions," nowhere did it allege that

> he rejected another prospective buyer's offer to purchase the concept. Instead, plaintiff avers that once Ells showed an interest in his ramen restaurant idea, plaintiff turned to selling the concept to Chipotle. These are factual assertions of the quintessential lost opportunity, which are not a recoverable out-of-pocket loss. As this Court has repeatedly stated, such damage is "disallowed as too speculative a recovery" (citations omitted).

Id. at *5.

Similarly speculative was plaintiff's assertion that if he were to be sued by the prior chef, he could incur litigation expenses and loss of reputation. Furthermore, the complaint failed to provide factual support for its claim of reputational harm. Finally, the Court held that the plaintiff was not entitled to nominal damages, because they are unavailable when actual harm is an element of the tort, as is the case with a fraudulent inducement claim.

CPLR 3211(a)(7) - Failure to state a cause of action- Facts essential to cause of action negated beyond substantial question by the evidentiary material submitted

Matter of Jonmark Corp. v. New York State Liq. Auth., 161 A.D.3d 1518, 73 N.Y.S.3d 920 (4th Dep't 2018) ("We add only that, contrary to the contention of petitioner, the court did not err in granting Addys' pre-answer CPLR 3211 (a) (7) motion to dismiss the petition against it. Where 'evidentiary material outside the pleading's four corners is considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one' (citations omitted). Here, the facts essential to petitioner's causes of action have 'been negated beyond substantial question by the [evidentiary material] submitted [with the petition] so that it might be ruled that [petitioner] does not have [a] cause[] of action' (citation omitted).").

CPLR 3211(e) / 3018 - Can amend to add statute of limitations defense

Woloszuk v. Logan-Young, 2018 NY Slip Op 04176 (4th Dep't 2018) ("With respect to appeal No. 1, we reject defendants' contention that Supreme Court abused its discretion in denying their motion seeking leave to amend their answers to add the statute of limitations as an affirmative defense. It is well settled that, '[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted' (citations omitted). Here, plaintiff established in opposition to the motion that he would be prejudiced by the late amendment of the answer (citations omitted).").

CPLR 3211(e) -Waiver of personal jurisdiction defense

U.S. Bank N.A. v. Pepe, 161 A.D.3d 811 (2d Dep't 2018) ("The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction (citations omitted). Here, the defendant's counsel filed a notice of appearance dated September 4, 2012. The record does not show that the defendant asserted lack of personal jurisdiction in a responsive pleading. Moreover, the defendant did not move to dismiss the complaint for lack of personal jurisdiction until almost three years after appearing in the action, after the judgment of foreclosure and sale had been issued. Under those circumstances, the defendant waived any claim that the court lacked personal jurisdiction over him in this action (citation omitted).").

CPLR 3212 - Summary judgment motion

CPLR 3212

David L. Ferstendig, *Court of Appeals Splits on Whether Defendant Carried Burden on Summary Judgment Motion*, 673 N.Y.S.L.D. 1, 2 (2016).

In *Pullman v. Silverman*, 2016 N.Y. Slip Op. 07107 (November 1, 2016), the issue was whether the medical expert affidavit submitted in support of defendant's summary judgment motion adequately addressed plaintiff's claims of liability. In this medical malpractice action, plaintiff alleged that he developed a cardiac arrhythmia, which progressed into an AV heart block, because of the defendant's negligent administration of Lipitor and the combination of Lipitor and Azithromycin.

The defendant moved for summary judgment on the issue of causation only. The motion papers included a medical expert affidavit which characterized the plaintiff's malpractice allegations as focusing on "an alleged contraindicated prescription by Dr. Silverman to plaintiff of Lipitor separately and/or in conjunction with Azithromycin." *Id*. at *1. The plaintiff argued in opposition that the defendant's expert failed to "address the concurrent azithromycin prescription and did not cite to any medical research in support of his conclusions about the combined effect." *Id*.

The trial court granted the defendant's summary judgment motion and the Appellate Division affirmed. Both courts found that the defendant had carried his burden and that the plaintiff's expert submissions on causation were inadequate and did not raise an issue of fact.

A majority of the Court of Appeals reversed. The Court found that the defendant did not initially carry his burden since the defendant's expert's affidavit

> proffered only conclusory assertions unsupported by any medical research that defendant's actions in prescribing both drugs concurrently did not proximately cause plaintiff's AV heart block. These conclusory statements did not adequately address plaintiff's allegations that the concurrent Lipitor and azithromycin prescriptions caused plaintiff's injuries. By ignoring the possible effect of the azithromycin prescription, defendant's expert failed to "tender[] sufficient evidence to demonstrate the absence of any material issues of fact" (citation omitted) as to proximate causation and, as a result, defendant was not entitled to summary judgment.

Id. at *2.

The dissent, however, looked at the same affidavit and found that it had adequately addressed all of the relevant issues -

> The affidavit of defendant's expert explains that no epidemiological studies even link Lipitor or other statins to plaintiff's injury and that an isolated case report—which, as the expert noted, cannot demonstrate causation (citation omitted)—showing that Lipitor, in combination with drugs other than Azithromycin, caused a type of myopathy was not relevant because plaintiff's medical records revealed that he did not have myopathy. The expert affidavit sufficiently demonstrated, for purposes of making a prima facie case, that plaintiff had no pertinent adverse reaction to Lipitor that could have been exacerbated by the prescription of Azithromycin, which was the basis of plaintiff's claim that the combination of drugs injured him. Contrary to the majority's conclusion, the expert was not required to further "address the effect of [A]zithromycin administration alone or in conjunction with Lipitor" (citation omitted), which is the converse of plaintiff's claim, as opposed to his actual claim.

Id. at *5.

CPLR 3212

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).

In *Hain v. Jamison*, 2016 N.Y. Slip Op. 08583 (December 22, 2016), late one evening, the decedent, the plaintiff's wife, was struck and killed by a vehicle driven by one of the Jamison defendants (the other was the owner of the vehicle), as she walked in the northbound lane of a rural road. She had exited her vehicle and entered the road to help a wandering calf that had escaped a nearby enclosure owned by the defendant Drumm Family Farm Inc. ("Farm"). The complaint alleged, among other things, that Farm was negligent in failing to properly maintain its fence and restrain the calf and keep it off of the roadway. Farm and the Jamison defendants answered and asserted cross claims for contribution and indemnification.

Farm moved for summary judgment, asserting that its alleged negligence was not a proximate cause of decedent's death. Instead, the decedent's intervening and unforeseeable act of leaving her vehicle and entering the road and the other defendant driver's negligence were the proximate causes of the incident.

The trial court denied the motion, holding that it could not determine as a matter of law "that decedent's conduct in exiting her vehicle was sufficiently extraordinary and unforeseeable to break the chain of causation." *Id*. at *2. The Appellate Division reversed, however, with a majority of the court holding that Farm had established that its negligence was not a proximate cause of decedent's death because "Farm's negligence merely furnished the occasion for, but did not cause, decedent to enter the roadway, where she was struck." *Id*.

The Court of Appeals reversed, noting that the proximate cause element is satisfied when it is established that defendant's negligence is a substantial cause of the events resulting in the plaintiff's injuries. Where there is an allegation of an intervening act, the question then becomes whether that "act is a normal or foreseeable consequence of the situation created by the defendant's negligence." *Id*. at *3. The Court acknowledged that the line between intervening acts severing the causation chain and those that do not is not precise, and that proximate cause is a fact-specific determination. Cases holding that intervening acts break the causation chain either involve a situation where the acts were unforeseeable, or where the defendant's acts of negligence "had ceased, and merely fortuitously placed the plaintiff in a location or position in which a secondary and separate instance of negligence acted independently upon the plaintiff to produce harm." *Id*. at *5.

Farm claimed that the decedent's decision to leave the safety of her vehicle to retrieve the calf severed the causal link between its alleged negligence and decedent's death. Rather, its negligence merely furnished the occasion for the decedent to be walking in the roadway. In opposition, it was argued that decedent's action in exiting the vehicle was reasonably foreseeable. The Court of Appeals held that neither of the two circumstances discussed above applied here to break the causation chain. The Court concluded that

> [t]he very same risk that rendered negligent the Farm's alleged failure to restrain or retrieve its farm animal – namely, that the wandering calf would enter a roadway and cause a collision – was, in fact, the risk that came to fruition. That the Farm could not predict the exact manner in which the calf would cause injury to a

> motorist does not preclude liability because the general risk and character of injuries was foreseeable. Furthermore, although decedent had apparently stopped her vehicle without striking the calf, the animal was still loose in the roadway and, under the circumstances, the danger and risk of an accident had not yet passed. The Farm's alleged negligence – i.e., its failure to securely restrain and/or retrieve its wandering calf – was not a completed occurrence that merely fortuitously placed decedent in a relatively safe position or location where an independent and unrelated act of negligence operated to bring about her death. Thus, we cannot say, as a matter of law, that the Farm's negligence merely furnished the occasion for the collision or that the accident resulting in decedent's death did not flow from the Farm's negligent conduct in permitting its calf to stray (citations omitted).

Id. at *6.

The Court stated that the factfinder could find that the decedent's action in leaving her vehicle and entering the road to remove the calf was a "normal or foreseeable consequence of the situation created by defendant's negligence" -

> [A] wandering farm animal may be large enough to obstruct a roadway and, regardless of size, may impede traffic to a significant degree. Such an animal may cause substantial harm if struck by a vehicle or when a driver acts to avoid impact. In addition, a factfinder may determine that a person, under the particular circumstances of a case, may reasonably consider it safe to approach the wandering animal.

Id. at *7.

CPLR 3212(a) - 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 (citation omitted).
Reeps v. BMW of N. Am., LLC, 160 A.D.3d 603, 72 N.Y.S.3d 451 (1st Dep't 2018).

CPLR 3212(a) - "Where, as here, a defendant has served a notice of appearance, but has not served 'a responsive pleading,' in this case, an answer (see CPLR 3011), issue has not been joined, and the plaintiff is barred from seeking summary judgment." *Jbbny, LLC v. Begum*, 156 A.D.3d 769, 67 N.Y.S.3d 284 (2d Dep't 2017).

CPLR 3212(b) - Failure to attach petition is forgiven

Matter of Bordell, 2018 NY Slip Op 04404 (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).").

CPLR 3212(b)

David L. Ferstendig, *New York Court of Appeals Cannot Search Record*, 684 N.Y.S.L.D. 3 (2017).

In *Princes Point LLC v Muss Dev. L.L.C.*, 2017 NY Slip Op 07298 (October 19, 2017), the plaintiff requested a "reverse" summary judgment, or more accurately, that the Court of Appeals "search the record" and grant it summary judgment. CPLR 3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion (emphasis added)." However, as the Court here noted, although the trial court and Appellate Division can search the record and grant summary judgment to a nonmoving party under CPLR 3212(b), the Court of Appeals cannot. *See Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc*., 61 N.Y.2d 106, 110-11 (1984). Nevertheless, movants need to be aware of this "danger" at the trial court and Appellate Division level. Thus, when speaking with a client about the benefits, costs and risks of moving for summary judgment, it may be necessary to advise that the "worst case scenario" may not be just the denial of the motion, even where the opposing party has not made its own motion (or appealed).

CPLR 3212(b) / 3101(d)(1)(i) - Failure to provide timely expert witness disclosure under CPLR 3101(d)(1)(i) does not preclude consideration of expert afidavits on subsequent summary judgment motion- AS PER 2015 AMENDMENT

Moreland v. Huck, 156 A.D.3d 1396, 65 N.Y.S.3d 861 (4th Dep't 2017) ("We affirm the order for reasons stated in the decision at Supreme Court. We write only to address plaintiff's contention that the court should have granted her cross motion to strike the affidavits of the three subject witnesses because defendants failed to provide timely expert witness disclosure for those witnesses pursuant to CPLR 3101 (d) (1) (i). We reject that contention. Even assuming, arguendo, that each of the three witnesses provided expert testimony in his affidavit, we note that CPLR 3212 (b) provides in relevant part that, "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the affidavit.").

CPLR 3213 - Summary judgment in lieu of complaint

CPLR 3213 - 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, 58 N.Y.S.3d 444 (2d Dep't 2017) ("The plaintiff commenced this action by motion for summary judgment in lieu of complaint pursuant to CPLR 3213 to enforce a default judgment of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida (hereinafter the Florida court). Service of process on the defendants was made by delivery to the Secretary of State pursuant to Business Corporation Law § 306(b). The defendants failed to appear or oppose the motion. However, in the order appealed from, the Supreme Court determined that the plaintiff failed to demonstrate that the Florida court had personal jurisdiction over the defendants, and expressed concern over the effectiveness of the service of process in that action and in this action. The court denied the plaintiff's motion without prejudice to renewal upon proper proof of the Florida court's personal jurisdiction over the defendants in the Florida action and proof of service of the order appealed from upon each defendant by any method available pursuant to CPLR § 311, except by delivery to the Secretary of State… Here, there was no jurisdictional challenge by the defendants. Accordingly, although the Supreme Court properly denied the plaintiff's motion without prejudice to renewal upon proper proof, it erred in requiring the plaintiff to furnish proof of the Florida court's personal jurisdiction over them. Instead, the Supreme Court should have required only proof of additional service in compliance with CPLR 3215(g)(4) (citations omitted). As the proponent of an unopposed motion for summary judgment in lieu of complaint, the plaintiff still bore the burden of establishing, inter alia, that the defendants were properly served with the summons and motion (citations omitted).").

CPLR 3215 - Default judgment

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, 67 N.Y.S.3d 242* (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, 63 N.Y.S.3d 486 (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 3215(c) - Plaintiff's motion for reference evidenced intent to continue prosecution of action

US Bank N.A. v. Brown, 147 A.D.3d 428, 46 N.Y.S.3d 107 (1st Dep't 2017) ("The court correctly found that plaintiff took 'proceedings for the entry of judgment within one year after the defendant's default' (see CPLR 3215[c]). Plaintiff made its first application for an order of reference within the statutory time limitation. The fact that this application was denied because

plaintiff attempted to withdraw it without prejudice is of no moment, since the statute merely requires that the party needs only to initiate proceedings, 'and these proceedings manifest an intent not to abandon the case' (citations omitted). Plaintiff clearly and unequivocally indicated that it intended to continue the prosecution of this case at the time it made its motion for a reference. Such a timely application 'even if unsuccessful' will not result in the dismissal of the complaint 'as abandoned pursuant to CPLR 3215(c)' (citations omitted).") (**citing Weinstein, Korn & Miller**).

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) ("The Supreme Court providently exercised its discretion in rejecting the plaintiff's excuse of law office failure and properly, in effect, directed dismissal of the complaint insofar as asserted against the defendants as abandoned pursuant to CPLR 3215(c). The plaintiff's excuse of law office failure did not rise to the level of a reasonable excuse, as it was vague, conclusory, and unsubstantiated (citations omitted). The excuse was contained in a brief paragraph in the supporting affirmation of an associate who stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff's file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm and no indication in the associate's affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto. Since the plaintiff failed to demonstrate a reasonable excuse for her delay in moving for a default judgment, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 2004 for an extension of time to move for a default judgment (citation omitted).").

CPLR 3215(g)(1) - Conflict in Appellate Division Departments as to whether the failure to provide the requisite five-day notice to a defendant who has appeared in the action is a jurisdictional defect

There is a dispute among the Appellate Division Departments as to whether the failure to provide the requisite five-day notice to a defendant who has appeared in the action is a jurisdictional defect depriving the defendant of a substantial right and the court of the authority to hear the motion. The First Department has held that the failure to give the notice required a new inquest. See Walker v. Foreman, 104 A.D.3d 460, 963 N.Y.S.2d 625 (1st Dep't 2013). The Second Department recently held that the failure to give notice "is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment." Paulus v. Christopher Vacirca, Inc., 128 A.D.3d 116, 6 N.Y.S.3d 572 (2d Dep't 2015). The Third Department found that the failure to provide notice standing alone did not warrant vacatur of the default judgment. See Fleet Fin. v. Nielsen, 234 A.D.2d 728, 650 N.Y.S.2d 904 (3d Dep't 1996). The Fourth Department, while being a bit inconsistent in its holdings, has recently settled in on finding the failure to be a jurisdictional defect meriting vacatur of the default judgment. See Curto v. Diehl, 87 A.D.3d 1374, 929 N.Y.S.2d

901 (4th Dep't 2011). See also **Weinstein, Korn & Miller, New York Civil Practice: CPLR P 3215.37.**

Citimortgage, Inc. v. Reese, 2018 NY Slip Op 04527 (2d Dep't 2018) ("The defendant was entitled to notice of the plaintiff's motions for an order of reference and for a judgment of foreclosure and sale pursuant to CPLR 3215(g)(1), which provides, in relevant part, that such notice to a defendant who has not appeared is required 'if more than one year has elapsed since the default.' Here, the defendant defaulted in November 2009, and the plaintiff moved for an order of reference in March 2013, more than three years later. Contrary to the plaintiff's contention, the issue of its failure to comply with CPLR 3215(g)(1) may be raised for the first time on appeal (citations omitted). The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void (citations omitted). Accordingly, since the Supreme Court lacked jurisdiction to entertain the plaintiff's motions, it should have granted those branches of the defendant's motion which were to vacate the order of reference and the judgment of foreclosure and sale (citation omitted).").

CPLR 3215(g)(3)- Additional notice requirement under CPLR 3215(g)(3)

Bank of Am., N.A. v. Diaz, 160 A.D.3d 457, 75 N.Y.S.3d 147 (1st Dep't 2018) ("Because the RPAPL provisions cited by both plaintiff and defendant were enacted after CPLR 3215(g)(3), the clearest indicator of whether a non-owner-occupied home is a 'residential mortgage' for the purpose of the additional notice requirement is the statute itself. CPLR 3215(g)(3) provides that when a default judgment 'based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation,' that person is entitled to additional notice of the action, which is provided by mailing the summons to his or her place of residence. The provision was enacted out of concern for 'unsophisticated homeowners' who 'do not receive sufficient notice that they are about to lose their homes through foreclosure' (citation omitted). As defendant does not reside at the mortgaged property, this foreclosure proceeding does not place his home at risk. Accordingly, we find that plaintiff was not required to serve a 3215(g)(3) notice on defendant. Given the factual issues as to the validity of service of the summons and complaint, the threshold issue of personal service should have been resolved with a traverse hearing (citations omitted). We reverse and remand for such a hearing.").

CPLR 3216 - Want of prosecution- neglect to proceed

CPLR 3216 - Dismissal order did not meet statutory preconditions

US Bank, N.A. v. Mizrahi, 156 A.D.3d 661, 64 N.Y.S.3d 565 (2d Dep't 2017) ("'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' (citation omitted). The September order could not be deemed a 90-day demand pursuant to CPLR 3216 because it gave US Bank only 60 days within which to file a motion for summary judgment (citation omitted). Since the dismissal order dated November 29, 2012, merely effectuated the September order, which did not meet the statutory

preconditions set forth in CPLR 3216, there was a failure of a condition precedent, and the Supreme Court was not authorized to dismiss the action on its own motion (citation omitted). In any event, there was no evidence that the plaintiff intended to abandon the action, that the default was willful, or that the defendants were prejudiced (citations omitted).").

CPLR 3216 - 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., 2018 NY Slip Op 04534 (2d Dep't 2018) ("'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' (citation omitted). 'Effective January 1, 2015, the Legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216' (citation omitted). One such precondition is that where a written demand to resume prosecution of the action is made by the court, as here, 'the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' (citation omitted). Here, the compliance conference order did not set forth any specific conduct constituting neglect by the plaintiff. Accordingly, since one of the statutory preconditions to dismissal was not met, the court should not have directed dismissal of the complaint pursuant to CPLR 3216 (citation omitted).").

CPLR 3216 - Court erred in administratively dismissing action without further notice

Deutsche Bank Natl. Trust Co. v. Cotton, 147 A.D.3d 1020, 46 N.Y.S.3d 913 (2d Dep't 2017) ("On February 11, 2014, the Supreme Court, sua sponte, entered an order pursuant to CPLR 3216 dismissing the instant action and directing the County Clerk to vacate the notice of pendency 'unless plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof.' It appears that the action was thereafter administratively dismissed on June 5, 2014, without further notice to the parties. On December 11, 2014, the plaintiff moved to vacate the dismissal and to restore this action to the active calendar. The Supreme Court denied the motion, which was unopposed. An action cannot be dismissed pursuant to CPLR 3216(a) 'unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirement, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed' (citation omitted). Here, the order dated February 11, 2014, which purported to serve as a 90-day notice pursuant to CPLR 3216, was defective in that it failed to state that the plaintiff's failure to comply with the notice 'will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute (CPLR 3216[b][3]). The Supreme Court thereafter erred in administratively dismissing the action without further notice to the parties (citations omitted). Accordingly, the Supreme Court should have granted the plaintiff's motion to vacate the order dated February 11, 2014, and to restore the action to the active calendar.").

CPLR 3216 - Relief not authorized where issue not joined

U.S. Bank N.A. v. Ricketts, 153 A.D.3d 1298, 61 N.Y.S.3d 571 (2d Dep't 2017) ("CPLR 3216 authorizes the dismissal of a complaint for neglect to prosecute provided that certain statutory conditions precedent are met, such as issue having been joined in the action (citations omitted). Here, dismissal of the action pursuant to the March 2014 conditional order was improper, as issue was never joined inasmuch as none of the defendants served an answer to the complaint (citations omitted). Since at least one precondition set forth in CPLR 3216 was not met here, the Supreme Court was without power to dismiss the action pursuant to that statute (citations omitted).").

CPLR 3217- Voluntary discontinuance

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)

There is a conflict in the Appellate Division as to whether a motion to dismiss is a "responsive pleading" within the meaning of CPLR 3217(a)(1). The First Department concludes that it is 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, 979 N.Y.S.2d 45 (1st Dep't 2014) ("Thus, BDO's notice was ineffective and a nullity, and the motion court should not have deemed defendants' motions withdrawn (citations omitted). That BDO served its notice of discontinuance in an attempt to circumvent the Administrative Judge's order denying its request to have its action assigned to the Commercial Division may be a valid basis for granting a discontinuance with prejudice (citations omitted). However, given the unusual procedural history that led to the commencement of this action, we decline to discontinue the action with prejudice. Specifically, this action arose from defendant SRC's failure to properly notify this Court of the settlement the parties had reached in the contribution action before the mediator. Indeed, although the parties had reached a settlement, and the mediator specifically directed the parties to inform this Court of the settlement, SRC unilaterally took the position that the settlement was not effective and that the appeal should continue. As a result, this Court dismissed the contribution action before the parties finalized a written agreement, thus precluding BDO from enforcing the oral agreement (citations omitted)."). The Fourth Department has come to a contrary conclusion. *See Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808, 58 N.Y.S.3d 769 (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. Thus, in appeal No. 1, we conclude that plaintiff's notices of discontinuance were timely, and we therefore reverse the order therein.").

CPLR 3217(a)(1) - Right to discontinue by service of notice

A.K. v. T.K., 150 A.D.3d 1091, 56 N.Y.S.3d 168 (2d Dep't 2017) ("Here, neither a complaint nor a responsive pleading was ever served in the third action, thereby preserving the absolute and unconditional right to discontinue by serving notice (citation omitted).").

CPLR 3217(b) - No evidence that the defendant would be prejudiced by a discontinuance without prejudice

Kondaur Capital Corp. v. Reilly, 2018 NY Slip Op 04707 (2d Dep't 2018) ("CPLR 3217(b) permits a voluntary discontinuance of a claim by court order 'upon terms and conditions, as the court deems proper' (citations omitted). In general, absent a showing of special circumstances, including prejudice to a substantial right of the defendant or other improper consequences, a motion for a voluntary discontinuance should be granted without prejudice (citations omitted). Here, there was no evidence that the defendant would be prejudiced by a discontinuance without prejudice (citation omitted). The defendant failed to establish as a matter of law that a second action would be time-barred and failed to show that he was prejudiced by the length of the litigation. Therefore, the Supreme Court should have granted that branch of the plaintiff's motion which was to discontinue the action without prejudice, and denied the defendant's cross motion to discontinue the action with prejudice. Moreover, under the circumstances of this case, there was no basis for the court, sua sponte, to direct a hearing on the amount of counsel fees to be awarded to the defendant.").

ARTICLE 34 - CALENDAR PRACTICE

CPLR 3402 - Note of issue

CPLR 3402 - Post note of issue discovery

Kanaly v. DeMartino, 2018 NY Slip Op 04060 (3d Dep't 2018) ("To the extent that plaintiff argues that Supreme Court's order was improper because defendants did not establish their entitlement to post-note of issue discovery (citations omitted), the parties' disputes over the scope of the medical authorizations were ongoing and began long before the note of issue was filed; these were not new discovery requests. Moreover, plaintiff's expert disclosure was not filed until more than a year after the note of issue was filed, so any disagreement about the scope of that disclosure, or request for additional information about the experts, could not have been addressed pre-note of issue. In any event, Supreme Court had broad discretion to 'permit post-note of issue discovery without vacating the note of issue,' as no party was prejudiced (citations omitted).")

CPLR 3404- Dismissal of abandoned case

***Bradley v. Konakanchi*, 156 A.D.3d 187, 191 (4th Dep't 2017).**

David L. Ferstendig, *Further Appellate Division Conflicts, and One Resolved*, 689 N.Y.S.L.D. 3-4 (2018)

Applicability of CPLR 3404 to Actions Where the Note Issued Has Been Vacated

CPLR 3404 provides that a case "marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute."

The First, Second, and Fourth Departments hold that CPLR 3404 does not apply to a case where the note of issue has been vacated. See Turner v. City of New York, 147 A.D.3d 597, 597 (1st Dep't 2017); Liew v. Jeffrey Samel & Partners, 149 A.D.3d 1059, 1061 (2d Dep't 2017); Bradley v. Konokanchi, 156 A.D.3d 187, 190–91 (4th Dep't 2014). The rationale behind the majority view is that vacating the note of issue "returns the case to pre-note of issue status. It does not constitute a marking 'off' or striking the case from the court's calendar within the meaning of CPLR 3404." Montalvo v. Mumpus Restorations, Inc., 110 A.D.3d 1045, 1046 (2d Dep't 2013). The Third Department, however, refuses to follow the majority. See Hebert v. Chaudrey, 119 A.D.3d 1170, 1171–72 (3d Dep't 2014). See also Gray v. Jim Cuttita Agency Inc., 281 A.D.2d 785, 785–86 (3d Dep't 2014) ("Where, as here, a case is actually placed on the trial calendar, subsequently stricken therefrom by an order of the court and then not restored within one year, it is deemed abandoned and dismissed pursuant to CPLR 3404.").

The most recent inductee to the majority position, the Fourth Department, recently explained its position and criticized the Third Department view:

> To state the obvious, a note of issue does not survive its own vacatur, and it makes no sense to apply CPLR 3404 when the statute's operative premise—i.e., the continuing vitality of the note of issue—no longer exists. The Third Department's contrary rule—like the textually-based arguments in defendant's brief—fails to recognize the technical distinction between vacating a note of issue and marking off/striking a properly noted case from the calendar. Indeed, "it is precisely in such [latter] circumstances that CPLR 3404, by its express terms, applies." In other words, while it is of course true (as defendant insists) that a case is "place[d]" on the calendar by filing a note of issue, it does not follow—as the Third Department consistently holds—that a case is "marked off" or "struck" from the calendar within the meaning of CPLR 3404 whenever the note of issue is vacated pursuant to 22 NYCRR 202.21 (e) (citations omitted).

CPLR 3404 - Court improvidently exercised its discretion in, sua sponte, directing dismissal of the complaint pursuant to 22 NYCRR 202.27(b)

Yi Jing Tan v. Liang, 160 A.D.3d 786, 75 N.Y.S.3d 68 (2d Dep't 2018) ("Pursuant to 22 NYCRR 202.27(b), a court has the discretion to direct dismissal of a complaint where the plaintiff fails to appear or is not ready to proceed. Here, the Supreme Court based its decision to dismiss the complaint upon the plaintiffs' lack of readiness to proceed on November 19, 2015, a date to which the court adjourned the matter despite its awareness that the plaintiffs' counsel would not be available. Under the circumstances presented, the court improvidently exercised its discretion in, sua sponte, directing dismissal of the complaint (citation omitted).").

CPLR 3408 - Mandatory settlement conference in residential foreclosure action

CPLR 3408 - Action did not mandate settlement conference

Nationstar Mtge., LLC v. Turcotte, 161 A.D.3d 1090 (2d Dep't 2018) ("Finally, the defendants' contention that the plaintiff's misconduct deprived them of a mandatory settlement conference to which they were entitled pursuant to CPLR 3408(a) is without merit. Former CPLR 3408, which was in effect at the time this action was commenced on June 25, 2008 (citation omitted), 'applied only to foreclosure actions involving high-cost home loans or subprime or nontraditional home loans' (citation omitted). Contrary to the defendants' contention, their adjustable rate note did not fall under the definition of a 'nontraditional home loan[ ]' so as to mandate a settlement conference (citations omitted).").

ARTICLE 41 - TRIAL BY JURY

CPLR 4102 - Jury demand and waiver

CPLR 4102

David L. Ferstendig, *Further Appellate Division Conflicts, and One Resolved*, 689 N.Y.S.L.D. 3 (2018)

Asserting Equitable Counterclaims and Right to a Jury Trial

Three of the four Appellate Division Departments (the First, Second and Third Departments) hold that a defendant waives his or her right to a jury trial on all legal claims, including the plaintiff's claim, when asserting an equitable counterclaim based on the same transactions. See Cannon Point N., Inc. v. City of New York 87 A.D.3d 861, 865–66 (1st Dep't 2011); Seneca v. Novaro, 80 A.D.2d 909, 910 (2d Dep't 1981); Hickland v. Hickland, 100 A.D.2d 643, 644 (3d Dep't 1984).

The Fourth Department, however, holds to the contrary. Most recently, in Pittsford Canalside Props., LLC v. Pittsford Vill. Green, 154 A.D.3d 1303 (4th Dep't 2017), the court explained the reason behind its dissent from the other departments:

> [C]ontrary to plaintiff's contention on its cross appeal, we conclude that the court properly denied plaintiff's motion to strike defendants' demand for a jury trial. We have declined to apply the prevailing rule in the other Departments of the Appellate Division that a defendant waives his or her right to a jury trial on jury-triable causes of action in the complaint by interposing an equitable counterclaim based on the

> same transaction. The plain text of CPLR 4102 (c) does not address that issue, and the rule that prevails in the other Departments would force defendants to commence separate actions to assert equitable counterclaims, thereby encouraging the prosecution of inefficient and wasteful parallel actions. We conclude, however, that "[t]he need for a full relitigation of the equitable claims and the possibility of inconsistent results can be avoided by permitting the legal action and the equitable claims to be tried at the same time" (citations omitted).

Id. at 1305.

CPLR 4111 - General and specific verdicts and written interrogatories

CPLR 4111(c) - Trial court properly vacated jury award and ordered new trial on damages based on clearly inconsistent verdict-High-low agreement of no moment

Flores v. 731 S. Blvd. LLC, 154 A.D.3d 518, 63 N.Y.S.3d 319 (1st Dep't 2017) ("Defense counsel's contentions that the trial court was without authority to order a new trial on damages given the parties' high-low settlement agreement, and because neither party raised the issue of an inconsistent verdict, are unavailing. A high-low settlement between parties is a conditional settlement, triggered only when there is a proper verdict (citations omitted). CPLR 4111(c) provides, inter alia, that a court "shall order a new trial" when a jury's answers to interrogatories "are inconsistent with each other and one or more is inconsistent with the general verdict." Here, Supreme Court properly vacated the jury award and ordered a new trial on damages based on the clearly inconsistent verdict (citations omitted).").

ARTICLE 42 - TRIAL BY THE COURT

CPLR 4201 - Powers of referees to report

CPLR 4201 - "Inasmuch as the referee's role was to hear and report, Supreme Court, as 'the ultimate arbiter of the dispute,' was under no corresponding obligation to incorporate the first report into a judgment"

Oropallo v. Bank of Am. Home Loans, LP, 2018 NY Slip Op 04799 (3d Dep't 2018) ("It is well-settled that a trial court maintains the discretion to cure mistakes, defects and irregularities that do not affect a substantial right of a party (citations omitted), including the discretion to clarify a prior order and judgment to reflect the true intent of the court's original holding (citations omitted). In consideration of Supreme Court's April 2013 order and judgment directing any subsequently appointed referee to 'hear and report' as to the value of defendants' equitable mortgage lien (citation omitted), the inconsistent language that was subsequently incorporated into the August 2013 order of reference and plaintiffs' subsequent motion to confirm — which motion is only required where a referee has been appointed to 'hear and report' (citation omitted) — it was not inappropriate for Supreme Court to clarify in its February 2015 order that its intent was for the

appointed referee to 'hear and report.' Under the circumstances, therefore, neither defendants' failure to object to the reference nor their participation in the subsequent hearing served as a waiver of or consent to the authority of the referee as indicated in the order of reference (citation omitted). Thus, inasmuch as the referee's role was to hear and report, Supreme Court, as 'the ultimate arbiter of the dispute,' was under no corresponding obligation to incorporate the first report into a judgment (citations omitted).").

CPLR 4201 - Referee had no jurisdiction to determine, but only to hear and report

Matter of Rose v. Simon, 2018 NY Slip Op 04736 (2d Dep't 2018) ("A referee derives authority from an order of reference by the court (citations omitted). Here, as correctly asserted by the mother, the order of reference did not authorize the Court Attorney Referee to hear and report or to hear and determine a contested family offense petition. The Court Attorney Referee therefore lacked jurisdiction to dismiss the mother's family offense petition in this instance (citation omitted). Accordingly, the family offense matter must be remitted to a judge of the Family Court for a new determination. . . . Upon our review of the record, however, we find no indication that the parties stipulated to the reference in the manner prescribed by CPLR 2104, and, absent such stipulation, the Court Attorney Referee had the power only to hear and report her findings (citations omitted). We further find that the mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge (citations omitted). The order of reference must therefore be deemed an order to hear and report. Thus, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective rights of custody and visitation (citation omitted). Accordingly, the portion of the order dated May 19, 2017, which determined custody and visitation, is deemed a report (see CPLR 4320[b]), and the custody matter must be remitted for further proceedings pursuant to CPLR 4403 before a judge of the Family Court.").

ARTICLE 43 - TRIAL BY A REFEREE

CPLR 4311 - Order of reference

CPLR 4311 - Court Attorney Referee lacked jurisdiction to issue order without parties' consent

Matter of Kohn v. Sanders, 152 A.D.3d 597, 55 N.Y.S.3d 671 (2d Dep't 2017) ("Appeal by the father from an order of the Family Court, Kings County (Denise M. Valme-Lundy, Ct. Atty. Ref.), dated May 17, 2016. The order dismissed the father's petition for modification of an order of custody and visitation. ORDERED that the order is reversed, on the law, without costs or

disbursements, and the matter is remitted to the Family Court, Kings County, for a new determination of the father's petition. A referee derives authority from an order of reference by the court (see CPLR 4311), which can be made only upon consent of the parties, except in limited circumstances not applicable here (citations omitted). Here, the parties did not have an order of reference with respect to this proceeding. Thus, the Court Attorney Referee lacked jurisdiction to issue the order dated May 17, 2016 (citations omitted), and we remit the matter to the Family Court, Kings County, for a new determination of the father's petition.").

CPLR 4319 - Decision

CPLR 4319 - Referee's determination of default rate of interest under note and mortgage was plainly within scope of issues delineated in the order of reference

MMAL Corp. v. Edrich, 156 A.D.3d 780, 67 N.Y.S.3d 261 (2d Dep't 2017) ("Where a referee is appointed to hear and determine, rather than to hear and report (see CPLR 4201), the referee possesses 'all the powers of a court in performing a like function' (CPLR 4301), and his or her 'decision shall stand as the decision of a court' (CPLR 4319). 'Since the actions of referees when they are assigned to determine an issue are tantamount to those of any sitting Supreme Court Justice, the Supreme Court may only review whether the referee exceeded the scope of the issues delineated in the order of reference' (citation omitted). Here, the order of reference specifically gave the Referee, in relevant part, the power 'to determine the issue of the default rate of interest.' Since the Referee's determination of the default rate of interest under the note and mortgage was plainly within the scope of the issues delineated in the order of reference, the Supreme Court properly denied that branch of the plaintiff's cross motion which was to reject that portion of the Referee's decision.").

ARTICLE 44 - TRIAL MOTIONS

CPLR 4401 - Motion for judgment during trial

CPLR 4401 / 3212 - Prior denial of defendants' summary judgment motion does not preclude dismissal at conclusion of the plaintiff's case at trial

Zebzda v. Hudson St., LLC, 156 A.D.3D 851, 65 N.Y.S.3d 727 (2d Dep't 2017) ("The plaintiff's contention that the Supreme Court's prior denial of the defendants' motion for summary judgment dismissing the complaint precluded dismissal at the conclusion of the plaintiff's case at trial is without merit (citations omitted).").

CPLR 4404 - Post trial motions

CPLR 4404

David L. Ferstendig, *Appellate Division Applies Wrong Test in Setting Aside Jury Verdict,* 673 N.Y.S.L.D. 2 (2016).

Killon v. Parrotta, 2016 N.Y. Slip Op. 07048 (October 27, 2016), was a personal injury action arising out of a fight between the plaintiff and defendant. It was a he-said, he-said situation, but it did involve a she. The plaintiff had been a longtime friend of the defendant's wife. While drunk, the plaintiff made a threatening call to the defendant about his treatment of his wife. The defendant then drove 20 miles in the middle of the night to the plaintiff's home. What happened next is the subject of dispute. Defendant says that when the plaintiff saw him, plaintiff left his home with a maul hammer handle, prompting the defendant to go back to his truck to retrieve a bat. The plaintiff then encouraged his dog to attack the defendant and swung the maul handle at him, grazing the back of the defendant's head. Defendant alleged that he could not retreat because of "bad knees" and so he swung his bat at the plaintiff. Defendant then "fled the scene." Plaintiff tells the story a bit differently. The plaintiff told the defendant to repeatedly leave. When the plaintiff stepped off the porch he threw the maul handle on the ground, not at the defendant, and then the defendant swung his bat at the plaintiff, causing extensive injuries to his jaw. A witness present for the incident stated that the defendant, upon his arrival, came out of his truck carrying his bat.

Nice story, but why did I just take away a minute of your life! Ah, because the issue here surrounds whether the defendant was the "initial aggressor" and whether the Appellate Division used the proper standard in evaluating the jury determination.

At trial, the court instructed the jury that the "initial aggressor" is "the person who first attacks or threatens to attack … [t]he actual striking of the first blow or inflicting the first wound is not in and of itself determinative of the question of who was the initial aggressor." *Id*. at *2. Significantly, if the defendant was found to be the "initial aggressor," the jury was required to find that he did not act in self-defense.

The jury unanimously found that defendant battered the plaintiff by striking him with a bat, but also found that the defendant acted in self-defense. The trial court denied plaintiff's motion to set aside the verdict. In 2012, the Appellate Division reversed and ordered a new trial, finding that "'no fair interpretation of the evidence' supported 'the verdict finding that defendant acted in self-defense' inasmuch as it was predicated upon 'a conclusion that defendant was not the initial aggressor in the encounter'." *Id*.

At the retrial, the trial court stated that it was constrained by the 2012 Appellate Division holding, as a matter of law, that the defendant was the initial aggressor, and thus denied defendant's request

for a self-defense jury charge. The second jury then found that the defendant had committed a battery and awarded damages. In 2015, the Appellate Division affirmed. The appeal of the 2015 Appellate Division order to the Court of Appeals brought up for review the earlier non-final 2012 order. The Court stressed that where the Appellate Division finds a verdict to be against the weight of the evidence, the remedy is to remit for a new trial. Conversely, "where the Appellate Division intends to hold that a jury verdict is insufficient as a matter of law, it must first determine that the verdict is 'utterly irrational'." *Id*. at *3.

In the 2012 Order, the Appellate Division found, in essence, that the verdict was against the weight of the evidence but the effect was to hold, as a matter of law, that the defendant was the initial aggressor and thus the justification defense was unavailable. Such a holding could only be reached by concluding that the verdict was utterly irrational, but the Appellate Division did not use that test.

The Court stated that whether a verdict is utterly irrational is a question of law, in which case the Court could look at the trial evidence and then make its own determination. The Court held that, based on the jury charge given, the first jury's conclusion that the defendant was not the initial aggressor and acted in self-defense was not utterly irrational based on the conflicting versions of the events and remitted the case to the Supreme Court for yet a third trial. It noted that normally it would have remitted to the Appellate Division to determine whether the self-defense verdict was against the weight of the evidence. However, "under these unusual circumstances where the Appellate Division already performed that analysis and decided the case should be retried," the Court felt it was "most appropriate" to remit the case directly to the Supreme Court for a new trial. *Id*. at *4 n.2.

CPLR 4404

David L. Ferstendig, *Majority of Court of Appeals Reverses Order Granting Defendant's Motion to Set Aside Verdict*, 678 N.Y.S.L.D. 2,3 (2017).

For a trial court to determine as a matter of law that a jury verdict is unsupported by sufficient evidence, it must conclude "that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v. Hallmark Cards, Inc*.. 45 N.Y.2d 493, 499 (1978).

In *Obey v. City of New York*, 2017 N.Y. Slip Op. 02590 (April 4, 2017), the plaintiff, a heroin addict, was traveling from a methadone clinic when he slipped off of a subway platform and was injured by a train. He told a treating psychologist that he was high on Xanax and Klonopin, psychoactive drugs that can cause dizziness and falling, if abused. The plaintiff could not remember anything from the time he slipped until he was tended to by medical personnel. At trial, he claimed his memory loss was caused when he slipped and hit his head, not from taking illegal drugs.

During the approximately 45 minute period covering the time that the plaintiff entered the subway station until he was discovered on the tracks, at least three trains passed through the station. The plaintiff claimed that the second train contacted him. While none of the train operators saw the plaintiff before the incident, a large pool of blood was found on the tracks; what appeared to be blood stains were on four cars of the first train; the operator of the second train reported seeing white sneakers on the train tracks; and the third train was alerted to the incident, permitting the train operator to stop the train.

The jury returned a verdict in plaintiff's favor, apportioning 60 percent fault to the plaintiff and 40 percent to the New York City Transit Authority (NYCTA), and awarding nearly $2 million in damages. The trial court granted the defendant's post-trial motion to set aside the verdict on the issue of liability, finding that the plaintiff had failed to establish that the operator of the second train (Lopez) was negligent or caused plaintiff's injuries. In a 3–2 decision, the Appellate Division affirmed, finding that plaintiff failed to satisfy his burden to show that the second train caused his injuries. The court pointed to the bloodstains on the first train, which were lacking on the second train. Moreover, the fact that Lopez observed sneakers on the tracks did not establish which train injured the plaintiff. Finally, the Appellate Division concluded that the plaintiff failed to establish prima facie that, had Lopez activated the train's emergency brake when he saw the sneakers, the incident could have been avoided (assuming the train caused the injury).

In a very brief decision, a majority of the Court of Appeals reversed, holding that,

> [l]egally sufficient evidence supported the jury's finding that defendant New York City Transit Authority was negligent and that its negligence was a proximate cause of plaintiff's injury.

Id. at *1.

In a dissent, Judge Garcia found that the plaintiff had failed to sustain his burden of proving that the second train caused his injuries, concluding that the physical evidence pointed solely to the first train.

> [W]hat appeared to be bloodstains were discovered on four cars of the first train, while no such stains were discovered on the second train. In an attempt to refute the physical evidence, plaintiff's expert claimed that the apparent bloodstains may actually have been "grape juice," "pop/soda," or rat blood, and that the weight and heat of the train may have cauterized plaintiff's wound. Not only are these claims incredible on their face, but they are undermined by plaintiff's own evidence. For instance, plaintiff contends that his wound may have instantly cauterized — to explain the absence of any blood on the second train — while simultaneously pointing to a "large pool of blood" on the tracks for purposes of determining the accident location.

Id. at *2.

Moreover, Judge Garcia also found that the plaintiff did not make a prima facie showing that the train operator of the second train was negligent. He rejected plaintiff's expert's claim that because Lopez stated that he saw plaintiff's sneakers when entering the station, he had enough time to stop the train in time, by engaging the emergency brake.

> However, plaintiff's expert implicitly rejected the proposition that the operator observed the sneakers immediately upon entering the station — a 400 foot distance — by testifying that the train's headlights would not have illuminated the sneakers until, at the earliest, "151.5 feet from the front of the train." Although the expert opined that 151.5 feet would have been a sufficient distance to stop the train, there is no record evidence to support the expert's assumption that the operator actually observed the sneakers from a distance of 151.5 feet. Rather, according to the operator's trial testimony as well as his written report from the day of the accident, the operator did not see the sneakers until the train was almost fully stopped near the end of the station. In the absence of any credible evidence that the operator had adequate time to stop the train, the jury's verdict relied on unsubstantiated speculation regarding the operator's negligence (citation omitted).

Id. at *2-3.

CPLR 4404 - Jury verdict set aside as contrary to the weight of the evidence because it was not supported by any fair interpretation of the evidence

Robinson v. Brooklyn Union Gas Co., 160 A.D.3d 999, 72 N.Y.S.3d 454 (2d Dep't 2018) ("'A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence' (citation omitted). This principle also applies to a jury's apportionment of fault (citation omitted). Here, the jury's determination that the plaintiff was 80% at fault was not supported by a fair interpretation of the evidence in light of the undisputed evidence regarding the condition of the street (citation omitted). An apportionment of 55% of the fault to the plaintiff and 45% of the fault to the defendant City of New York better reflects a fair interpretation of the evidence (citation omitted).").

CPLR 4404 - Court's errors in failing to properly charge the jury and add the interrogatory requested by the plaintiffs prejudiced a substantial right and warrants a new trial

Duran v. Temple Beth Sholom, Inc., 155 A.D.3d 690, 64 N.Y.S.3d 278 (2d Dep't 2017) ("'A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise' (citations omitted). In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to his [or her] own common sense, experience, and sense of fairness rather than to precedents in arriving at a decision' (Micallef v Miehle Co., Div. of Miehle-Goss Dexter, 39 NY2d 376, 381 [citation omitted], quoting Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.11; see Morency v Horizon Transp. Servs., Inc., 139 AD3d at 1023). Here, the Supreme Court erred in denying the plaintiffs' request to ask the jury to determine

not only whether the temple violated Labor Law § 240(1), but also to determine whether Duran fell off the beam (citations omitted). Under the particular circumstances of this case, this constituted a fundamental error warranting a new trial because the court's instructions failed to explain to the jury that, in light of arguably inconsistent accounts of how the accident occurred, the jury was entitled to find that Duran did not fall from the beam or, alternatively, that he did fall from the beam but no safety device was required under Labor Law § 240(1). Further, there was sufficient evidence of juror confusion with respect to this issue (citations omitted). Notably, the jury requested a readback of Labor Law § 240(1). The court's errors in failing to properly charge the jury and add the interrogatory requested by the plaintiffs prejudiced a substantial right and warrants a new trial (citations omitted).For that reason, the Supreme Court should have granted that branch of the plaintiffs' motion which was pursuant to CPLR 4404(a) to set aside the verdict in the interest of justice and for a new trial on the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against the temple (citation omitted).") **(citing Weinstein-Korn-Miller).**

ARTICLE 45 - EVIDENCE

CPLR 4503 - Attorney

CPLR 4503 - Common-Interest privilege

David L. Ferstendig, *Divided Court of Appeals Imposes Litigation Requirement on Common-Interest Privilege*, 668 N.Y.S.L.D. 1, 2 (2016).

Generally, the presence of a third party to a communication between counsel and client waives the attorney-client privilege. The common-interest privilege, however, is an exception. Under this doctrine, the privilege will not be destroyed by the third party's presence "if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129 (1st Dep't 2014). There was a conflict among the Appellate Division Departments as to whether the communication has to be made in connection with a pending action or "in reasonable anticipation of litigation." The Second Department had taken this narrower view, while the First Department in Ambac ruled that the communication need not be tied to litigation. That was until a divided New York State Court of Appeals stepped in and held there to be a litigation requirement.

Ambac concerned a discovery dispute arising out of an action brought by Ambac, a financial guaranty insurer, that guaranteed payments on residential mortgage-backed securities (RMBS) issued by Countrywide and related entities. Ambac claimed that Countrywide fraudulently induced it to insure the RMBS transactions and breached contractual representations. Ambac also sued Bank of America Corporation (BOA) based on its merger with Countrywide. The crux of the discovery dispute was BOA's withholding of some 400 communications that occurred between BOA and Countrywide after the merger plan was signed but before the merger closed. BOA argued that the communications were protected from disclosure by the attorney-client privilege because they related to legal issues that both companies had to resolve jointly to successfully complete the

merger. BOA claimed that the merger agreement "evidenced the parties' shared legal interest in the merger's 'successful 2016completion' as well as their commitment to confidentiality, and therefore shielded the relevant communications from discovery." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc*., 2016 N.Y. Slip Op. 04439 (June 9, 2016) at ∗2–3.

Ambac moved to compel, arguing that because both BOA and Countrywide had shared voluntarily confidential material before the merger closed, they had waived the attorney-client privilege. An appointed special referee granted Ambac's motion, noting that generally the exchange of privileged communications constitutes a waiver of the attorney-client privilege. The referee added that the "common interest" doctrine is an exception to the waiver rule, but found that for the exception to apply there must be a common legal interest in a pending or reasonably anticipated litigation, which was not the case here.

BOA moved to vacate the special referee's decision and order, arguing that its communications with Countrywide were protected even in the absence of pending anticipated litigation. The Supreme Court denied the motion, finding that there had to be a reasonable anticipation of litigation for the common interest doctrine to apply. The Appellate Division reversed, concluding that the better policy would be not to require that the communication be tied to litigation.

A majority of the New York State Court of Appeals reversed the Appellate Division order, holding that the litigation requirement "that has historically existed in New York" applied and that the common-interest doctrine should not be expanded "to protect shared communications in furtherance of any common legal interest." *Id*. at ∗6. It found that the benefits in extending the doctrine to communications made in the absence of pending or anticipated litigation were outweighed by the substantial loss of relevant evidence and the potential for abuse. The Court noted that in a non-litigation setting, there may be parties asserting common legal interests, who are really protecting non-legal or exclusively business interests. It rejected BOA's argument that the common-interest doctrine should be coextensive with the attorney-client privilege, which is not tied to the contemplation of litigation

> because the doctrine itself is not an evidentiary privilege or an independent basis for the attorney client privilege (citation omitted). Rather, it limits the circumstances under which attorneys and clients can disseminate their communications to third parties without waiving the privilege, which our courts have reasonably construed to extend no further than communications related to pending or reasonably anticipated litigation.

Id. at *8.

The dissent pointed out that

> [g]iven that the attorney-client privilege has no litigation requirement and the reality that clients often seek legal advice specifically to comply with legal and regulatory mandates and avoid litigation or liability, the privilege should apply to private client-attorney communications exchanged during the course of a

> transformative business enterprise, in which the parties commit to collaboration and exchange of client information to obtain legal advice aimed at compliance with transaction-related statutory and regulatory mandates.

Id. at *9.

The dissent emphasized that a majority of federal courts and a significant number of state courts that have addressed the issue have held that the privilege applied even if litigation is not pending or reasonably anticipated.

CPLR 4504- Doctor, dentist, podiatrist, chiropractor and nurse

CPLR 4504 / 3101 - Disclosure of photographs constituting breach of fiduciary duty

Skokan v. Peredo, 151 A.D.3d 1096, 58 N.Y.S.3d 110 (2d Dep't 2017) ("The defendant failed to demonstrate, prima facie, that the disclosure of the plaintiff's photographs did not constitute a breach of fiduciary duty, as her submissions failed to eliminate triable issues of fact as to whether the plaintiff consented to that disclosure (citations omitted). The defendant failed to establish, prima facie, that the disclosure was permitted under the consent forms signed by the plaintiff, and in particular, that the photographs were limited to the plaintiff's 'treated sites' or that the photographs were disclosed for 'teaching purposes.' Nor did the defendant establish, prima facie, that a verbal consent to the disclosure would have been valid under the circumstances of this case, or, if a verbal consent would have been valid, whether the plaintiff provided such verbal consent. Since the defendant failed to establish her prima facie entitlement to judgment as a matter of law dismissing the third cause of action, alleging breach of fiduciary duty, the Supreme Court correctly denied that branch of the motion, regardless of the sufficiency of the plaintiff's opposition papers (citation omitted).").

CPLR 4515 - Form of expert opinion

CPLR 4515 - Expert opinion on specific causation in toxic tort case

Dominick v. Charles Millar & Son Co., 149 A.D.3d 1554, 54 N.Y.S.3d 233 (4th Dep't 2017) ("Plaintiff testified that he was exposed to asbestos dust from asbestos boards and cement supplied by the Millar defendants that were used in the heat treat area of a pneumatic-tool making plant. The hypothetical question that plaintiff asked his expert was based on plaintiff's testimony or was otherwise 'fairly inferable from the evidence' (citations omitted). With respect to specific causation, the Court of Appeals held in Parker v. Mobil Oil Corp. (citation omitted) that the expert opinion must set forth that the plaintiff 'was exposed to sufficient levels of the toxin to cause the [injuries]' (citation omitted). However, as the Court of Appeals later wrote, 'Parker explains that precise quantification' or a dose-response relationship' or an exact numerical value' is not required to make a showing of specific causation' (citation omitted). There simply ' must be evidence from

which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' ' (citation omitted). Here, plaintiff's expert opined that, if a worker sees asbestos dust, that is a 'massive exposure . . . capable of causing disease.' Contrary to the Millar defendants' contention, the expert's opinion, considered along with the rest of her testimony, was sufficient to establish specific causation (citations omitted).").

CPLR 4515 - Foundation for expert opinion

David L. *Ferstendig, Plaintiff's Experts Fail to Establish That Decedent Was Exposed to Sufficient Levels of Toxins*, 677 N.Y.S.L.D. 2, 3 (2017).

The Court of Appeals decisions in *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434 (2006) and *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014) are the seminal cases detailing the general requirements for the admission of an expert's scientific opinions in toxic tort cases. Thus, "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." *Parker*, 7 N.Y.3d at 448. More recently, in *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801 (2016), discussed in detail in the May 2016 edition of the Law Digest, the Court reiterated that "we have never 'dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect.'" *Id*. at 808.

Matter of New York City Asbestos Litig., 48 N.Y.S.3d 365 (1st Dep't 2017) ("Juni") is an asbestos-related case dealing with the admission of expert testimony. In Juni, plaintiff claimed that the decedent contracted mesothelioma from his alleged exposure as an auto mechanic to various asbestos-containing products. In this decision, the claims related to exposure to asbestos dust from brakes, clutches, and manifold gaskets in defendant Ford Motor Company vehicles. While the jury found for the plaintiff, the trial court granted Ford's motion to set aside the verdict, pursuant to CPLR 4404(a).

What was really at issue here was whether asbestos cases should be treated like other toxic tort cases. You may ask (with Passover approaching), what makes this type of case different from all other toxic tort cases? The question stems at least in part from the fact that it is basically accepted by the courts that mesothelioma is (only) caused by exposure to asbestos. Moreover, in practice, in New York state courts, allegations of any alleged exposure to a product containing any amount of asbestos have generally sufficed.

A majority of the First Department in Juni stated unequivocally, however, that the Parker and Cornell requirements apply to asbestos-exposure cases, rejecting the dissent's suggestion

> that applying the same criteria would set an insurmountable standard for asbestos claims. However, there is no valid distinction to be made between the difficulty of

> establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation.

48 N.Y.S.3d 365 at ∗2.

It also rejected plaintiff's claim that the court's earlier decision in *Lustenring v. AC&S, Inc*., 13 A.D.3d 69 (1st Dep't 2004), lv. denied, 4 N.Y.3d 708 (2005), or other asbestos cases have somehow altered the Court of Appeals' standards. In fact, each of those cases was decided based on its discrete set of facts and the expert testimony there established that the extent and quantity of asbestos dust exposure was sufficient to cause mesothelioma. Thus,

> the fact that asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease (citation omitted). Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies (citation omitted).

Juni, 48 N.Y.S.3d 365 at ∗2.

The court found that the plaintiff's experts here did not "quantify the decedent's exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford's products." Id. It agreed with the trial court's decision not to accept plaintiff's single exposure or cumulative exposure theories -

> Neither of plaintiff's experts stated a basis for their assertion that even a single exposure to asbestos can be treated as contributing to causing an asbestos-related disease. Moreover, reliance on the theory of cumulative exposure, at least in the manner proposed by plaintiffs, is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease (citation omitted).

Id.

The majority disagreed with the dissent that an alleged consensus in the scientific community that low dose asbestos exposure is sufficient to cause mesothelioma "entitles a particular plaintiff to be awarded judgment against a particular defendant by merely establishing some exposure to a product containing any amount of asbestos." *Id*.

CPLR 4515 - Expert opinion- "The professional reliability exception to the hearsay rule enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession"

Tornatore v. Cohen, 2018 NY Slip Op 04145 (4th Dep't 2018) ("We reject defendant's further contention that the court erred in denying her motion to strike the testimony of the life care planning expert on the ground that her opinion was principally based upon inadmissable hearsay statements of plaintiff's treating physician. It is well settled that 'opinion evidence must be based on facts in the record or personally known to the witness' (citation omitted). It is equally well settled, however, that an expert is permitted to offer opinion testimony based upon facts not in evidence where the material is 'of a kind accepted in the profession as reliable in forming a professional opinion' (citations omitted). 'The professional reliability exception to the hearsay rule enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' (citations omitted), and 'provided that it does not constitute the sole or principal basis for the expert's opinion' (citations omitted).").

CPLR 4518 - Business records

CPLR 4518 - Failure to lay a proper foundation for admission of records

Deutsche Bank Natl. Trust Co. v. Carlin, 152 A.D.3d 491, 61 N.Y.S.3d 16; (2d Dep't 2017) ("The plaintiff failed to demonstrate the admissibility of the records relied upon by Rhodes under the business records exception to the hearsay rule (citation omitted). Rhodes, an employee of the current loan servicer, did not aver that he was personally familiar with the record keeping practices and procedures of BOA, the prior loan servicer. Thus, Rhodes failed to lay a proper foundation for admission of records concerning service of the required notices, and his assertions based on these records were inadmissible (citations omitted).").

CPLR 4518 - "The business records exception to the hearsay rule does not permit the receipt into evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under a duty in relation thereto (citation omitted)."

76th & Broadway Owner LLC v. Consolidated Edison Co. of N.Y. Inc., 160 A.D.3d 447, 74 N.Y.S.3d 527 (1st Dep't 2018).

CPLR 4518(a) - Portion of records germane to diagnosis and treatment

Matter of Jonathan E. (John E.), 149 A.D.3d 1197, 51 N.Y.S.3d 252 (3rd Dep't 2017) ("Here, while Family Court admitted the entirety of the father's hospital records into evidence without any testimony as to which portions of the records were germane to the father's diagnosis and treatment, it relied on only those portions of the hospital records that recorded the father's admissions regarding his drug use. Under the circumstances of this case, it is beyond question that the father's

admissions of drug use, including the particular drugs used, the amount used and the frequency with which he used them, were relevant to a diagnosis of drug addiction and detoxification treatment and, thus, it was in the regular course of the hospital's business to record such statements. Accordingly, inasmuch as the portions of the medical records relied on by Family Court were admissible under Family Ct Act § 1046 (a) (iv), any error in admitting any inadmissible portions of the hospital records was inconsequential (citations omitted).").

CPLR 4518(d) - Rebuttal of presumption of paternity

Matter of Cayra M. v. Fotis B., 147 A.D.3d 479, 47 N.Y.S.3d 276 (1st Dep't 2017) ("Respondent also presented evidence of a meritorious defense. Although the DNA test showed that there was a 99.9% probability that respondent was the child's father, respondent stated that his identical twin brother, who was in the courtroom and was prepared to testify, had sexual relations with petitioner mother during the conception period. The brother's testimony may have rebutted the presumption of paternity provided in Family Court Act § 532(a) and CPLR 4518(d) (citation omitted), if respondent was also able to demonstrate that he and his brother have identical DNA. Further, the best interests of the subject child are not furthered by a possibly erroneous paternity finding.").

CPLR 4545 - Admissibility of collateral source of payment

CPLR 4545

David L. Ferstendig, *Court of Appeals Splits on Application of CPLR 4545*, 692 N.Y.S.L.D. 2-3 (2018).

Court Of Appeals Splits on Application of CPLR 4545

Do Accident Disability Retirement Benefits Act as an Offset Against Both Future Earnings and Pension Benefits?

Andino v. Mills, 2018 N.Y. Slip Op. 04273 (June 12, 2018), concerns the application of CPLR 4545, commonly referred to as the collateral source rule. The relevant portion (prior to an amendment which does not impact the analysis) provides that

> [i]n any action brought to recover damages for personal injury … where the plaintiff seeks to recover for the cost of medical care, … loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source [with some exceptions] …. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to

> the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits.

CPLR 4545(a).

It is significant to note that the law in this area has changed dramatically. Under the common law, an injured person could recover the full amount of losses from a tortfeasor even if the injured person also recovered payments from employers or through his or her medical or other insurance policies. CPLR 4545, enacted in 1984, changed the law significantly, flipping the equation. Now reimbursed medical expenses or lost earnings, for example, can be an offset against damages awarded in a third-party tort action.

In Andino, the plaintiff, a retired police officer injured while on duty, brought this action and the jury awarded her a set amount for past and future lost earnings, past and future pain and suffering, future medical expenses, and future loss of pension.

Pursuant to CPLR 4545, defendant argued that the plaintiff's accident disability retirement benefits (ADR) were a collateral source that the court should offset against the jury award for future lost earnings and pension benefits. Following a hearing, the trial court denied the motion, finding that the defendants had failed to show a connection between the projected ADR benefits and the lost earnings and pension. The Appellate Division modified the order, granting the motion to offset the award for future pension benefits (bringing these damages to zero), but otherwise affirming the denial of an offset for future lost earnings.

A majority of the Court of Appeals modified the Appellate Division order. It concluded that "ADR benefits operate sequentially as payment for future lost earnings and pension benefits." Andino, 2018 N.Y. Slip Op. 04273 at ∗2. The Court noted that police officers who suffer an accidental on-the-job injury causing them to stop working do not receive Workers' Compensation Law benefits. Instead, they receive ADR benefits. While those benefits are lifetime payments, the Medical Board of the Police Pension Fund (Board) can require annual medical examinations. If the Board concludes that the recipient can engage in "a gainful occupation," the recipient can be placed on an eligible preferred list of candidates available to work. If the recipient then is employed or is offered City service, ADR benefits can be reduced. As a result, ADR benefits that are paid for a period prior to when the recipient would have been eligible for a service retirement can be reduced by amounts earned or earning capacity, over a statutory maximum of permissible income. This, the majority stated, means that these ADR benefits replace future lost earnings.

However, once the recipient reaches eligibility for a regular service pension, if not for the injury, ADR benefits are not reduced. In addition, the recipient can work at that point without having his or her ADR benefits reduced (since they are now operating as a pension). Thus, the majority concluded that because "ADR replaces earnings and pension, it is a collateral source within the meaning of CPLR 4545 that a court must set off against both, representing the category of economic loss in which ADR is allocated sequentially." *Id*. at ∗3.

The majority noted that the ultimate goal of CPLR 4545 is to eliminate duplicative recovery by the plaintiff. It pointed to a letter from the New York City Mayor at the time of the enactment of CPLR 4545, contained in the Bill Jacket, evidencing that New York City believed that CPLR 4545 would lead to a full offset of ADR benefits against tort damage awards. Thus, the Court ruled that the projected ADR benefits should have been offset against the jury's award of both categories of economic losses. "ADR benefits replace the income Andino would have earned if she did not have to retire early due to her work-related disability- causing injury. Then, once she reaches what would have been her in-service retirement age, the ADR benefits replace the pension she was entitled to at that time." *Id*.

Contrary to the plaintiff's position, the majority stated that its prior decision in Oden v. Chemung County Indus. Dev. Agency, 87 N.Y.2d 81 (1995), did not mandate that there be a direct match between the collateral source and the jury damage award, requiring an exact dollar equivalence. All that needs to be established is that the collateral source replaces a category of loss in the jury award. In addition, Oden did not limit a collateral source's offset to a single category of an award. Thus, while in Oden there was only one category of loss actually replaced by the benefits, here, the majority noted, the ADR benefits replaced two different categories of the award.

The dissent argued that the majority had repudiated its earlier "careful" decision in Oden by claiming that "a particular category of loss" can mean two or more categories of losses; this conclusion may leave plaintiffs undercompensated; "wages" or "salary" are not the same as "benefits" and ADR benefits, like pension benefits, are received only when you no longer provide services; and thus, ADR benefits "neatly correspond to the category of pension benefits, not to the category of wages."

The dissent stated that Oden required that a collateral source "may only correspond to a particular category of loss." Here, ADR benefits offset the plaintiff's entire lost pension. Thus, any surplus should not be used to offset any other category. Finally, the dissent opined that the pension benefits plaintiff expects to recover are not duplicative of the future damages award, because, if the plaintiff had not been injured, she would have been allowed to earn income after retirement without a reduction of her pension benefits.

CPLR 4547 - Compromise and offers to compromise

CPLR 4547 - Emails constituting settlement communications

Gottbetter v. Crone Kline Rinde, LLP, 2018 NY Slip Op 04677 (1st Dep't 2018) ("Contrary to defendants' argument, certain emails at issue constitute settlement communications, and detailed references to those negotiations are inadmissible and therefore must be stricken from the answer (citations omitted). In addition, the first counterclaim must be dismissed because it is predicated upon allegations that Paul Gottbetter waived his rights under the agreement during the course of the settlement discussions. We note that, in any event, the inadmissible communications do not demonstrate such a waiver.").

ARTICLE 50 - JUDGMENTS

CPLR 5003-a - Prompt payment following settlement

CPLR 5003-a - Monies payable by settling defendants to third-party lienholder (not monies owed directly to settling plaintiff) do not constitute "sums due" to plaintiff within meaning of statute. Ronkese v. Tilcon N.Y., Inc., 153 A.D.3d 259, 59 N.Y.S.3d 605 (3d Dep't 2017)

CPLR 5003-a - No interest where legislative approval was condition to proposed settlement

Azbel v. County of Nassau, 149 A.D.3d 1020, 53 N.Y.S.3d 656 (2d Dep't 2017) ("Here, the Supreme Court properly denied the plaintiffs' motion pursuant to CPLR 5003-a(e) to direct entry of a judgment awarding them interest on the amount of the parties' settlement, plus costs and disbursements**.** Contrary to the plaintiffs' contention, legislative approval was a condition of the proposed settlement entered into between the plaintiffs and the County. The Nassau County Administrative Code provides that the County Attorney shall not be empowered to settle any rights, claims, demands, or causes of action against the County unless authorized by the County Legislature (citation omitted). '[A] party that contracts with the State or one of its political subdivisions is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them' (citations omitted). Inasmuch as the County Legislature did not approve the bond ordinance, a condition of the parties' settlement was not met. Therefore, the matter was not finally settled and the 90-day period within which the County would have been required to make payment of the settlement amount was not triggered (citation omitted).").

CPLR 5003-a - Maximum limit of MVAIC's liability under the Insurance Law was $25,000, despite amount in release

Matter of Baker v. Motor Veh. Acc. Indem. Corp., 161 A.D.3d 1070 (2d Dep't 2018) ("MVAIC alleged that it sought, on several occasions, to tender its $25,000 statutory liability limit on the underlying judgment, and forwarded to the petitioner's counsel a release reflecting the proper statutory amount. It is uncontested that MVAIC refused to tender payment until the petitioner executed the release. However, the petitioner's counsel demanded and forwarded a release reflecting the sum of $30,108.46. . . . The maximum limit of MVAIC's liability under the Insurance Law is $25,000 (citation omitted). MVAIC's contention that the petitioner is not entitled to interest because the delay in payment was caused by the plaintiff's failure to execute a release in the proper amount is without merit. While MVAIC has the right to a release upon the settlement of a claim (citations omitted), MVAIC is not entitled to such a release when ordered to pay on a judgment. Here, the underlying action was not settled, but terminated with the entry of a judgment. No release is required to be tendered before the payment of a judgment, as it is not an agreement to pay, but an obligation to pay. While unconditional tender of a judgment amount stops the running of

postjudgment interest (citations omitted), here, MVAIC conditioned the tender of the payment upon the execution of the release it provided. Thus, MVAIC's contention that the petitioner caused the delay in payment of the underlying judgment is without merit. However, contrary to the petitioner's contention, MVAIC's liability for interest should have been calculated based on the sum of $25,000, and such interest should have been computed from the date of entry of the unpaid underlying judgment, that is, June 3, 2016, at 9% per annum (citations omitted).").

CPLR 5011 - Definition and content of judgment

CPLR 5011 - Prior disclosure order which preceded plaintiff's deposition, was not law of the case, where deposition introduced additional evidence and raised new issues. *Milligan v. Bifulco*, 153 A.D.3d 1624 (4th Dep't 2017).

CPLR 5011 - Law of the case

Delgado v. City of New York, 144 A.D.3d 46, 38 N.Y.S.3d 129 (1st Dep't 2016) (Where an issue is specifically decided on a summary judgment motion, that determination is the law of the case. Thus, the trial court and the parties are bound by such determination "absent a showing of subsequent evidence or change of law.")

CPLR 5011 - Dismissal on statute of limitation grounds is considered to be on the merits for res judicata purposes

Webb v. Greater N.Y. Auto. Dealers Assn., Inc., 144 A.D.3d 1134, 42 N.Y.S.3d 324 (2d Dep't 2016) ("Here, the plaintiff's claims in the amended complaint in this action commenced in 2013 arose out of the same set of operative facts as claims she asserted in the 2012 action, which were dismissed on the ground that they were barred by the applicable statute of limitations (citation omitted), and could have been raised in that prior action. Contrary to the plaintiff's contention, a dismissal on the ground of the statute of limitations is considered to be on the merits for res judicata purposes (citations omitted).").

CPLR 5011 - Res judicata and collateral estoppel

Maki v. Bassett Healthcare, 141 A.D.3d 979, 981, 35 N.Y.S.3d 587, 590 (3d Dep't 2016) ("The claims asserted in this action stem from the same series of transactions that gave rise to the 2010 action — i.e., the medical treatment provided to plaintiff following the 2008 accident. Indeed, the majority of the facts alleged in the two complaints are nearly identical, with the only difference being that the complaint commencing this action alleges continued pain and suffering, which nonetheless relate 'in time, space, origin [and] motivation' to those adjudicated in the 2010 action (citations omitted). Thus, inasmuch as all issues related to plaintiff's claims sounding in simple negligence and fraud were fully and finally decided in the 2010 action (citation omitted), they are barred by principles of res judicata and collateral estoppel (citation omitted). Plaintiff's breach of contract claim, which alleged that defendants breached their contractual obligation to provide him

with proper medical treatment, 'could have been raised in the prior litigation' and, consequently, is precluded by the doctrine of res judicata (citations omitted). Accordingly, Supreme Court did not err in dismissing the complaint.").

CPLR 5011- Claim splitting rule

Strategic Point - The Fourth Department has ruled that the claim splitting rule "applies only when a plaintiff commences a new action (or interposes a new counterclaim) to expand his or her recovery from a prior action, not when the defendant in a prior action commences a new action against the former plaintiff to vindicate his or her own affirmative claims. In the latter instance, the defendant-turned-plaintiff did not assert any claim until the new action, and thus could not have impermissibly 'split' such a claim across multiple actions." Thus, where a tenant "successfully defends an action commenced by his or her landlord, the tenant may commence a new plenary action against the landlord to recover the attorneys' fees to which he or she may be entitled under Real Property Law § 234." *See Caracaus v. Conifer Cent. Sq. Assoc.*, 158 A.D.3d 63, 68 N.Y.S.3d 225 (4th Dep't 2017) ("As a 'narrow doctrine,' the claim splitting rule is 'most frequently invoked in landlord-tenant cases [involving] attorney's fees' (citations omitted). … Each of the foregoing cases are alike in one key respect - they enforced the claim splitting rule against a landlord-plaintiff who sought attorneys' fees expended in prosecuting a prior action against the tenant-defendant. In other words, they each involve a landlord who successfully sued a tenant, and who later sued the same tenant for the attorneys' fees incurred in the prior action. The landlords were commencing new actions (or interposing new counterclaims) to secure additional relief that could have been obtained in their prior actions, and that, each of the foregoing cases held, was barred by the claim splitting rule. … The claim splitting rule thus applies only when a plaintiff commences a new action (or interposes a new counterclaim) to expand his or her recovery from a prior action, not when the defendant in a prior action commences a new action against the former plaintiff to vindicate his or her own affirmative claims. In the latter instance, the defendant-turned-plaintiff did not assert any claim until the new action, and thus could not have impermissibly "split" such a claim across multiple actions (citation omitted). After all, a party must have asserted a claim in one action before he or she can be charged with splitting that claim in a subsequent action. … We recognize that the First Department held otherwise in *O'Connell v. 1205-15 First Ave. Assoc., LLC* (28 AD3d 233 [1st Dept 2006]), but we decline to follow that case. … Finally, we decline the landlord's alternative invitation to treat the boilerplate, one-line requests for attorneys' fees in the tenant's answers in Village Court as the equivalent of a "claim" that triggered the claim splitting rule."). The First Department has taken a contrary position. *See O'Connell v. 1205-15 First Ave. Assoc., LLC* , 28 A.D.3d 233, 234, 813 N.Y.S.2d 378, 379 (1st Dept 2006) ("the prohibition against the splitting of causes of action required plaintiff to seek attorneys' fees within the action in which they were incurred, not a subsequent action.").

CPLR 5014 - Action upon judgment

CPLR 5014 - Renewal judgment

Jones Morrison, LLP v. Schloss, 155 A.D.3d 704, 65 N.Y.S.3d 52 (2d Dep't 2017) ("The Supreme Court properly granted the plaintiff's motion for summary judgment and entered a renewal judgment pursuant to CPLR 5014(1). The plaintiff established its prima facie entitlement to a renewal judgment as a matter of law by showing - (1) the existence of the original judgment; (2) that the defendant was the judgment debtor; (3) that the original judgment was docketed at least nine years prior to the commencement of this action; and (4) that the original judgment remains partially or completely unsatisfied (citations omitted). In opposition, the defendant failed to raise a triable issue of fact. Her arguments in opposition to the motion and in support of her cross motion were or could have been made in the prior actions, and are therefore barred by res judicata (citations omitted).").

CPLR 5015 - Relief from judgment or order

CPLR 5015 / 317 - Deliberate attempt to avoid service

John v. Arin Bainbridge Realty Corp., 147 A.D.3d 454, 46 N.Y.S.3d 589 (1st Dep't 2017) ("Viewing the totality of the record, we find that the court providently exercised its discretion to deny vacatur of the default judgment under CPLR 317. Numerous anomalies in the record support the court's inference that Arin sought to deliberately avoid service. For example, both the address given to the Secretary of State, 3161 Bainbridge Avenue, Bronx County (the Bainbridge address), and on the deed registration for the subject property, 320 Nassau Blvd, Garden City, were purportedly incorrect due to errors by Arin's real estate counsel at the time Arin purchased the Bainbridge property, yet Arin never sought an affidavit from counsel to explain the error, and Arin explains it only as a "mystery." Moreover the summons and complaint, among many other notices, were sent to these addresses, which purportedly housed defendants Samcity and Arin's real estate attorney's office, and were not returned as undeliverable, but no affidavit was sought by Arin from anyone at either address to explain why these correspondences were not forwarded to Arin. Additionally, while Arin asserts that it used a P.O. box as its business address for a number of years, the P.O. box recited on the lease, while similar, is not the same as the P.O. box recited by plaintiff's vice president in his affidavit. Arin's secretary and shareholder, also averred that, since 2005, Arin has used the business address of 705 Rhinelander Avenue, Bronx County, however, in reply, its vice president avers that the address used is 705 Rylander Avenue. While poor draftsmanship or typographical errors might explain some of these anomalies, it does not explain why Arin submitted a lease to show that it was Samcity's out-of-possession landlord, where the lease affirmatively refutes such an assertion, or the lack of any affirmative evidence of why those notices sent to the Bainbridge Ave. and Nassau Blvd. addresses were never forwarded to Arin. Under these circumstances, there were sufficient facts in the record to support the court's inference of deliberate avoidance of process in this case, or at least, that Arin has not demonstrated that it did not receive notice in time to defend this action.").

CPLR 5015(a)(1) - No reasonable excuse proffered to support vacating dismissal pursuant to 22 NYCRR 202.27

Chase Home Fin., LLC v. Desormeau, 152 A.D.3d 1033, 59 N.Y.S.3d 812 (3d Dep't 2017) ("Even if plaintiff's motion were timely, denial of the motion was proper as plaintiff failed to demonstrate a reasonable excuse for its failure to proceed. 'A motion to vacate a dismissal pursuant to 22 NYCRR 202.27 must be supported by a reasonable excuse for the failure to proceed and a meritorious cause of action' (citations omitted). Plaintiff's counsel alleged that the delay in proceeding with the foreclosure action was due to the transfer of the mortgage loan to a new servicer and the need to comply with Administrative Order No. 548/10, which required that plaintiff review all documents relied upon in the foreclosure action. To demonstrate its compliance with the review, plaintiff relied upon the affidavit of Nathan Abeln, sworn to April 10, 2012. Inasmuch as the Abeln affidavit was executed 14 months prior to the order of dismissal, it cannot serve as a basis for a reasonable excuse. Plaintiff's counsel further alleged that the delay was due to the need to comply with Administrative Order No. 431/11, which required that plaintiff's counsel undertake a separate review of the loan documents and submit an affidavit of merit. The review conducted by plaintiff's counsel was not completed until June 27, 2013, and plaintiff has offered no reason why its counsel could not complete review of the documents and proceed with the foreclosure action within the 14-month period following execution of the Abeln affidavit and prior to entry of the order dismissing the action. Therefore, even if we were to reach the merits of plaintiff's motion, we would find no reasonable excuse for plaintiff's failure to proceed, which would make it unnecessary to determine whether plaintiff had demonstrated a meritorious cause of action (citation omitted).").

CPLR 5015(a)(1) – Trial court should not have vacated default - Conclusory and undetailed allegation of "law office confusion" does not constitute a reasonable excuse

OneWest Bank, FSB v. Singer, 153 A.D.3d 714, 59 N.Y.S.3d 480 (2d Dep't 2017) ("Contrary to OneWest's contention, it failed to provide a detailed and credible explanation of the default (citations omitted). Rather, counsel's affirmation in support of the motion contained only the conclusory and undetailed allegation of 'law office confusion' after being substituted as counsel for OneWest, which does not constitute a reasonable excuse (citations omitted). No other evidence was submitted to corroborate the allegation. OneWest, therefore, failed to demonstrate a reasonable excuse for its default (citations omitted). Accordingly, the Supreme Court improvidently exercised its discretion in granting OneWest's motion to vacate its default (citations omitted).").

CPLR 5015(a)(1) – Default not vacated- Plaintiff's motion to vacate default made 18 months after begin served with order and he made statement directly contrary to critical allegation in complaint

Marston v. Cole, 147 A.D.3d 678, 48 N.Y.S.3d 116 (1st Dep't 2017) ("The court may grant a motion to vacate a default on grounds of excusable default and a showing of a meritorious defense, if the motion is made within one year after service of the order entered on default, with written notice of its entry (citations omitted). Marston did not move to vacate the order entered on default

until February 18, 2014, nearly 18 months after he was served with the order and requisite notice. Furthermore, in support of his motion, Marston sought to demonstrate a meritorious defense by making a statement directly contrary to a critical allegation in his complaint. Accordingly, the motion court providently exercised its discretion not to vacate the default (citation omitted).").

CPLR 5015(a)(1) - Law office failure here not a reasonable excuse

Hill v. McCrae, 146 A.D.3d 1131, 45 N.Y.S.3d 273 (3d Dep't 2017) ("In October 23, 2014, the parties appeared for a conference before Supreme Court to discuss outstanding discovery issues. At that conference, Supreme Court ordered that McCrae's deposition be held on or before December 5, 2014 and scheduled a compliance conference for January 29, 2015. McCrae ultimately was not deposed and when neither McCrae nor Gonzalez or their counsel appeared for the January 2015 compliance conference, both plaintiff and O'Brien orally moved for default judgments pursuant to 22 NYCRR 202.27. … Here, the excuse of law office failure proffered by McCrae and Gonzalez was not a reasonable excuse for their nonappearance at the January 2015 compliance conference, particularly given that their counsel had a history of ignoring communications from the opposing parties and, at the time of the compliance conference, McCrae had yet to be deposed, despite Supreme Court's order that such deposition be completed on or before December 5, 2014 (citations omitted). In the absence of a reasonable excuse, we need not reach the question of whether McCrae and Gonzalez demonstrated a meritorious defense or cross claim (citations omitted).").

CPLR 5015(a) / 2005 - Vacating default- instance of excusable law office failure

Luderowski v. Sexton, 152 A.D.3d 918, 59 N.Y.S.3d 505 (3d Dep't 2017) ("Here, defendants attribute their failure to timely serve an answer to law office failure, namely, defense counsel's admittedly mistaken belief that one of his former associates had timely answered. This associate, who had been handling the matter, left the firm around the time that plaintiffs served defendants with the amended decision and order, thus commencing the period within which defendants had to answer. Defense counsel incorrectly assumed that this associate had filed and served the answer in the course of 'wrap[ping] up' his work for the firm and did not discover this error until after plaintiffs served him with notice of their intention to seek default judgments. Under the circumstances, we find that defendants' default was attributable to an excusable instance of law office failure (citations omitted). The record reveals that, once the error was discovered, it was promptly cured (citations omitted). Defendants' participation in significant motion practice before defaulting also indicates that they had no intention of abandoning their defense (citations omitted).").

CPLR 5015(a)(1) - Defendant establishes reasonable excuse for Secretary of State not having updated address on file

Li Fen Li v. Cannon Co., Inc., 155 A.D.3d 858, 63 N.Y.S.3d 702 (2d Dep't 2017) ("'A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense' (citation omitted). While a corporate defendant's failure to update its address for service that is kept on file with the Secretary of State

generally does not constitute a reasonable excuse (citations omitted), a court is not precluded from finding a reasonable excuse in such a case where the circumstances warrant it (citations omitted). Here, Ekistics established a reasonable excuse by submitting evidence that it attempted to update its address on file with the Secretary of State at the time it moved to a new location, that it was unaware that its address had not been updated in the Secretary of State's files, that it did not acquire actual notice of this action until long after the order authorizing entry of a default judgment against it had been issued, and that the plaintiff knew its actual business address but sent no notice of the action to that address (citations omitted). Moreover, Ekistics demonstrated a potentially meritorious defense to the action by submitting evidence that it had no control over, and no responsibility for, a power cable on the sidewalk over which the plaintiff allegedly tripped. Accordingly, the motion by Ekistics pursuant to CPLR 5015(a)(1) to vacate its default was properly granted.").

CPLR 5015(a)(1) - Vacating Default-no reasonable excuse proffered

Lee v. Latendorf, 2018 NY Slip Op 04709 (2d Dep't 2018) ("Here, the Supreme Court providently exercised its discretion in determining that the plaintiffs did not offer a reasonable excuse for their default. The excuse proffered by the plaintiffs' former attorney, that he failed to appear at the May 19, 2015, conference due to a malfunctioning GPS system and that he 'got lost,' was unreasonable under the circumstances, as it was not a detailed and credible explanation for the claimed law office failure. Moreover, the plaintiffs failed to set forth any excuse, let alone a reasonable one, for their former attorney's failure to appear at the compliance conference scheduled for February 18, 2015, or why he arrived late for the adjourned conference on February 26, 2015.").

Matter of Matthew C. v. Robin B., 2018 NY Slip Op 04078 (1st Dep't 2018) ("Respondent failed to demonstrate a reasonable excuse for her default (citations omitted). She presented no evidence to substantiate her alleged lack of funds to travel to New York City to appear at the hearing (citations omitted). She failed to timely contact the court to inform it of her unavailability, and she failed to make herself available by telephone at the time the case was called. Instead, she went about her day, as scheduled, including attending a physical therapy appointment, and waited until after the case was called and adjudicated in her absence to make contact with the court (citation omitted).").

Hertz Vehicles, LLC v. Gejo, LLC, 161 A.D.3d 549 (1st Dep't 2018) ("'A defendant seeking to vacate a default under [CPLR 5015(a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action' (citation omitted). Here, while MPS's initial excuse of law office failure for failing to timely answer may be reasonable, MPS was dilatory in asserting its rights (citations omitted). MPS retained new counsel about eight months prior to entry of the default judgment, yet counsel waited until the eve of the expiration of the one-year time limit before moving to vacate. MPS provided no excuse for why its new counsel failed to address the pending default judgment motion during the time period before a decision was rendered, or why it waited almost another year to move to vacate the default judgment.").

Golf Glen Plaza Niles, Il. L.P. v. AMCOID USA, LLC, 160 A.D.3d 1375 (4th Dep't 2018) ("Contrary to defendant's further contention, the court properly denied as untimely the request in his motion to vacate the default judgment and allow him to proceed on the merits on the ground that he had a reasonable excuse for the default and has a meritorious defense (citation omitted). Moreover, even if defendant had timely moved to vacate the default on that ground, we conclude that defendant's assertion that he erroneously assumed that his wife's cousin and her attorney would respond to the complaint on his behalf does not constitute a reasonable excuse (citations omitted). Further, defendant's unsubstantiated claim that the signatures on the assignments were forged fails to establish that he has a meritorious defense (citations omitted).").

CPLR 5015(a)(1) - Vacating Default-reasonable excuse provided

Benchmark Farm, Inc. v. Red Horse Farm, LLC, 2018 NY Slip Op 04522 (2d Dep't 2018) ("Here, the defendant submitted the sworn affidavit of its principal, who stated that the defendant did not learn of the action or the judgment until August 2016, and that approximately one month thereafter it moved to vacate the judgment. The affidavit indicated that in 2003 the defendant's principal had moved his residence from the address on file with the Secretary of State and that neither the defendant nor its principal had received mail at that address since 2004. The affidavit also provided that the defendant's address had not been updated with the Secretary of State. There is no evidence in the record that the defendant or its agent received actual notice of the summons, which was delivered to the Secretary of State, in time to defend this action (citations omitted). Although the defendant did not explain why it failed to update its address with the Secretary of State, 'there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay' (citations omitted), and there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had knowledge of the defendant's actual business address and had written to the defendant at that address regarding the dispute that gave rise to the plaintiff's complaint (citations omitted).").

CPLR 5019 - Validity and correction of judgment or order

CPLR 5019 - Plaintiff's request that the action be allowed to continue against the individual who, it appears, assumed movant's identity, i.e., the 'Colin M. Smith' who represented himself to be an attorney with law offices at 721 Fifth Avenue, New York, NY 10022, and purported to enter into the subject contract, should have been granted

Dobbs v. Smith, 151 A.D.3d 418, 52 N.Y.S.3d 860 (1st Dep't 2017) ("Movant's motion for summary judgment dismissing the breach of contract claims against him was correctly granted upon movant's unrebutted showing that he was not the 'Colin M. Smith' with whom plaintiff had contracted. However, since movant sought dismissal only as against himself, plaintiff's request

that the action be allowed to continue against the individual who, it appears, assumed movant's identity, i.e., the 'Colin M. Smith' who represented himself to be an attorney with law offices at 721 Fifth Avenue, New York, NY 10022, and purported to enter into the subject contract, should have been granted (citation omitted).").

ARTICLE 53 - RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS

CPLR 5302 - Applicability

CPLR 5302 - English award of costs does not constitute a penalty

Hill Dickinson LLP v. Il Sole Ltd., 149 A.D.3d 471, 49 N.Y.S.3d 888 (1st Dep't 2017) ("Were we to review Hirtenstein's challenge to the recognition of the British judgment, we would find it unavailing. It is undisputed that the foreign money judgment is 'final, conclusive and enforceable' (citation omitted) and the grounds for non-recognition are inapplicable (citation omitted). The English court's award of costs to compensate Hill Dickinson for having to defend an action by defendants does not constitute a penalty (citation omitted).").

CPLR 5304 - Grounds for non-recognition

CPLR 5304 - Grounds set forth in CPLR 5304 for non-recognition are inapplicable

Marshall v. Fleming, 161 A.D.3d 496 (1st Dep't 2018) ("The motion court properly recognized the Australian judgment, which was 'final, conclusive and enforceable where rendered' (citation omitted). The grounds set forth in CPLR 5304 for non-recognition are inapplicable. Contrary to defendants' contention, the Australian judgment is not repugnant to New York's statute of limitations (citation omitted). The judgment did not arise from a time-barred claim; it represents the costs associated with defendants' unsuccessful motion to dismiss the Australian action on the ground of forum non conveniens. Recognition here would not be 'the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense' (citation omitted).").

ARTICLE 55 - APPEALS GENERALLY

CPLR 5501 - Scope of review

CPLR 5501 - Party Finality Doctrine

Hain v. Jamison, 28 N.Y.3d 524, footnote 2, 46 N.Y.S.3d 502, 68 N.E.3d 1233 (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).

CPLR 5501(c) - The amounts awarded for plaintiff's injuries deviate materially from what is reasonable compensation

Nawrocki v. Huron St. Dev. LLC, 161 A.D.3d 697, 74 N.Y.S.3d 494 (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, 2018 NY Slip Op 04454 (4th Dep't 2018) ("Thus, we conclude that defendants are not aggrieved by the judgment, and their appeals must be dismissed (citations omitted). 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., 74 N.Y.S.3d 881 (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 - Since plaintiff did not appeal, the Court could not reinstate the complaint

Hain v. Jamison, 28 N.Y.3d 524, footnote 3 (2016) (Following the Appellate Division decision granting co-defendant Farm's summary judgment motion, only the Jamison co-defendants, but not the plaintiff, moved for leave to appeal. As a result, although Court of Appeals reversed, it could not reinstate the complaint against Farm.). *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).

CPLR 5511 - Aggrievement – language 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, 54 N.Y.S.3d 422 (2d Dep't 2017) ("Inasmuch as the Supreme Court granted the plaintiffs' motion, they are not aggrieved by the order appealed from (citation omitted). On appeal, their sole contention relates to handwritten language on the order, which is not part of any decretal paragraph. The first part of the notation states that '[t]his order of Reference does not validate the lien, it just computes the amount.' However, 'findings of fact and conclusions of law which do not grant or deny relief are not independently appealable' (citations omitted). 'Merely because the order appealed from contains language or reasoning that a party deems adverse to its interests does not furnish a basis for standing to take an appeal'' (citations omitted). The second part of the notation challenged by the plaintiffs states that the order is 'without prejudice to a dispute with the NYC Health Department' as to the amount of the lien. The plaintiffs are not aggrieved by this language, since 'any dispute as to the amount of the lien may be resolved after a reference pursuant to RPAPL 1321' (citation omitted).").

CPLR 5513 - Time to take appeal

CPLR 5513 - Appeal time runs from service of order with written notice of entry. Despite premature notice of appeal, court exercises discretion to treat it as valid.

Paternosh v. Wood, 151 A.D.3d 1733, 56 N.Y.S.3d 747 (4th Dep't 2017) ("As an initial matter, we reject defendant's contention that plaintiffs' appeal should be dismissed as untimely filed. Even where, as here, the appellant is the party that prepares and files the judgment or order appealed from, the 30-day period in which to file a notice of appeal is triggered only by service of a copy of the judgment or order, together with 'written notice of its entry,' on the opposing party (citations omitted). The record here does not contain a notice of entry, and it therefore does not establish that the 30-day period ever began to run (citations omitted). Although plaintiffs' notice of appeal thus appears to be premature, rather than late as contended by defendant, we exercise our discretion to treat it as valid (citation omitted).").

CPLR 5513 - Notice of appeal untimely- 30 days runs from original order, not supplemental order, which contained no material change

Matter of Twin Bay Vil., Inc., 2018 NY Slip Op 04405 (3d Dep't 2018) ("Initially, we find respondents' appeal from the May 2016 supplemental order to be untimely. In conjunction with their original application to judicially dissolve the corporation, petitioners requested that Supreme Court (Muller, J.) nullify a $14,000 mortgage between respondent Tamara Chomiak and the corporation. In its March 2016 order, the court declared the purported mortgage null and void; however, after appointment by the receiver, it was determined that the Clerk's office needed more specific language describing the subject mortgage in order to nullify it. Accordingly, the court

issued the May 2016 supplemental order to modify its March 2016 order, specifying the recording date and book number of the subject mortgage. As there is no material change in the supplemental order, the notice of appeal — to be timely — must have been filed within 30 days from March 23, 2016, which is the date of service of a copy of the March 2016 order with notice of entry (citation omitted). Accordingly, as respondents' July 2016 notice of appeal was not timely filed, respondents' appeal from the May 2016 supplemental order is dismissed (citations omitted).").

CPLR 5515 - Taking an appeal

CPLR 5515 - Appeal permitted where order differs from consent

Matter of Jordan v. Horstmeyer, 152 A.D.3d 1097, 60 N.Y.S.3d 549 (3d Dep't 2017) ("Turning to the substance of the appeal from that order, Family Court denied the mother's objections to the Support Magistrate's order upon the ground that she could not challenge an order entered upon consent. While '[i]t is well settled that no appeal lies from an order issued on consent' (citations omitted), that rule does not apply where the order 'differs from or exceeds the consent' (citation omitted). The arguments advanced by the mother fall within the exception to the rule barring appeals from consent orders and, accordingly, Family Court's order must be reversed.").

CPLR 5522 - Disposition of appeal

CPLR 5522 - Moot appeal

North Geddes St. Props., LLC v. Iglesia Misionera Monte DeSion, 2018 NY Slip Op 04150 (4th Dep't 2018) ("Given the above described circumstances, we dismiss defendant's appeal from the first order. Plaintiff's cause of action for specific performance is now moot because the transaction has closed and defendant failed either to post the required bond or to appeal from the second order (citations omitted). In addition, although defendant purports to challenge the granting of its petition for permission to sell, we note that defendant is not aggrieved thereby (citation omitted).").

CPLR 5522 - Academic appeal – Exception "where necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent"

Markowits v. Friedman, 144 A.D.3d 998, 42 N.Y.S.3d 52 (2d Dep't 2016) ("'While it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent' (citations omitted). Here, the plaintiffs are correct that the Supreme Court lacked the authority to direct Alexander Markowits to participate in the arbitration, since the order compelling arbitration merely precludes Alexander Markowits from proceeding in the action (citation omitted). Further, the subject portion of the order could spawn adverse legal consequences for Markowits should the defendants seek to hold him in contempt for failing to comply with it. Accordingly, we vacate so much of the order as granted that branch of the Friedmans' motion

which was, in effect, to direct Alexander Markowits to notify the arbitrator, by March 19, 2015, of dates available to appear for an arbitration during the weeks of April 16, 2015, or April 24, 2015.").

CPLR 5526 - Content and form of record on appeal

CPLR 5526 - Insufficient record on appeal

Woodman v. Woodman, 2018 NY Slip Op 04479 (4th Dep't 2018) ("Here, defendant contends that plaintiff did not timely respond to his discovery requests, and failed to disclose discovery material and to file a note of issue and certificate of readiness. The record on appeal, however, contains only the notice of appeal, the decision and order of Supreme Court, the pleadings, and excerpts from the transcript of a hearing, and thus the 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, 74 N.Y.S.3d 923 (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 5528 - Content of briefs and appendices

CPLR 5528(a)(5) - Omission of relevant documents in appendix rendered it impossible for appellate court to determine issues

Wells Fargo Bank, N.A. v. Oyenuga, 64 N.Y.S.3d 905 (2d Dep't 2017) ("In this mortgage foreclosure action, the defendant Modupe Oyenuga appeals from a judgment of foreclosure and sale, raising issues, inter alia, regarding service of the summons and complaint and the plaintiff's delay in moving for a default judgment. Oyenuga perfected the appeal by using the appendix method, but he did not include in the appendix the note and mortgage, the summons and complaint, the plaintiff's motions for a default judgment and a judgment of foreclosure and sale, and all of the Supreme Court's prior orders. The omission of these documents renders it impossible to determine any of the Oyenuga's claims. Accordingly, the appeal must be dismissed (citation omitted).").

ARTICLE 57- APPEALS TO THE APPELLATE DIVISION

CPLR 5701 - Appeals to appellate division from supreme and county courts

CPLR 5701 - Order on motion to compel a witness to answer questions propounded at a deposition is not appealable as of right

Donato v. Nutovits, 149 A.D.3d 1037, 52 N.Y.S.3d 488 (2d Dep't 2017) ("An order denying a motion to compel a witness to answer questions propounded at an examination before trial is akin to a ruling made in the course of the examination itself and is not appealable as of right, even where it was made upon a full record and on the plaintiff's motion to compel responses (citations omitted). Here, the plaintiff never sought leave to appeal. Under these circumstances, we decline to grant leave to appeal on the Court's own motion (citations omitted). Accordingly, we dismiss the appeal.").

CPLR 5701(a)(2) - Given extraordinary nature of sua sponte relief, the dismissal of the complaint, Appellate Division "nostra sponte" deems notice of appeal to be motion for leave and grants leave

All Craft Fabricators, Inc. v. ATC Assoc., Inc., 153 A.D.3d 1159, 60 N.Y.S.3d 660 (1st Dep't 2017) ("To the extent that the order sua sponte dismissed the complaint, that portion of the order is not appealable as of right (citations omitted). However, given the extraordinary nature of the sua sponte relief, that is, dismissal of the complaint, we nostra sponte deem the notice of appeal from that portion of the order to be a motion for leave to appeal, grant such leave citations omitted), and reverse the order for the reasons stated above.").

ARTICLE 62 - ATTACHMENT

CPLR 6201 - Grounds for attachment

CPLR 6201 - Court cannot attach real estate outside its jurisdiction; distinguishes Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010)

JSC VTB Bank v. Mavlyanov, 154 A.D.3d 560, 63 N.Y.S.3d 40 (1st Dep't 2017) ("The court should not have ordered attachment of real estate located in California, i.e., outside its jurisdiction (citations omitted). Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010), is distinguishable. It involved uncertificated ownership/membership interests in limited liability companies and a corporation, which could be attached by serving the manager of the entities in New York (citation omitted). By contrast, a sheriff levies on real property 'by filing with the clerk of the county in which the property is located a notice of attachment' (citation omitted). Even if a New York court could attach real estate located in California, we would stay all claims related to the California properties, because, only about a month after

plaintiff sued here, it brought an action in that state against many of the same defendants as in the case at bar, alleging fraudulent conveyance with respect to the California properties. The California action 'offers more' than the case at bar (citations omitted), because, as plaintiff admits, a notice of pendency against the California properties can be filed only in that state, not here. It also appears that the California action will go to trial before the case at bar (citation omitted).").

CPLR 6212 - Motion papers

CPLR 6212 - Wrongful attachment damages; Issuing restraining notices is not an attachment

Benzemann v. Citibank N.A., 149 A.D.3d 586, 53 N.Y.S.3d 33 (1st Dep't 2017) ("Plaintiff's claim for 'wrongful attachment,' which alleges that the defendants were collectively responsible for plaintiff's property being wrongfully restrained, also fails. Plaintiff does not plead that there was an 'attachment' governed by article 62 of the CPLR, but rather that there were restraining notices issued pursuant to CPLR 5222. 'The mere fact that property has been subjected to some form of restraint does not serve as a basis for the statutory claim of wrongful attachment' (citation omitted). We adopt the Fourth Department's reasoning.").

CPLR 6212 - Wrongful attachment damages; Plaintiffs strictly liable for damages

Citibank, N.A. v. Keenan Powers & Andrews PC, 149 A.D.3d 484, 49 N.Y.S.3d 895 (1st Dep't 2017) ("A finding of fault is not required to recover damages under this provision, as plaintiffs are 'strictly liable' for the damages they caused (citation omitted). Under the circumstances, we find that the full amount of defense costs incurred by Secure Title in the underlying litigation was recoverable as damages for plaintiffs' wrongful attachment under CPLR 6212(e) (citations omitted).").

ARTICLE 63 – INJUNCTION

CPLR 6301 - Grounds for preliminary injunction and temporary restraining order

CPLR 6301 - No jurisdiction to entertain injunction application because no action was pending

Matter of Town of Cicero v. Lakeshore Estates, LLC, 152 A.D.3d 1168, 60 N.Y.S.3d 730 (4th Dep't 2017) ("'[T]he valid commencement of an action is a condition precedent to [Supreme Court's] acquiring the jurisdiction even to entertain an application for a[n] . . . injunction' (citations omitted). Here, however, there is no action supporting the application for an injunction. Indeed, the order to show cause and supporting papers themselves constitute the only request for an injunction. While 'courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal' (citation omitted), more than improper form is involved here (citation omitted).

Converting the order to show cause and supporting papers into a summons and complaint in these circumstances would effectively permit the Town to seek an injunction by motion, a result that is at odds with the well-established principle that '[t]he pendency of an action is an indispensable prerequisite to the granting of a[n] . . . injunction' (citations omitted). We thus conclude that the court lacked jurisdiction to entertain the Town's request (citation omitted). Without an underlying action the order putatively on appeal does not constitute an appealable paper (citation omitted). The appeal must therefore be dismissed.").

CPLR 6312 - Motion papers

CPLR 6312(b) - Preliminary injunction, not TRO, was appropriate, and the former REQUIRES an undertaking

Slifka v. Slifka, 2018 NY Slip Op 04515 (1st Dep't 2018) ("The court erred in enjoining the sale of property at issue pending the decision by the Surrogate pursuant to a temporary restraining order, which does not require an undertaking (citation omitted). The TRO is merely a provisional remedy pending a hearing on a motion for a preliminary injunction (citation omitted), and the court did not schedule a hearing on plaintiffs' motion. However, it issued the 'stay/TRO' after allowing both sides an opportunity to be heard. Thus, the relief is in fact a preliminary injunction, and plaintiffs are required to post an undertaking (citation omitted). We remand to Supreme Court to fix the amount of the undertaking (citations omitted).").

ARTICLE 65 - NOTICE OF PENDENCY

CPLR 6501 - Notice of pendency; constructive notice

CPLR 6501 - Need ongoing action

Piller v. Tribeca Dev. Group LLC, 156 A.D.3d 1257 (3d Dep't 2017) ("Further, as the complaint is reinstated against Eisner, there is an ongoing action in which 'the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property,' and plaintiff's notice of pendency must be reinstated (citations omitted).").

CPLR 6514 - Motion for cancellation of notice of pendency

CPLR 6514(c) - Where the court invokes its inherent power to cancel the notice of pendency and not pursuant to CPLR 6514(c), the court has no authority to award costs and disbursements under CPLR 6514(c). *Congel v. Malfitano,* 61 A.D.3d 807, 809, 877 N.Y.S.2d 443, 446 (2d Dep't 2009). However, the court retains the right to award costs and attorneys' fees under 22 NYCRR 130-1.1 for frivolous conduct. *See Delidimitropoulos v. Karantinidis,* 142 A.D.3d 1038, 38 N.Y.S.3d 36 (2d Dep't 2016).

ARTICLE 75 - ARBITRATION

CPLR 7501 - Effect of arbitration agreement

CPLR 7501 - Unambiguous language evinces parties' unequivocal intent to arbitrate

Suckling v. Iu, 151 A.D.3d 664, 54 N.Y.S.3d 585 (1st Dep't 2017) ("The dispute resolution clause (section 14.11) of the operating agreements for defendants 56 Edison LLC and 52 Reeve LLC provides that 'the Members shall submit [certain] dispute[s] to an arbitration procedure' (subd [b]; emphasis added). This unambiguous language evinces the parties' 'unequivocal intent to arbitrate the relevant dispute' (citation omitted). The arbitration clause is no mere agreement to agree; it is 'clear, explicit and unequivocal,' and does not depend upon 'implication or subtlety' (citation omitted). Nor does the lack of a designated arbitration procedure render the clause unenforceable, because CPLR 7504 provides an objective method for supplying that missing term (citations omitted).").

CPLR 7503 - Application to compel or stay arbitration

CPLR 7503 - Fee sharing agreement and *Brady*

Adams v. Kent Sec. of N.Y., Inc., 156 A.D.3d 588 (1st Dep't 2017) ("Applying the foregoing standard, we hold that plaintiff has made a preliminary showing that the fee sharing and venue provisions in the arbitration agreement have the effect of precluding him from pursuing his statutory wage claim in arbitration. We remand for further proceedings, consistent with Brady, which, at a minimum, would include proof of plaintiff's income and assets, as well as proof of the expected costs and fees to arbitrate this dispute in Florida. Because the parties' arbitration agreements contains a severability clause, in the event plaintiff prevails on his claim that the aforementioned fee sharing and venue provisions should be held unenforceable under Brady, the matter should proceed to arbitration in New York, with defendant to bear the costs of the arbitration.").

CPLR 7503 / 7511 - Where arbitration clause stated that "[a]ny dispute arising under the terms of this agreement shall be resolved by the parties voluntarily submitting to binding arbitration," and petitioner did not agree to arbitrate, the petition to vacate the award was correctly granted. *Matter of Poma v. Arici*, 75 N.Y.S.3d 910 (1st Dep't 2018).

CPLR 7511- Vacating or modifying award

CPLR 7511 - Public policy precludes enforcement of penalty imposed by arbitrator

Matter of Bukowski (State of NY Dept. of Corr. & Community Supervision), 148 A.D.3d 1386, 50 N.Y.S.3d 588 (3d Dep't 2017) ("Accordingly, in view of the statutory and regulatory prohibitions against the use of unjustified physical force and the imposition of corporal punishment in all circumstances, and given that Bukowski not only unquestionably engaged in such prohibited conduct here, but also thereafter repeatedly lied about his actions, thus evidencing a failure to acknowledge the magnitude of his misconduct, we conclude that public policy precludes enforcement of the penalty imposed by the arbitrator in this matter (citations omitted). In reaching this result, we take no position as to the penalty that ultimately should be imposed; the appropriate penalty, which should be both effective and sufficiently address the public policy considerations previously discussed, is a matter for the arbitrator to resolve pursuant to the terms of the collective bargaining agreement (citations omitted). Accordingly, we affirm Supreme Court's order remitting the matter for the imposition of a new penalty.").

CPLR 7511 - Arbitrator's award was irrational and in conflict with CPLR 1209

Matter of Fast Care Med. Diagnostics, PLLC/PV v. Government Employees Ins. Co., 161 A.D.3d 1149 (2d Dep't 2018) ("An arbitration award may be vacated if the court finds that the rights of a party were prejudiced by (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator; (3) the arbitrator exceeding his or her power; or (4) the failure to follow the procedures of CPLR article 75 (see CPLR 7511[b]). In addition, an arbitration award may be vacated 'if it violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' (citations omitted). An arbitration award may also be vacated where it is in 'explicit conflict' with established laws and 'the strong and well-defined policy considerations' embodied therein' (citations omitted). We agree with the Supreme Court that the arbitrator's award was irrational and in conflict with CPLR 1209, which applies 'only where an infant is a party' to an arbitration proceeding (citations omitted). The infant patient was not a party to the arbitration; rather, Fast Care, as the infant's assignee, was the party that brought the arbitration (citation omitted). Therefore, we agree with the court that the arbitrator disregarded established law in determining that the requirements of CPLR 1209 applied here (citations omitted). Furthermore, the master arbitrator's determination that the assignment of benefits was not effective was not based on any requirement set forth in established law or regulations (citation omitted).").

CPLR 7513 - Fees and expenses

CPLR 7513 - Award of attorneys' fees did not exceed arbitrator's power- "mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the

issue to arbitration, with the resultant award being valid and enforceable." *Matter of R.F. Lafferty & Co., Inc. v. Winter*, 161 A.D.3d 535 (1st Dep't 2018).

ARTICLE 78 - PROCEEDING AGAINST BODY OR OFFICER

CPLR 7801 - Nature of proceeding

CPLR 7801 - No final determination, no exhaustion of administrative remedies, no actual concrete injury

David L. Ferstendig, *Once, Twice, Three Times a Maybe*, 677 N.Y.S.L.D. 2 (2017).).

The issue in *Matter of East Ramapo Cent. Sch. Dist. v. King*, 2017 N.Y. Slip Op. 02360 (March 28, 2017), related to a challenge brought by a local educational agency, the plaintiff East Ramapo Central School District ("the District"), to a determination of the State Education Department, a state education agency ("the State"). The State regulates the District's compliance with the requirements of the Individuals with Disabilities Education Act (the "IDEA").

To receive IDEA funding, the State must establish policies and procedures to assure that students with disabilities receive "a free appropriate public education in the least restrictive environment and an individualized education program tailored to their unique needs, and that these students and their parents are afforded certain procedural safeguards." *Matter of East Ramapo Cent. Sch. Dist. v. King*, 130 A.D.3d 19, 21 (3d Dep't 2015). The District's receipt of IDEA funding depends on its annual submission of a plan that assures that the District is complying with the State Education Department's policies and procedures. Here, in reviewing various student records, the State determined that the District's dispute resolution practices violated state and federal law and directed the District to take corrective measures. The District brought this Article 78 proceeding challenging the State's determination on the ground that its findings were unsupported by substantial evidence and were based on an erroneous construction of the IDEA.

The trial court dismissed the petition on the merits. The Appellate Division affirmed, but on the ground that Congress did not provide the District with a private right of action under the IDEA to challenge the State's determination. The court found the IDEA did not expressly confer such a private right of action and there was no evidence that Congress intended to create such a right.

The Court of Appeals affirmed, but yet again on a different ground. The Court did not decide the issue as to whether the District had a private right of action. Instead, it assumed it did, but found that the State had not made a final determination, that the District had not established that it had exhausted its administrative remedies, and that the District was "unable to articulate any actual, concrete injury that it has suffered at this juncture." 2017 N.Y. Slip Op. 02360 at ∗2. The Court noted that although the State had advised the District that its failure to comply could result in further enforcement actions, including the withholding of funds, the State had not made a final decision to withhold funds.

So, after three unsuccessful attempts, the District is left with a ruling that it cannot bring the proceeding at this point and with no assurances that if and when those impediments to finality are removed, it has a private right of action under the IDEA.

CPLR 7801 - Matter not ripe for judicial review

David L. Ferstendig, *In Zoning Dispute, Petitioner Seeks to Annul Positive Declaration*, 666 N.Y.S.L.D. 2, 3 (2016).

In *Ranco Sand & Stone Corp. v. Vecchio*, 2016 N.Y. Slip Op. 02477 (March 31, 2016), Ranco owned two pieces of contiguous property which were located in an area zoned for residential use. However, in 1997, Ranco leased one parcel to a private bus company which used the land as a trucking station and bus yard. Even though this was clearly a nonconforming use, the Town did not seek to enforce the residential zoning requirements. In 2002, Ranco sought to rezone the parcel to heavy industrial use.

In 2004, the Town Planning Board recommended approval of the application but no further action was taken for five years, when the Town Board adopted a resolution issuing a positive declaration pursuant to the State Environmental Quality Review Act (SEQRA) that the rezoning of the parcel "may have a significant effect on the environment." It required Ranco to prepare a draft environmental impact statement (DEIS). Such a statement is to describe "significant adverse environmental impacts" and include alternatives and mitigation measures. It provides the agency with information to assist in assessing the possible environmental consequences.

Ranco commenced this CPLR Article 78 proceeding seeking to annul the positive declaration and requested mandamus relief. The respondent moved to dismiss for failure to state a cause of action. The Supreme Court granted the motion, finding that the issue was not ripe for judicial review. The Appellate Division affirmed, holding that the positive declaration did not give rise to a justiciable controversy.

Ranco argued that the requirement that it prepare a DEIS would cause it actual and real financial injury, and thus there was a justiciable controversy.

In order to bring an Article 78 proceeding to challenge an administrative action, it needs to be "final and binding upon the petitioner." The issue here was whether the positive declaration was ripe for judicial review. The Court of Appeals noted that when challenging an action under SEQRA, a positive declaration is ripe for review when two requirements are met -

> First, "the action must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process'" (citation omitted). This threshold requirement consists of "'a pragmatic evaluation . . . of whether the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury'" *(id.)*. Second, "there must be a finding that the apparent harm inflicted by the action 'may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" *(id.)*.

Id. at *4.

The Court concluded that, in this action, Ranco satisfied only the first requirement, but not the second, and to accept Ranco's position would, in essence, conflate the two requirements -

> Indeed, Ranco's approach would lead to convergence of the two requirements set forth in Gordon by reducing the analysis to whether a petitioner will incur unrecoverable costs. The inevitable result would be that every positive declaration requiring the creation of a DEIS would be ripe for review because the preparation of a DEIS by its nature carries financial costs that generally cannot be recouped, regardless of the outcome of the SEQRA process and the ultimate determination on a petitioner's zoning application. However, courts should seek to avoid this type of "piecemeal review of each determination made in the context of the SEQRA process [which] would subject it to 'unrestrained review. . . result[ing] in significant delays in what is already a detailed and lengthy process'" (citation omitted).

Id. at *5.

The Court of Appeals noted that generally a positive declaration that requires a DEIS is not a final agency action, but rather an initial step in the SEQRA process.

CPLR 7803 - Questions raised

CPLR 7803 - Determination was not arbitrary and capricious

Matter of Krug v. City of Buffalo, 2018 NY Slip Op 04118 (4th Dep't 2018) ("We reject respondent's contention that its determination was not arbitrary and capricious. Respondent has a duty to provide a defense to petitioner 'if his alleged conduct occurred or allegedly occurred while he was acting within the scope of his public employment or duties' (citations omitted), and the determination that petitioner was not acting within the scope of his public employment or duties 'may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious' (citation omitted). Here, it is undisputed that petitioner was on duty and working as a police officer when the alleged conduct occurred (citation omitted).").

CPLR 7803(4)

David L. Ferstendig, *Split Opinion on Whether NYC Commission on Human Rights' Determination Was Supported By Substantial Evidence*, 691 N.Y.S.L.D. 2-3 (2018).

Split Opinion on Whether NYC Commission on Human Rights' Determination Was Supported By Substantial Evidence

Did Petitioners Carry Burden Of Demonstrating Undue Hardship?

As practitioners are well aware, the questions that can be raised on a CPLR Article 78 proceeding brought to challenge a determination are limited. See CPLR 7803. One of these questions is "[w]hether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." CPLR 7803(4)

Here, we are also dealing with a similar provision, Administrative Code of City of New York § 8-123(e), which provides that the findings of the New York City Commission on Human Rights (Commission) "shall be conclusive if supported by substantial evidence on the record considered as a whole."

In Matter of Marine Holdings, LLC v. New York City Comm. on Human Rights, 2018 N.Y. Slip Op. 03303 (May 8, 2018), the petitioners' tenant had filed a complaint with the Commission, alleging that the petitioners had discriminated against the tenant – who could not enter or leave the apartment without being carried – by refusing her request to install a handicap (wheelchair) accessible entrance to her apartment. The petitioners brought this proceeding, challenging the Commission's determination, directing them to install a wheelchair-accessible entrance, which involved converting a window into a doorway and installing a ramp.

After the Commission issued a probable cause determination, a hearing was conducted, and the Administrative Law Judge (ALJ) found that petitioners did not discriminate unlawfully against the tenant because providing the proposed accommodation would create an undue hardship.

However, the Commission rejected the ALJ's findings; found that the petitioners did not carry their burden to establish undue hardship and that they unlawfully discriminated against the tenant and were required to make the modification; awarded the tenant $75,000 as damages for mental anguish; and imposed a $125,000 civil penalty.

The trial court denied the petition in part, ruling that the Commission's "determination that [petitioners] did not establish the affirmative defense of undue hardship based upon structural infeasibility is supported by substantial evidence in the record." Id. at ∗3. The Appellate Division reversed, finding that "the record did not contain any substantial evidence rebutting the petitioners' showing that it would be structurally infeasible to install a handicapped accessible entrance to [the tenant's] apartment." *Id*.

A majority of the Court of Appeals reversed, ruling that there was substantial evidence to support the Commission's conclusion that petitioners did not carry their burden of demonstrating undue hardship in the conduct of their business because the requested accommodation would be structurally infeasible. The relevant Administrative Code provision (§ 8-107(15)(a)) requires that

"reasonable accommodations," defined as an accommodation that "shall not cause undue hardship in the conduct of the covered entity's business" (NYC Administrative Code § 8-102(18)), be made for persons with disabilities.

The Court focused on evidence presented at the hearing that the petitioners had done a similar window-to-door conversion elsewhere in its residential complex:

> No evidence was presented that this prior window-to door conversion had imposed any hardship on petitioners, and substantial evidence supports the determination that petitioners did not prove that the proposed conversion would require alterations significantly different from the previous one. The Commission could rationally conclude that petitioners failed to carry their burden of proving that the proposed accommodation would cause undue hardship in the conduct of their business.

Id. at ∗1.

The dissent concluded to the contrary that the Commission's determination was not supported by substantial evidence and that the petitioners had met their burden of proving their undue hardship claim. It maintained that the Commission applied an improper standard, that is, whether the requested accommodation could be done, or was theoretically possible:

> An accommodation need not be physically impossible to cause an undue hardship, because most accommodations are theoretically possible—indeed, it is "possible" for petitioners to construct an entirely new building to accommodate the tenant. Instead, the reasonable accommodation standard requires an examination of whether the accommodation will "cause undue hardship in the conduct of the covered entity's business" (NYC Admin Code § 8-102 [18]). That all experts agreed that the work "could be done" is in no way dispositive. When the proper standard is applied, it is evident that petitioners' business, that of providing housing to its tenants, will suffer an undue hardship from this accommodation, as there is a possibility that neighbors will be displaced, that neighboring apartments will be harmed, that the building may be structurally degraded, and that gas lines could be ruptured.

Id. at ∗4.

Moreover, a modification can be "structurally feasible" and still cause undue hardship. The dissent noted that the Commission's improper summary dismissal of the petitioners' structural engineer's observation of the differences between the accommodation requested here and the accommodation provided in another of the petitioners' buildings was irrational. They included "the width of the windows, the lack of gas lines below the management office, and the length of the necessary ramp." *Id*.

CPLR Article 78

David L. Ferstendig, *Divided Court Holds First Responders Are Not Entitled to Accidental Disability Retirement Benefits*, 688 N.Y.S.L.D. 2-3 (2018)

Divided Court Holds First Responders Are Not Entitled to Accidental Disability Retirement Benefits

Majority Finds That Substantial Evidence Supported Respondent's Determinations That Petitioners Were Not Incapacitated As A Result of an Accident

The decision in *Matter of Kelly v. DiNapoli*, 2018 N.Y. Slip Op. 01016 (February 13, 2018), was the result of the appeal of two actions, both dealing with whether the petitioners, each first responders, were entitled to accidental disability retirement benefits (that are generally more generous than performance of duty disability retirement benefits). The issue, more precisely, was whether the petitioners were incapacitated "as the natural and proximate result of an accident … sustained in … service." Retirement and Social Security Law § 363(a)(i) (RSSL).

James J. Kelly was a police officer on duty during Hurricane Sandy who was sent with another officer to a home on which a tree had fallen, trapping the residents. The house appeared to be "very unstable" and there were downed wires. Operating under the belief that the fire department technical response unit would be delayed for several hours, Kelly entered the home in response to "blood-curdling screams" for help. When inside, Officer Kelly saw a resident impaled. While clearing away debris to free individuals under a pile of debris, he felt pain in his shoulder. When a rafter that was dangling from the roof began to fall, he reached up to brace the rafter (to avoid injury to another officer) further injuring his shoulder and neck.

When Kelly applied for accidental disability retirement benefits, the Hearing Officer found that the injury causing incident was "an accident" under RSSL § 363 because "[e] ntering that unstable structure was not within [petitioner's] regular and usual duties." *Id*. at ∗2. However, the respondent Comptroller overruled the Hearing Officer, and the Appellate Division confirmed the determination in an ensuing Article 78 proceeding.

Pat Sica was a firefighter, injured when responding to a medical emergency of an individual with breathing difficulties at a local supermarket. Shortly after assisting two unconscious individuals, he took ill and was taken to an emergency room. It was later revealed that he had been exposed to toxic gases in the supermarket, leading to a disabling heart condition. When Sica applied for accidental disability retirement benefits, the Hearing Officer found that the incident was an "accident" and his injuries "resulted from an unexpected and unforeseeable event, which arose during the performance of [Sica's] routine employment duties." *Id*. The Comptroller overruled the Hearing Officer's determination. However, the Appellate Division annulled the Comptroller's determination, concluding "that Sica 'was not responding to a fire that presented the inherent and foreseeable risk of inhaling toxic gases or smoke,' and that he 'was neither aware that the air within the supermarket contained toxic chemical gases, nor did he have any information that could reasonably have led him to anticipate, expect[,] or foresee the precise hazard when responding to the medical emergency at the supermarket' (citation omitted)." *Id*. at ∗3.

The Court of Appeals was unanimous in finding that Mr. Sica was not entitled to accidental disability retirement benefits, but was divided on the denial to Mr. Kelly. The majority noted that its prior precedent established that an injury-causing incident is considered "accidental" when it is "sudden, unexpected and not a risk of the work performed." *Id.* at ∗4. The Court emphasized that the focus is on the "precipitating cause of injury" and not on "the petitioner's job assignment." *Id*.

In evaluating the respondent's determination, the substantial evidence standard applied. That standard, which the Court characterized as "not an exacting one," "is less than a preponderance of the evidence … [and] demands only that a given inference is reasonable and plausible, not necessarily the most probable" Id. at ∗5. Based on this standard, the Court held that respondents' determinations were rational. It concluded that there was substantial evidence that neither petitioner was injured as a result of an "accident" because there were no "precipitating accidental event[s] … which w[ere] not a risk of the work performed." *Id*. at ∗4. The respondent could have rationally concluded that the petitioners "were acting within the scope of their 'ordinary employment duties, considered in view of the particular employment in question,' and that there was no sudden, unexpected event that was not an inherent risk of petitioners' regular duties (emphasis added)." *Id*. at ∗5.

In Kelly, the respondent concluded that the officer was expected to assist injured persons and to respond to emergencies. Significantly, while acknowledging that "a different result would not have been unreasonable," the Court concluded that there was substantial evidence to support the determination. In Sica, the majority similarly found that substantial evidence supported the respondent's conclusion that Sica was performing his regular duties as a firefighter; that he had been trained for the risk of exposure to toxic substances; that he had responded to a gas leak in the past; and that his job duties specifically required him to work "with exposure to … fumes, explosives, toxic materials, chemicals and corrosives."

The dissent, written by Judge Wilson, agreed that the Comptroller's determination in Sica should be reinstated because, "[a]s a firefighter, job-related exposure to toxic fumes is to be expected, and firefighters receive relevant training (Mr. Sica testified as much) and are provided protective gear to don when appropriate." *Id*.

However, he disagreed with the majority on Police Officer Kelly. The dissent noted that the rescue here was a job for firefighters, not the police, but because of the unavailability of the fire department, the officers attempted the rescue, during which the rafter gave way. The Comptroller's rationale rested on the proposition that because emergency response is part of police officers' jobs, anything that happens is not an accident. The dissent insisted that the proper analysis should begin with determining whether the nature of the hazard was a part of the bargained-for risks of the job; and if it was outside the bargained for risks, to then assess whether it was "sufficiently out of the ordinary risks of everyday life to constitute an accident." *Id*. at ∗6. It concluded that entering a collapsing building and confronting falling rafters during a hurricane when fire and EMS workers were unavailable is a hazard outside the bargained-for risks of the job. Moreover, the hazard was "out of the ordinary":

> In the ordinary course of our lives, we bend over; we rise from chairs; we walk down steps, some of which were previously visited by dogs; but we do not save lives by deflecting burning beams in collapsing homes during a hurricane — we imagine that for superheroes.

Id. at ∗7.

ARTICLE 83 - DISBURSEMENTS AND ADDITIONAL ALLOWANCES

CPLR 8303-a - Frivolous claims

CPLR 8303-a; 22 NYCRR 130- Plaintiff's conduct was frivolous, meriting award of costs and attorneys' fees

Divito v. Fiandach, 160 A.D.3d 1404 (4th Dep't 2018) ("We also reject plaintiff's various procedural challenges. The record belies his contention that the court erred in making the award sua sponte without affording him an opportunity to be heard (citation omitted). Defendant's motion explicitly sought an award of costs and attorney's fees resulting from plaintiff's frivolous conduct, and plaintiff had an opportunity to respond to that motion. Furthermore, contrary to plaintiff's contention, the court issued a written decision explicitly 'setting forth the conduct on which the award . . . [was] based, [and] the reasons why the court found the conduct to be frivolous' (citation omitted). The decision also adequately explained why the amount of the award was appropriate (citation omitted). We conclude that it is self-evident that the cost of vacating an income execution based upon false representations concerning a nonexistent default judgment should be shouldered by the party responsible for preparing and serving it.").

CPLR 8303-a; 22 NYCRR 130 - Sanctions awarded

ATS-1 Corp. v. Rodriguez, 156 A.D.3d 674, 67 N.Y.S.3d 60 (2d Dep't 2017) ("Under the circumstances of this case, including, but not limited to, the appellants' attempt to vacate the stipulation of settlement based upon their purported mistake, we find that much of the conduct of the appellant Cirilo Rodriguez and attorney George W. Echevarria, including their prosecution of this appeal, which is based upon the same meritless arguments advanced on the cross motion to vacate the stipulation of settlement, has been "undertaken primarily to delay or prolong the resolution of the litigation" (citation omitted). We find that this conduct warrants sanctions in the amount of $500 each on the appellant Cirilo Rodriguez and attorney George W. Echevarria.").

Liang v. Wei Ji, 155 A.D.3d 1018, 66 N.Y.S.3d 321 (2d Dep't 2017) ("Moreover, we reject the plaintiff's contention that the order directing the imposition of a sanction against him failed to comply with 22 NYCRR 130-1.2. That rule provides that '[t]he court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate.' Courts have not held that

the procedural dictates of 22 NYCRR 130-1.2 must be followed 'in any rigid fashion' (citations omitted). Here, in the order appealed from, the Supreme Court discussed the reasons why it was directing dismissal of the complaint. It then cited 22 NYCRR 130-1.1(a), and stated that the branch of the motion which was for the imposition of a sanction in the amount of $160 was granted. It is clear from the context of the order that the court found the plaintiff's conduct to be frivolous for the same reasons it gave for directing dismissal of the complaint. Accordingly, the order did not fail to comply with the requirements of 22 NYCRR 130-1.2.").

CPLR 8303-a; 22 NYCRR 130 – Plaintiff's counsel acted frivolously

Retained Realty, Inc. v. 1828 51, LLC, 153 A.D.3d 1438, 61 N.Y.S.3d 611 (2d Dep't 2017) ("Here, the record demonstrates that the Supreme Court providently exercised its discretion in finding that the plaintiff's counsel acted frivolously in renewing the motion for an order of reference premised upon the defendants' default in answering or appearing despite being on notice, based upon prior motion practice, that an answer had been interposed on behalf of the defendants. In addition, counsel's misrepresentation to the court of the nature of the relief sought in its renewed motion warranted the award of an attorney's fee to the defendants pursuant to 22 NYCRR 130-1.1 (citations omitted). Thus, the court properly stated the basis of its determination that the plaintiff's counsel engaged in frivolous conduct in accordance with 22 NYCRR 130-1.2.").

CPLR 8303-a; 22 NYCRR 130 - Frivolous appeal – knowingly false claim

Boye v. Rubin & Bailin, LLP, 152 A.D.3d 1, 56 N.Y.S.3d 57 (1st Dep't 2017) ("Here, counsel was ethically obligated to withdraw any baseless and false claims, if not upon his own review of the record, certainly by the time Supreme Court advised him of this fact. Instead, counsel continued to repeat a knowingly false claim in what could only be described as a purposeful attempt to mislead this Court, and pursued claims which were completely without merit in law or fact. The appropriate remedy for maintaining a frivolous appeal is the award of sanctions in the amount of the reasonable expenses and costs including attorneys' fees incurred in defending the appeal (citation omitted).").

CPLR 8303-a; 22 NYCRR 130 - Significant award of attorneys' fees

Board of Mgrs. of Foundry at Wash. Park Condominium v. Foundry Dev. Co., In, 142 A.D.3d 1124, 38 N.Y.S.3d 60 (2d Dep't 2016). ("Here, contrary to the appellant's contention, the award of an attorney's fee to BSRB for McDonough's services in preparation of BSRB's motion to dismiss was not improper, notwithstanding that McDonough's fee was actually paid by BSRB's malpractice insurance carrier, and without regard to the nature of the fee arrangement between BSRB and McDonough. While compensatory sanctions should correspond at least to some degree to the amount of damages, the aggrieved party is not always required to show 'actual pecuniary loss' (citations omitted). Contrary to the appellant's further contention, the fact that BSRB was the client, not the counsel of record, in Action No. 3, did not preclude the portion of the fee award which was for the work performed by its partner, Gardiner S. Barone, in assisting McDonough with preparation of the motion to dismiss the action. An attorney such as Mr. Barone, who represents himself, may recover fees for 'the professional time, knowledge and experience . . .

which he would otherwise have to pay an attorney for rendering' (citations omitted). Under the circumstances, the Supreme Court providently exercised its discretion in awarding BSRB an attorney's fee and disbursements in the total sum of $29,968.70. The appellant's remaining contentions are either not properly before this Court, improperly raised for the first time on appeal, or without merit.").

CPLR 8303-a; 22 NYCRR 130 - Absence of hearing not fatal to award

He v. Realty USA, 150 A.D.3d 1418, 55 N.Y.S.3d 477 (3d Dep't 2017) ("This Court had already found that plaintiff had engaged in frivolous conduct by commencing and pursuing this action against defendants (citation omitted), leaving to Supreme Court the limited issue of how much in costs and reasonable counsel fees to award. Plaintiff was entitled to be heard on that issue, but '[t]he form of the hearing . . . depend[ed] upon the nature of the conduct and the circumstances of the case' (citations omitted). Supreme Court stated its intention to resolve the issue on papers unless the need for a hearing was shown. Counsel for defendants submitted an affirmation in which he stated that he had been retained by them in 2012 and, referencing an attached interim bill detailing the legal work performed and expenses incurred as a result of this action, opined that the amount sought was reasonable and necessary. Plaintiff failed to offer any criticism of the requested costs and counsel fees beyond complaining in conclusory fashion that they were 'illegal and excessive.' There was no request for a hearing by the parties and, given the state of the papers, no reason to hold one. Accordingly, in the absence of any substantive factual dispute, Supreme Court did not abuse its discretion in determining the amount of costs and reasonable counsel fees on papers (citations omitted). Supreme Court made that determination in a written order finding that the requested costs and counsel fees were appropriate and, suffice it to say, its decision to do so finds ample support in the record (citations omitted).").

ARTICLE 86 - COUNSEL FEES AND EXPENSES IN CERTAIN ACTIONS AGAINST THE STATE

CPLR 8601 / 8602

David L. Ferstendig, *Split Court of Appeals Tackles Reach of New York's Equal Access to Justice Act*, 679 N.Y.S.L.D. 1,2 (2017).

CPLR Article 86, better known as the New York State Equal Access in Justice Act (EAJA), is based on the Federal Equal Access to Justice Act, 28 U.S.C. § 2412(d). New York's EAJA provides in pertinent part that

> except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.

CPLR 8601(a).

The statute is intended to assist litigants with limited means to be able to retain counsel to litigate wrongful actions of the State.

In *Kimmel v. State of New York*, 2017 N.Y. Slip Op. 03689 (May 9, 2017), the Court of Appeals was confronted with the question of whether the EAJA applies to a prevailing plaintiff in a Human Rights Law (HRL) sex discrimination employment case against the State. The plaintiff here was a New York State Trooper who alleged sexual harassment, retaliation based on her sex, and exposure to a hostile work environment. She was often the first woman to serve in a particular police station. Over a ten-year period following the 1995 commencement of this litigation, the State engaged in "obstructionist and delaying tactics," resulting in the Appellate Division striking the State defendants' answers. Ultimately, the jury awarded over $700,000, and the plaintiff's counsel (both current and former) sought attorneys' fees and costs under the EAJA.

The trial court held that attorneys' fees and costs could not be awarded. A divided Appellate Division reversed. In another split decision, the Court of Appeals affirmed. The plurality noted that the plain meaning of the statute covered this situation and provided only two exceptions - if another statute specifically provides for attorneys' fees (which the HRL did not at the time this action was commenced); or to an action in the Court of Claims (this action was brought in the Supreme Court under Executive Law § 297(9)). The Court stressed that where a statute includes specific exceptions, generally unmentioned exceptions do not apply.

The crux of the difference between the plurality and dissent focused on the EAJA's definition of the word "action" used in CPLR 8601(a). CPLR 8602(a) defines "action" as "any civil action or proceeding brought to seek judicial review of an action of the state." The plurality interpreted that phrase to include two different possibilities. One is any civil action regardless of the relief sought. The second is a proceeding brought to seek judicial review. Under this interpretation, the requirement that the relief sought be for the "judicial review of an action of the state" did not apply to a civil action. The State and the dissent asserted that the term "judicial review" modified and placed an express limitation on "'any civil action,' thereby excluding cases, like this one, that seek compensatory damages." *Id*. at *4. In other words,

> the term judicial review modifies both "any civil action" and "proceeding" and, therefore, restricts EAJA awards to prevailing parties in article 78 proceedings, as well as a limited subset of civil actions seeking review of a state agency's administrative actions.

Id.

The plurality opinion rejected this analysis, arguing that when interpreting a statute, one should avoid making any of its provisions superfluous. The Court pointed out that CPLR Article 78 proceedings and declaratory judgment actions cannot be brought in the Court of Claims (and must be brought in the Supreme Court), rendering the exclusion already in the statute concerning actions in the Court of Claims superfluous. "Under the state defendants' interpretation, therefore, the

statutory exclusion for 'an action brought in the court of claims' would have no meaning." *Id*. at *4-5.

Moreover, prior to the enactment of the EAJA, the Court had held that HRL claims against the State seeking monetary relief could be brought in the Supreme Court. Since the legislature "is presumed to have known" of the Court's decision when it enacted EAJA years later, "the Court of Claims exclusion was not intended to exclude Human Rights Law claims from eligibility for an EAJA award." *Id*. at *5.. The Court emphasized that the legislative history and remedial nature of the statute supported its interpretation.

The plurality opinion also pointed to a 2015 amendment to the Human Rights Law for further support -

> Finally, attorneys' fees and costs are now specifically provided for under the Human Rights Law in cases of housing discrimination and in cases of sex discrimination in credit or employment (L 2015, ch 364, § 1). The 2015 amendment reflects the legislature's acknowledgment that fee shifting provisions are appropriate in the area of Human Rights Law violations. The amendment also means that attorneys' fees in certain civil actions and proceedings brought under the Human Rights Law alleging sex discrimination will no longer be subject to the EAJA's limiting requirements but to the separate requirements set forth in the Human Rights Law itself.

Id. at *10.

In his dissent, Justice Garcia characterized the EAJA as a "fee shifting" statute in derogation of the common law, rather than a "remedial" one, and, as such, it should be construed strictly. He concluded that the plurality opinion, applying CPLR Article 86 to an action seeking predominantly compensatory damages, was contrary to the legislative history and the case law interpreting the statute -

> The meaning of article 86 has been plain to courts in this State for the past 28 years. New York courts have applied article 86 only in the context of article 78 proceedings, declaratory judgment actions, and actions for injunctive relief. In more than 70 published cases contemplating article 86, courts have considered it exclusively in the context of actions seeking judicial review of agency administrative actions…. During the same period, in more than 10 annual reports made of fee awards under the EAJA, there is no record of a single case in which plaintiff attempted to obtain attorneys' fees under article 86 in a suit seeking predominantly compensatory damages – until now.

Id. at *18-19.

CPLR 8601 / 8602 - Petitioner was not a prevailing party

Matter of Gonzalez v. New York State Dept. of Corr. & Community Supervision, 152 A.D.3d 680, 59 N.Y.S.3d 393 (2d Dep't 2017) ("Under the State EAJA, 'a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust' (CPLR 8601[a]). CPLR 8601(b) provides that '[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which sets forth (1) the facts supporting the claim that the party is a prevailing party and is eligible to receive an award under this section, (2) the amount sought, and (3) an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and other expenses are claimed.' 'CPLR article 86 is in derogation of the common law and therefore should be strictly construed' (citation omitted). The State EAJA was enacted to 'improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification,' and was intended to 'provid[e] recompense for the cost of correcting official error . . . as long as it is limited to helping those who need assistance, it does not deter State agencies from pursuing legitimate goals and it contains adequate restraints on the amount of fees awarded' (citations omitted). 'The State EAJA was modeled on the Federal Equal Access to Justice Act and the significant body of case law that has evolved thereunder' (citations omitted). We conclude that the Supreme Court properly determined that the petitioner was not a 'prevailing party' under CPLR 8601(a) and 8602(f), albeit for a different reason. Contrary to the petitioner's contention, the stipulation entered into between the parties on January 30, 2015, which was so-ordered by the court, did not reflect a material change in the legal relationship between the parties because the petitioner's claims had already been rendered moot by Kaplan's voluntary decision on December 30, 2014, to vacate her earlier decision removing the petitioner from the Nursery Program (citations omitted). Furthermore, the petitioner did not achieve prevailing party status by obtaining a temporary restraining order and a preliminary injunction from the court directing the respondents to admit the petitioner to the Nursery Program pending the outcome of the proceeding (citations omitted).").

RECENT COMMERCIAL DIVISION RULES

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

The Commercial Division of the Supreme Court continues to adopt rules designed to streamline and improve the litigation process.

Movant Must Provide Copy of Supporting Motion Papers to Opposing Party When Seeking a Temporary Restraining Order

CPLR 6313 provides that a temporary restraining order may be granted without notice and historically the practice was to issue the restraint ex parte. However, long ago, judges expressed discomfort with issuing a TRO based on the movant's (biased) word alone, resulting in an adversary's first knowledge of a pending action when it was served with the TRO. As a result, years ago, Rule 20 of the Rules of the Commercial Division (22 NYCRR § 202.70(g), Rule 20) was adopted, which required the movant to give notice to "the opposing parties to permit them an opportunity to appear and contest the application," unless the movant can establish that "there will be significant prejudice" if notice is given. What was missing was a requirement that the movant also provide copies of the supporting motion papers to his or her adversary, so that he or she is on notice of the action, can get a real understanding of the issues and provide a meaningful response (opposition) at oral argument of the TRO. Effective July 1, 2017, that gap has been filled.

If Requested, Parties Are to Provide Details as to Length of Trial

Rule 26 of the Commercial Division Rules (22 NYCRR § 202.70(g), Rule 26), requires that the parties give the court a "realistic estimate" of the trial length. Effective July 1, 2017, the Rule was amended to provide that at the request of the court, the parties must now include an estimate of the number of hours each party believes it will use for direct examination, cross examination, redirect examination, and argument. The trial court is empowered to rule on the potential number of hours each party will be entitled to, and it can increase the total number of hours "as justice may require." The trial judge will have the discretion to employ this new procedure.

Sample Choice of Forum Provisions Adopted

Forum selection clauses can provide certainty and clarity to parties to commercial agreements, as to where and how a commercial dispute will be resolved. These clauses have been held to be presumptively valid by New York courts. See Brooke Group v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996). Effective July 1, 2017, a new section § 202.70(d)(2) has been adopted, to aid contracting parties in drafting an appropriate party-specific provision. The amendment 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.

The amendment supplies the actual language of such provisions, which are intended to be of a "mandatory" nature, as opposed to "permissive" forum selection clauses, which courts may not strictly enforce. See Brooke Group, above. The use of these well-drafted, sample mandatory forum selection clauses enhances their enforceability.

As the supporting memorandum notes, contracting parties may wish to provide an alternative venue, in the event the jurisdictional requirements are not met.

Parties' Consultation Prior to Pre-Trial Conference Regarding Expert Testimony

A continuing source of tension in New York State courts outside of the Commercial Division is the limited expert disclosure permitted under CPLR 3101(d). Significantly, with limited exception, depositions of experts are not permitted.

Back in 2013, Commercial Division Rule 13 was adopted expressly providing for the exchange of experts' reports and the deposition of testifying experts. This type of disclosure is essential in commercial matters and is similar to practice in the federal courts and most state courts in the country.

Effective May 1, 2017, Rule 30(c) was adopted to narrow disagreement among competing experts -

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

The rule provides discretion to the trial judge to use this provision as a tool to streamline the trial. The sponsors memorandum notes that by "attempting to narrow disagreement," this "could well reduce the volume of technical testimony through which the fact finder will be forced to sift, thereby reducing trial time and enhancing efficiencies." Moreover, by reviewing the experts' deposition testimony and reports and consulting in good faith "counsel would endeavor to reach agreement with regard to one or more of the opinions being offered. Any agreement reached, which could be memorialized in an appropriate stipulation, would necessarily reduce the amount of expert testimony necessary at trial."

Additional Commercial Division Rules

- § 202.70(d)(2) was further amended (eff. 1/1/2018) to add a sample choice-of-law provision. See attached.

- A revised New Model Compliance Conference Stipulation and Order Form was issued for "optional use" (eff. 1/1/2018). A form is attached.

- Certification at Preliminary Conference relating to Alternative Dispute Resolution (eff. 1/1/2018):

  Rule 10. Submission of Information; Certification Relating to Alternative Dispute Resolution

  At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commences and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case. Counsel for each part shall also submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during litigation.

  Rule 11. Discovery

  (a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

- Amendment of Rule 11-e of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 11-e), to Address Technology-Assisted Review in Discovery (eff. 10/1/2018):

  (f) The parties are encourages to sue the most efficient means to review documents, including electronically stored information ("ESL"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases/ the parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.