CLE Course Materials

Note: Complete course materials are also distributed in electronic pdf format online in advance of the program.

CPLR Update 2019

NYSBA Co-Sponsors:
Committee on Continuing Legal Education
CPLR Update 2019

Friday, February 8, 2019
9:00 a.m. – 1:00 p.m.

4.0 MCLE Credits | 3.0 Areas of Professional Practice; 1.0 Ethics

Sponsored by the Committee on Continuing Legal Education of the New York State Bar Association.
This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.
Program Description

The New York State Bar Association is proud to present CPLR Update 2019, presented by David L. Ferstendig. Learn about recent developments in New York civil practice, flagging problems, suggesting solutions, and focusing on best practices.
Program Agenda

8:30 a.m. – 9:00 a.m.  Registration

9:00 a.m. – 10:40 a.m.  Part 1 – 2.0 MCLE Credits: 1.5 Professional Practice, 0.5 Ethics

- Statutory Amendments and Rule Changes
- Statutes of Limitation
- Commencement and Jurisdiction, Including Service-Related Issues
- Pleadings

10:40 a.m. – 10:50 a.m.  Refreshment Break

10:50 a.m. – 12:30 p.m.  Part 2 – 2.0 MCLE Credits: 1.5 Professional Practice, 0.5 Ethics

- Disclosure, Including Deposition Practice, Social Media Disclosure and Expert Witness-Related Issues
- Motion Practice, Including Motions to Dismiss and for Summary Judgment
- Appellate Practice, Including the New Appellate Division Rules

12:30 p.m.  Q&A

1:00 p.m.  Adjournment

4.0 Total MCLE Credits
3.0 Professional Practice, 1.0 Ethics
Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

www.nysba.org/CPLR2019Materials/

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.
Follow Continuing Legal Education on Twitter for Quick and Relevant Program Information!

@NYSBACLE
New York Rules of Professional Conduct

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

NYSBA CLE

Bringing you the best and most relevant continuing education to help you be a better lawyer. Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

View a Complete Listing of Upcoming CLE Programs at www.nysba.org/CLE
Depositions
Practice and Procedure in Federal and New York State Courts
Second Edition

The second edition of *Depositions* substantially revises the first edition. In addition to updating case law, statutory material and the rules, this edition includes an expanded legal section (Part One), a new section (Part Two) on ethics, including coverage of the new rules of professional conduct, and an expanded practical advice section (Part Three).

The authors, a United States District Judge for the Southern District of New York and the chief attorney clerk and director for the New York State Supreme Court, Commercial Division, New York County, incorporate their wealth of knowledge and experience into valuable practical guidance for conducting depositions.

This publication details deposition rules and procedures and highlights the differences between federal and state practice in New York. Topics include pre-trial discovery schedules, rules regarding number and recording method of depositions, appropriate and inappropriate conduct at depositions, objections, motions for protective orders, orders to compel, sanctions and more.

Get the Information Edge
1.800.582.2452   www.nysba.org/pubs
Mention Code: PUB9152

AUTHORS
Honorable Harold Baer, Jr.
District Court Judge
Southern District of New York
Robert C. Meade, Jr., Esq.
Director, Commercial Division
New York State Supreme Court

PRODUCT INFO AND PRICES
Print: 40749 | E-Book: 40749E
2011 | 738 pages
Non-Members $130
NYSBA Members $95

$5.95 shipping and handling within the continental U. S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

Use coupon code PUB9152 when you order online and save 20%
Discount does not apply to HotDocs™ products.
Offer ends 06/30/2019
CPLR Update 2019 (Abridged)
**CPLR Update February 2019**
New York State Bar Association Committee Continuing Legal Education

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

**Date:** Friday, February 8, 2019
**Time:** 9:00 a.m. – 1:00 p.m.
**Where:** Convene
810 Seventh Avenue (Between 52nd & 53rd Streets)
Dakota Hub
New York, NY 10019
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 bar examination candidates as part of the New York law course.

Portions of the text reprinted from the following permission:


- LexisNexis® Expert Commentaries, David L. Ferstendig on Brill v. City of New York. Copyright 2007 Matthew Bender & Company, Inc. a LexisNexis company. All rights reserved.

# Table of 2018 CPLR Amendments

<table>
<thead>
<tr>
<th>CPLR Section or Rule</th>
<th>Amendment</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>CPLR 203(g)(2) and 214-a</td>
<td>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.</td>
<td>1/31/2018</td>
</tr>
<tr>
<td>CPLR 214-b</td>
<td>Amended to extend the expiration date for renewal of time barred Agent Orange claims to June 16, 2020.</td>
<td>7/1/2018</td>
</tr>
<tr>
<td>CPLR 1349(2)(h)(i)</td>
<td>Amended to provide that money received through forfeiture can be used for law enforcement assisted diversion of individuals with substance use disorders (into substance abuse treatment, health or mental health services, housing assistance, with other services as may be needed).</td>
<td>8/24/2018</td>
</tr>
<tr>
<td>CPLR 2111</td>
<td>Amended to extend provisions of law relating to the use of electronic means for the commencement and filing of papers in certain actions or proceedings until September 1, 2019.</td>
<td>7/24/2018</td>
</tr>
<tr>
<td>CPLR 2305(d)</td>
<td>Added to provide that where a trial subpoena directs service of the subpoenaed documents to the attorney or a self-represented party at the return address noted on the subpoena (rather than to the court clerk), a copy of the subpoena must also be served “simultaneously” upon all of the parties. In addition, the receiving party is to deliver “forthwith” a complete copy of the produced documents in the same format as received, to all opposing counsel and self-represented parties.</td>
<td>8/24/2018</td>
</tr>
</tbody>
</table>
NY CLS CPLR 4511(c)  
Added to provide that when requested by a party, the court will take judicial notice of an image, map, location, distance, calculation and any other information taken from a web mapping service, a global satellite imaging site or an internet mapping tool, subject to a rebuttable presumption that such image, map, location, etc. accurately depicts the evidence presented. The presumption can be rebutted by credible and reliable evidence that the image or information did not “fairly and accurately portray that which is being offered to prove.” The party intending to present the image or information at a trial or hearing, must give notice at least 30 days before the trial or hearing, providing a copy or identifying the internet address. The adverse party receiving notice must then object no later than 10 days before the trial or hearing. This resulted in the relettering of existing CPLR 4511(c) to 4511(d) and 4511(d) to 4511(e).

CPLR 4518(c)  
Amended to make technical corrections to conform with revisions to the uniform commercial code.

CPLR 4540-a  
Added to provide that material provided by a party in response to a CPLR Article 31 demand for “material authored or otherwise created by such party” is presumed to be authentic when it is offered into evidence by an adverse party. The presumption can be rebutted, however, by a preponderance of evidence proving that the material was not authentic and it does not preclude any other admissibility objections.

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.

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 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>
<thead>
<tr>
<th>NY CLS CPLR 8003(a)</th>
<th>Amended to increase referee compensation from $50 to $350 for each day spent as a referee unless the court sets a different compensation OR by the consent in writing of all parties not in default for failing to appear.</th>
<th>12/21/2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>NY CLS CPLR 8003(b)</td>
<td>Amended to increase the maximum referee’s fees from $500 to $750, upon a sale pursuant to a judgment in any action, unless the property sold for $50,000 or more, in which case the referee can receive additional compensation as the court deems proper.</td>
<td>12/21/2018</td>
</tr>
<tr>
<td>CPLR Section or Rule</td>
<td>Amendment</td>
<td>Effective Date</td>
</tr>
<tr>
<td>---------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>NY CLS CPLR § 503</td>
<td>Amended to authorize venue in &quot;the county in which a substantial part of the events or omissions giving rise to the claim occurred.&quot;</td>
<td>10/23/2017</td>
</tr>
<tr>
<td>NY CLS CPLR § 1101</td>
<td>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.</td>
<td>4/20/2017</td>
</tr>
<tr>
<td>NY CLS CPLR § 2111</td>
<td>Amended to extend the expiration date for subsection (b) 2-a to September 1, 2018.</td>
<td>7/24/2017</td>
</tr>
<tr>
<td>NY CLS CPLR § 2112</td>
<td>Amended to eliminate present exclusions from mandatory e-filing in the Appellate Division.</td>
<td>7/24/2017</td>
</tr>
<tr>
<td>NY CLS CPLR R 3408</td>
<td>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.</td>
<td>4/20/2017</td>
</tr>
<tr>
<td>NY CLS CPLR R 4518</td>
<td>Amended to provide that hospital records located in a jurisdiction other than New York State, may be admissible &quot;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.&quot;</td>
<td>8/21/2017</td>
</tr>
<tr>
<td>NY CLS CPLR R 5521</td>
<td>Amended to reference Public Officers Law § 89(4)(d), relating to an order requiring disclosure of documents under the Freedom of Information law.</td>
<td>5/27/2017</td>
</tr>
</tbody>
</table>

Table of 2017 CPLR Amendments
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) became 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 statewide 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). As of the effective date, the applicable actions covered – which differ from Department to Department – were as follows:

First Department: All appeals in commercial matters originating in Supreme Court, Bronx and New York Counties.

Second Department: All appeals in matters originating and electronically filed in Supreme and Surrogate’s Courts in Westchester County.

Third Department: All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.

Fourth Department: All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial District.

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

First Department: http://www.nycourts.gov/COURTS/AD1/efiling.html
Second Department: http://www.nycourts.gov/courts/AD2/efiling
Third Department: http://www.nycourts.gov/ad3/
Fourth Department: http://ad4.nycourts.gov/efile
STATUTE OF LIMITATIONS

CPLR 201

CPLR 201 - Statute of Limitations versus Statute of Repose

Nestor v. Putney Twombly Hall & Hirson, LLP, 153 A.D.3d 840, 61 N.Y.S.3d 248 (2d Dep’t 2017) (“In New York, Statutes of Limitation are generally considered procedural because they are [v]iewed as pertaining to the remedy rather than the right’ (citation omitted). A statute of limitations ‘does not begin to run until a cause of action accrues’ (citation omitted). In contrast, ‘a statute of repose begins to run when the specified event or events takes place, regardless of whether a potential claim has accrued or, indeed, whether any injury has occurred’ (citation omitted). ‘The repose period serves as an absolute barrier that prevents a plaintiff’s right of action’ (citation omitted). ‘In other words, the period of repose has the effect of preventing what might otherwise have been a cause of action from ever arising’ (citation omitted). Statutes of repose ‘exhibit a substantive texture, nature and consequence that distinguishes them from ordinary limitation provisions’ (citation omitted). In Tanges, in distinguishing statutes of repose from statutes of limitations, the Court of Appeals noted that it had previously stated that ‘[i]f a statute creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause’ (citation omitted). In contrast, when a cause of action ‘was cognizable at common law or by other statute law, a statutory time limit is commonly taken as one of limitations and must be asserted by way of defense’ (citation omitted). California Code of Civil Procedure § 366.3(a) provides: ‘If a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply’ (citation omitted). In applying this statute, California courts have referred to it as a statute of limitations (citations omitted). Here, contrary to the plaintiff’s contention, California Code of Civil Procedure § 366.3 is a statute of limitations, not a statute of repose. Unlike a statute of repose, section 366.3 begins to run at the time the cause of action to recover on the promise to make a testamentary disposition accrues, namely, the date of the promisor’s death (citations omitted). Moreover, California cases analyzing section 366.3 have termed this statute a statute of limitations.”

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
limitations, not a statute of repose, and in one case, the court found that a defense based on this statute of limitations had been waived because the executor of the estate had not pleaded it (citations omitted). Although the California courts’ classification of section 366.3 is not dispositive, it ‘is instructive and should not be ignored’ (citation omitted). Thus, section 366.3 is a procedural statute of limitations, and it would not have applied to Christina’s claim against the decedent’s estate in New York. Since section 366.3 was inapplicable, the plaintiff would not ‘have prevailed on the underlying claim’ had the Putney defendants raised this defense (citation omitted).

CPLR 201 - Agreement to shorten statute of limitations period: Period of time within which to bring action should be fair and reasonable.

_D&S Restoration, Inc. v. Wenger Constr. Co., Inc._, 160 A.D.3d 924, 75 N.Y.S.3d 505 (2d Dep’t 2018) (“[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable” (citations omitted). ‘[T]he period of time within which an action must be brought . . . should be fair and reasonable, in view of the circumstances of each particular case . . . The circumstances, not the time, must be the determining factor’ (citations omitted). There is nothing inherently unreasonable about the one-year period of limitation, to which the parties here freely agreed (citations omitted). ‘The problem with the limitation period in this case is not its duration, but its accrual date’ (citation omitted). It is neither fair nor reasonable to require that an action be commenced within one year from the date of the plaintiff's substantial completion of its work on the project, while imposing a condition precedent to the action that was not within the plaintiff's control and which was not met within the limitations period. ‘A limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim’ (citation omitted). The limitation period in the subcontract conflicts with the conditions precedent to payment becoming due to the plaintiff, which, under the circumstances of this case, acted to nullify any claim the plaintiff might have for breach of the subcontract. Therefore, interpreting the subcontract against the defendant, which drafted the agreement (citations omitted), we find that the one-year limitation period is unenforceable under the circumstances here (citations omitted). Accordingly, the Supreme Court should not have granted that branch of the defendant's motion which was to dismiss the breach of contract cause of action as time-barred.”).

CPLR 201/2004 - You cannot use CPLR 2004 to extend the statute of limitations.

_Zayed v. New York City Dept. of Design & Constr._, 157 A.D.3d 410, 66 N.Y.S.3d 124 (1st Dep’t 2018) (“Although plaintiff successfully sought leave to file a late notice of claim before expiration of the statute of limitations, and was granted a 30-day extension of time to do so, he did not avail himself of that opportunity and, by any calculation, the one-year and 90-day statute of limitations then expired (citations omitted). The motion court was not permitted to grant an extension after the statute of limitations had run since, to do so, would render meaningless the portion of General Municipal Law § 50—e(5) that expressly prohibits the court from doing so (citation omitted). CPLR 2004 cannot be used to extend the statute of limitations (citations omitted).”).
CPLR 201 - Document did not qualify as unqualified acknowledgment of debt under GOL 17-101.

Karpa Realty Group, LLC v. Deutsche Bank Natl. Trust Co., 164 A.D.3d 886, 84 N.Y.S.3d 174 (2d Dep’t 2018) (‘‘General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt’’ (citations omitted). To constitute a valid acknowledgment, a ‘writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it’’ (citations omitted). Contrary to Deutsche Bank’s contention, a letter written by Aird that accompanied his second short sale package submitted to Deutsche Bank’s loan servicer did not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the running of the statute of limitations (citations omitted).’’).

Yadegar v. Deutsche Bank Natl. Trust Co., 164 A.D.3d 945, 83 N.Y.S.3d 173 (2d Dep’t 2018) (‘‘General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt’’ (citation omitted). To constitute a valid acknowledgment, a ‘writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it’’ (citations omitted). Contrary to the defendant’s contention, the plaintiff’s letter accompanying her request for the defendant to authorize a short sale of the property, and the other documents relied on by the defendant, did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations (citations omitted). The plaintiff’s letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the plaintiff’s own funds (citations omitted). Thus, the defendant failed to raise a triable issue of fact in opposition to the plaintiff’s motion for summary judgment and, with respect to its cross motion, the defendant failed to establish its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it.”).

Pugni v. Giannini, 163 A.D.3d 1018, 83 N.Y.S.3d 491 (2d Dep’t 2018) (‘‘The plaintiff produced various emails which, he claimed, constituted an acknowledgment by Giannini of the debt pursuant to General Obligations law § 17-101. . . . The plaintiff contends that there are issues of fact as to whether the statute of limitations was tolled, because the defendants revived their obligation to repay the loan pursuant to General Obligations Law § 17-101. . . . In support of this contention, the plaintiff relies on the defendants’ emails. A ‘writing, in order to constitute an acknowledgment, must recognize the existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it’’ (citation omitted). Here, the emails in question did not acknowledge that one or both defendants owed a pre-existing debt to the plaintiff, nor did those emails express an intention by the defendants to pay the alleged debt.”).

CPLR 202 - Borrowing Statute

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’ affirmer. 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 choice-of-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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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


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 inDavis 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.


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.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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).


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.

CPLR 202 - Borrowing statute: Where alleged injury is economic, accrual is in state where plaintiff resides and sustains the economic impact of the loss.

Centre Lane Partners, LLC v. Skadden, Arps, Slate, Meagher, & Flom LLP, 154 A.D.3d 525, 62 N.Y.S.3d 341 (1st Dep’t 2017) (“Where the alleged injury is economic in nature, the cause of action is generally deemed to accrue in the state ‘where the plaintiff resides and sustains the economic impact of the loss’ (citations omitted). Here, the debtors’ principal places of business are in Oregon, and their financial losses were allegedly incurred in that state. Contrary to plaintiffs’ claim, the motion court’s application of Oregon’s two-year statute of limitations via New York’s borrowing statute (CPLR 202) in light of, inter alia, the situs of debtors’ Oregon-based businesses, the legal relationships existing between plaintiffs, debtors and defendants, and the nature of the instant action, was proper and the result would not be ‘absurd,’ notwithstanding defendants’ place of business being located in New York (citations omitted). . . . Given such factual pleadings, the motion court properly rejected plaintiffs’ argument that Oregon’s discovery/tolling rule for legal malpractice claims rendered this malpractice action timely commenced. The court properly concluded that a reasonable person, knowing the facts that the debtors had available to them at the time of the two challenged transfers, should have been aware of a substantial possibility of defendants’ conflicted representation, as well as the harm that such negligent representation had caused, and such knowledge could not have been gained later than when the debtors filed for Chapter 7 bankruptcy on December 31, 2013 (citation omitted).”).
Relation Back

CPLR 203 - Relation doctrine applied

_Uddin v. A.T.A. Constr. Corp._, 164 A.D.3d 1400, 83 N.Y.S.3d 602 (2d Dep’t 2018) (“Here, the claims against Flan arise out of the same conduct, transaction, or occurrence as the claims asserted against Park Slope. In addition, the plaintiff demonstrated that, under the particular circumstances presented, Park Slope and Flan are united in interest inasmuch as the two entities, ‘intentionally or not, often blurred the distinction between them’ (citations omitted). Moreover, Flan had notice of this action within the applicable limitations period, inasmuch as the Flancaichs jointly operated both Park Slope and Flan, and Flan was designated in the condominium declaration to receive service of process on behalf of Park Slope (citation omitted). Finally, the plaintiff demonstrated that the initial failure to add Flan was not intentional, but was the result of an excusable mistake (citations omitted).”).

_Myung Hwa Jang v. Mang_, 164 A.D.3d 803, 83 N.Y.S.3d 293 (2d Dep’t 2018) (“The Supreme Court providently exercised its discretion in granting the plaintiff’s motion pursuant to CPLR 3025 and 1003 for leave to amend the complaint, as Deng suffered no prejudice or surprise resulting directly from the delay in seeking leave and the proposed amendment was not ‘palpably insufficient or patently devoid of merit’ (citations omitted). Although the applicable statute of limitations expired prior to the filing of the plaintiff’s motion (citation omitted), the relation-back doctrine allowed the claim asserted against Deng to relate back to the claims previously asserted against the Liang defendants. The claim against Deng arose out of the same transaction or occurrence as the claims asserted against the Liang defendants, to wit, the plaintiff’s treatment in Liang’s medical office on February 26, 2013. Deng was united in interest with the Liang defendants, as she was an employee of Liang and his medical practice. Under the circumstances presented, Deng knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against her as well (citations omitted).”).

_CPLR 203 - Relation back doctrine does not apply because defendants were separate and distinct entities, had no jural relationship and neither corporation was vicariously liable for the acts of the other._

_Kammerzell v. Clean Burn, Inc._, 165 A.D.3d 768, 85 N.Y.S.3d 518 (2d Dep’t 2018) (‘Here, the plaintiff has not established that the relation-back doctrine is applicable. The record reveals that Clean Burn and Sandri are separate and distinct business entities which have no jural relationship (citation omitted). Neither corporation is vicariously liable for the acts of the other. There is no evidence of a relationship that would support the conclusion that there is unity of interest between them (citations omitted).’).
CPLR 203 - Relation back doctrine: “Individual trustees ‘knew or should have known that the action would have been brought against [them] in the absence of [defendant's] mistake.’”

NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc., 2018 NY Slip Op 08735 (3d Dep’t 2018) (“There is nothing in the record before us demonstrating that defendant intentionally elected not to assert its counterclaims against the individual trustees and/or that it did so to obtain ‘a tactical advantage in the litigation’ (citation omitted). A review of defendant's pleadings demonstrates that it intended to sue the individual trustees. Although the specific names of the individual trustees could have been ascertained from certain documentation that the trust provided to defendant on an annual basis, ‘we need no longer consider whether [such a] mistake was excusable’ (citation omitted). Rather, as the Court of Appeals has recognized, the primary question — and ‘the linchpin of the relation back doctrine’ — is whether the newly added party had actual notice of the claim (citations omitted). As trustees of the trust, we find it implausible that the individual trustees were not aware of the trust's commencement of this action and the counterclaims that defendant asserted against the trust — such knowledge being imputed to them as trustees (citations omitted). Moreover, insofar as the counterclaims asserted against the individual trustees are essentially the same counterclaims that defendant asserted against the trust in its original answer and answer to the first amended complaint, it cannot be said that the individual trustees were surprised or prejudiced in their ability to prepare a defense to defendant's counterclaims (citation omitted). Given these facts, we find that the individual trustees ‘knew or should have known that the action would have been brought against [them] in the absence of [defendant's] mistake’ and, therefore, find that defendant established its entitlement to the benefit of the relation back doctrine (citations omitted). Accordingly, Supreme Court should not have granted plaintiffs' motion to dismiss defendant's cross motion for leave to amend the complaint to add a cause of action against the individual trustees pursuant to General Business Law §§ 349 and 350 (citations omitted). Notwithstanding the fact that defendant's negligence counterclaim was not time-barred, we nevertheless find that said counterclaim was properly dismissed as duplicative of its breach of fiduciary duty counterclaim.”).

CPLR 203 - Relation back doctrine: Intentional decision not to assert claim initially is not a mistake.

Yanez v. Watkins, 164 A.D.3d 547, 82 N.Y.S.3d 76 (2d Dep’t 2018) (“‘When a plaintiff intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired’ (citation omitted). Here, there was no showing of a mistake concerning the defendants’ identities, which would have prevented the plaintiff from commencing an action against them before the statute of limitations expired (citations omitted).’”).

CPLR 203 - Relation back doctrine inapplicable because original complaint did not give the defendant notice of the transactions, occurrences, or series of transactions or occurrences.

Lang-Salgado v. Mount Sinai Med. Ctr., Inc., 157 A.D.3d 532, 69 N.Y.S.3d 292 (1st Dep’t 2018) (“The original complaint asserts one cause of action that arose from plaintiff’s X-ray on July 5,
2012. The proposed negligent hiring and failure to promulgate regulations claims arise from different facts and implicate different duties based on conduct preceding, and separate and different from, the alleged negligence of the X-ray technician on that date. Thus, the relation back doctrine is inapplicable because the facts alleged in the original complaint failed to give notice of the facts necessary to support the amended pleading (citations omitted). ‘The mere reference to “negligence” in the original complaint did not give [defendant] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved with respect to the proposed causes of action alleging negligent hiring and negligent supervision’ (citation omitted).”

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

*Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 A.D.3d 1263, 77 N.Y.S.3d 171 (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.”).

**CPLR 203(d) / 203(f) - Underlying action was dismissed in defendants' favor more than one year before defendants moved for leave to amend counterclaim; leave to amend denied and CPLR 203(d) does not apply.**

*People's Capital & Leasing Corp. v. 1 800 Postcards, Inc.*, 162 A.D.3d 560, 80 N.Y.S.3d 19 (1st Dep’t 2018) (“We affirm the denial of defendants’ motion for leave to amend. While malicious prosecution claims can be premised on civil proceedings (citations omitted), the proposed malicious prosecution counterclaim is time-barred. The underlying action was dismissed in defendants' favor more than one year before defendants moved for leave to amend (citation omitted). Contrary to defendants’ arguments, under the circumstances of this case, neither CPLR 203(d) nor CPLR 203(f) avails them. The proposed counterclaim fails, moreover, due to defendants' failure to adequately allege special damages (citation omitted).”).

**CPLR 203(f) - Amendment to add crossclaim was granted, even though it added new theory of recovery, because it arose out of the same occurrence set forth in the original pleadings.**

*Taylor v. Deubell*, 153 A.D.3d 1662, 60 N.Y.S.3d 739 (4th Dep’t 2017) (After liability trial, defendant sought leave to amend answer to add additional cross-claims against co-defendant for property damage and loss of use of bus. “The determination whether to grant leave to amend a pleading rests within the court’s sound discretion and will not be disturbed absent a clear abuse of that discretion (citation omitted), and we conclude that the court did not abuse its discretion here. Although the amended answer added a new theory of recovery against Masters Edge, it arose out of the same occurrence set forth in the original pleadings, i.e., a motor vehicle accident allegedly caused by the negligence of Masters Edge (citations omitted).”).
CPLR 203(f), 306-b, 3025(a)


Plaintiff Unsuccessfully Seeks to Amend Complaint “As of Right” After Having Never Served Defendants with the Original Complaint in a Timely Fashion

Majority and Dissent Disagree as to Application of As of Right Amendment and Relation Back Doctrine

In *Vanyo v. Buffalo Police Benevolent Ass’n*, 159 A.D.3d 1448 (4th Dep’t 2018), the plaintiff, a terminated police officer, filed a summons and complaint on February 10, 2015, but never served it on the defendants City of Buffalo (City) and the Buffalo Police Benevolent Association, Inc. (PBA). Instead, over three months later, on May 21, 2015, the plaintiff filed an “amended” summons and complaint and served them on the defendants on May 26, 2015. The amended complaint merely added a fifth cause of action, and did not add any parties. The defendants each moved to dismiss the amended complaint under CPLR 3211(a)(5) and (7) and before the trial court ruled on those motions, the plaintiff moved for an order under CPLR 306-b seeking to extend the time to serve the original complaint and to deem the original complaint timely served nunc pro tunc.

The Fourth Department judges could not agree on whether the plaintiff properly amended her complaint as of right or whether the relation back doctrine applied.

A majority of the Appellate Division held that the trial court did not abuse its discretion in denying the plaintiff’s motion for an extension under CPLR 306-b, after weighing the various factors to be considered in connection with the interest of justice standard. They included the expiration of the statute of limitations on the first two causes of action and the plaintiff’s failure to move for an extension for over seven months after expiration of the service period. Moreover, the Appellate Division held that the trial court properly dismissed the first two causes of actions of the amended complaint as untimely. It found that the amended complaint, which was the only pleading the plaintiff actually served on the defendants, was untimely, as it was filed well beyond the applicable four-month limitation period under CPLR 217, applicable to those causes of action.

The majority rejected the plaintiff’s claim that the relation back doctrine under CPLR 203(f) applied, holding that because the original timely filed complaint was never served “[t]he original complaint thus did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint. The claims in the amended complaint, therefore, are measured for timeliness by service (or filing in this case) of the amended complaint (citation omitted).” *Id.* at 1451. Moreover, the Court found that the plaintiff’s amended complaint was filed and served without leave outside the time limits provided in CPLR 3025(a) for an amendment as of right. The majority, however, did not explain this statement further or provide its reasoning and, as you will see below, the dissent takes issue with this finding.
The dissent agreed with the majority that the trial court did not abuse its discretion under CPLR 306-b (and that the third through fifth causes of action should be dismissed). However, it differed with the majority as to the application of the amendment statute and the relation back doctrine. The dissent initially noted that the defendant moved to dismiss under CPLR 3211(a)(5) and (7), not CPLR 306-b. While at least one of the defendants opposed the plaintiff’s motion under CPLR 306-b, and sought dismissal in those opposition papers, neither served a notice of cross-motion seeking such relief. Thus, the dissent concluded that, without such a notice of motion, the trial court lacked authority to grant defendants relief under CPLR 306-b.

In addition, because the defendants failed to move to dismiss under CPLR 3211(a)(8) on personal jurisdiction grounds, they waived their service objection (with respect to the original complaint).

Most significantly, the dissent disagreed with the majority as to whether the plaintiff’s first two causes of action were untimely. The dissent maintained that after the plaintiff filed the original complaint on February 10, 2015 within the applicable four-month limitation period, she amended her pleading as of right to add the fifth cause of action. CPLR 3025(a) provides that a pleading can be amended without leave of court within 20 days after service of the pleading; at any time before expiration of the period for responding; or within 20 days after service of a pleading responding to it. The dissent stressed that none of those events had happened prior to the service of the amended pleading. Thus, the amended complaint, served without leave of court was proper and timely; and the claims in the amended complaint were deemed interposed for statute of limitations purposes when the original complaint was filed under the relation back doctrine (CPLR 203(f)).

The dissent complained that the defendants and the majority had conflated commencement by filing with obtaining personal jurisdiction by service of process:

Here, defendants simply assume that the commencement of the action by the original filing disappeared or was somehow purged by the failure to serve the original summons and complaint and the filing and service of the amended complaint. While the complaint may have been superseded by the amended complaint, the commencement of the action was not and clearly could not have been superseded by the amended complaint. . . . The Legislative change from a commencement-by-service system to a commencement-by-filing system segregated these concepts and made them mutually exclusive. Under the new system, problems with service no longer prevent timely commencement of an action.

*Id.* at 1457 (emphasis in original).

**CPLR 203(g) / 214-a**

New Discovery Statute of Limitations and Revival for Claims Arising Out of the Failure to Diagnose Cancer or a Malignant Tumor

CPLR 214-a provides for a two-and-a-half-year statute of limitations in medical, dental, and podiatric malpractice actions, running from the date of the act, omission, or failure. The statute includes two extending provisions: the continuous treatment doctrine and the foreign object rule. What was missing was protection for patients with claims arising out of a misdiagnosis or a failure to diagnose, where the patient might not have discovered the injuries suffered until after the limitation period expired.

A 2018 amendment to CPLR 203(g) and CPLR 214-a attempts to fill that gap, at least with respect to claims for the failure to diagnose cancer or a malignant tumor. L. 2018, ch 1, eff. January 31, 2018. Specifically, CPLR 214-a was amended to provide that the two-and-a-half year limitation period 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.

Moreover, CPLR 203(g)(2) was added to apply to notices of claim and actions against the state (see Court of Claims Act and §10) and municipal defendants (see General Municipal Law § 50-e and § 50-i). Similar to the CPLR 214-a amendment, it provides that the time to serve a notice of claim or bring an action or special proceeding will run from the later of either discovery (with a 7-year cap), or the date of the last treatment, where there is continuous treatment.

The amendment provides that it is to take effect immediately, "and shall apply to acts, omissions, or failures occurring on or after such effective date" (January 31, 2018). In addition, the amendment goes further and applies to acts, omissions, or failures occurring

a. within one year, ninety days prior to January 31, 2018, for actions against municipalities;

b. within two years prior to January 31, 2018, for actions against the state; and

c. within two and a half years prior to January 31, 2018, for actions against private defendants.

Finally, the amendment includes a revival provision, providing that a claim alleging failure to diagnose cancer or a malignant tumor that became time-barred within ten months of the effective date of the amendment (March 31, 2017) is revived, and an action may be commenced within six months of the effective date or July 31, 2018.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
**CPLR 204 Stay**

**CPLR 204(b) - Toll runs from time demand for arbitration is served until final determination of non arbitrability.**

*Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v. Flower City Glass Co., Inc.,* 160 A.D.3d 1497, 75 N.Y.S.3d 735 (4th Dep’t 2018) (“We also reject the contention of the Flower City defendants that they met their burden of proof on their motion by establishing that the District made the demand for arbitration in bad faith (citation omitted). We therefore conclude that the CPLR 204 (b) toll applied from the time the demand for arbitration was served, on September 30, 2014, until the final determination of nonarbitrability by the court on June 5, 2016. In addition, for the same reasons that the claim for arbitration did not accrue until the architect certified ‘Substantial Completion’ of the work on October 1, 2008, we conclude that the breach of contract cause of action did not accrue until October 1, 2008. Applying the CPLR 204 (b) toll, we further conclude that the District timely commenced the breach of contract cause of action in appeal No. 2 on September 11, 2015.”).

**CPLR 205(a) - Six Month Extension**

**CPLR 205(a) - Termination of action, 6-month extension; applies to actions and special proceedings; dismissal of prior proceeding by being marked off calendar is not dismissal on the merits**

*Matter of Lindenwood Cut Rate Liquors, Ltd. v. New York State Liq. Auth.,* 161 A.D.3d 1077, 77 N.Y.S.3d 459 (2d Dep’t 2018) (“As the petitioner correctly contends, CPLR 205(a) applies not only to actions but also to special proceedings under CPLR article 78 (citations omitted). The toll of CPLR 205(a) would not apply, however, if the prior proceeding was dismissed on the merits; thus, the court must determine whether the order dismissing the prior proceeding is entitled to res judicata effect (citation omitted). Here, the prior proceeding was dismissed after being marked off the calendar. Contrary to the Authority’s contention, ‘[a] dismissal of an action by being marked off the Trial Calendar is not a dismissal on the merits,’ and ‘[a] new action on the same theory is therefore not barred by the doctrine of res judicata’ (citations omitted). Moreover, there is nothing in the order denying the petitioner’s motion to restore the prior proceeding to the calendar which suggests that the prior proceeding was dismissed with prejudice (citation omitted).”).
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)


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 205 - Follow up to Eitani case**

*U.S. Bank N.A. v. Gordon*, 158 A.D.3d 832, 72 N.Y.S.3d 156 (2d Dep’t 2018) *(Compare Majority:* “Here, even assuming that there were no questions of fact as to whether the plaintiffs in the 2007 and 2013 actions were legally distinct entities, the plaintiff in this action is entitled to the benefit of CPLR 205(a). As the assignee and subsequent holder of the note and mortgage, the plaintiff in the 2013 action had a statutory right, pursuant to CPLR 1018, to continue the 2007 action in the place of the prior plaintiff once the assignment occurred in 2009, even in the absence of a formal substitution (citations omitted). Indeed, the plaintiff in this action, as the current holder of the note and mortgage, is not seeking to enforce any rights separate and independent from those asserted in the 2007 action (citations omitted). Rather, it is seeking to enforce the rights under the note and mortgage by obtaining a judgment of foreclosure and sale, the same rights that the plaintiff in the 2007 action sought to enforce (citations omitted). Under these circumstances, the plaintiff was entitled to the application of the savings provision contained in CPLR 205(a), and that branch of Rose Gordon’s motion which was to dismiss the complaint as time-barred should have been denied on this ground as well.”; *and Dissent:* “I also disagree with the majority’s alternative holding that this Court should apply its recent decision in Wells Fargo Bank, N.A. v. Eitani (148 AD3d 193) to find, as a matter of law, that the plaintiff here is entitled to the benefit of CPLR 205(a)....Here, as a threshold matter, the plaintiff does not rely on a successor in interest theory. In any event, the only evidence in the record that the mortgage and note were assigned to the plaintiff is a January 26, 2009, written mortgage assignment, which the plaintiff concedes was a ‘legal nullity’ since it originated from an assignment by MERS, which was never the actual holder or assignee of the underlying note and thus lacked authority to assign it (citation omitted). Unlike the record in Eitani, the record here fails to establish that the plaintiff became the holder of the note and mortgage while the 2007 action was pending, and that the plaintiff was essentially the plaintiff in the prior action when it was dismissed. The record otherwise fails to establish that the plaintiff is the current holder or assignee of the note and, thus, a successor in interest to the plaintiff in the 2007 action (citation omitted).”).
CPLR 205(a) - Does not apply because out of state action is not “prior” action.

*Deadco Petroleum v. Trafifuga AG*, 151 A.D.3d 547, 58 N.Y.S.3d 16 (1st Dep’t 2017) (“While the California action was timely commenced, the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a ‘prior action’ within the meaning of that provision (citations omitted).”).

CPLR 205(a) - Does not apply where prior action was dismissed for neglect to prosecute.

*Familio v. Hersh*, 150 A.D.3d 1203, 52 N.Y.S.3d 901 (2d Dep’t 2017) (“The Supreme Court properly directed the dismissal of the complaint as time-barred on the ground that the provisions of CPLR 205(a) that toll the statute of limitations are inapplicable in this action because the plaintiff’s prior action had been dismissed for neglect to prosecute (citations omitted). Contrary to the plaintiff’s contention, under the circumstances of this case, the record of the dismissal of the prior action set forth the specific conduct constituting the neglect to prosecute, which conduct demonstrated a general pattern of delay (citations omitted).”).

CPLR 205(a) - Does not apply where prior action dismissed for lack of personal jurisdiction.

*Matter of Littlejohn v. New York State Dept. of Corr. & Community Supervision*, 150 A.D.3d 1523, 55 N.Y.S.3d 775 (3d Dep’t 2017) (“The record demonstrates that petitioner, who was aware in March 2015 that his application to participate in the shock incarceration program was denied, did not commence this CPLR article 78 proceeding within the applicable four-month statutory time period (citations omitted). Although petitioner timely filed a petition by order to show cause in Dutchess County, that proceeding was dismissed for lack of personal jurisdiction and, thus, the tolling provisions of CPLR 205 (a) are inapplicable.”).

CPLR 205(a) - Prior action terminated upon issuance of Second Circuit order.

*Fischer v. City of New York*, 147 A.D.3d 1030, 48 N.Y.S.3d 247 (2d Dep’t 2017) (First federal court action dismissed by district court followed by Second Circuit affirman. “Contrary to the plaintiff’s contention, the Supreme Court properly determined that for the purposes of CPLR 205(a), the plaintiff’s prior, federal action terminated upon issuance of the Second Circuit’s order in May 2013 (citations omitted). Thereafter, the plaintiff had six months to commence a new action, and she did not do so. The instant action was not commenced until June 17, 2014.”).

CPLR 207- Absence Toll

CPLR 207 - Absence toll did not apply

*Schwartz v. Chan*, 162 A.D.3d 408, 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 - No evidence that dementia disability existed at time claim accrued.

_Estate of Smulewicz v. Meltzer, Lippe, Goldstein & Breitstone, LLP_, 160 A.D.3d 543, 72 N.Y.S.3d 433 (1st Dep’t 2018) (“Plaintiff’s argument that the limitation period was tolled by the decedent's alleged dementia is also unavailing, as there is no evidence that the decedent suffered from such disability at the time the claim accrued (CPLR 208), or that it rendered her ‘unable to protect [her] legal rights because of an over-all inability to function in society’ (citations omitted).”).

CPLR 208 - Toll did not terminate upon the appointment of the article 81 guardian.

_Mederos v. New York City Health & Hosps. Corp._, 154 A.D.3d 597, 61 N.Y.S.3d 905 (1st Dep’t 2017) (“Supreme Court correctly found that the CPLR 208 toll did not terminate upon the appointment of the article 81 guardian (citations omitted). The 90-day period to serve the notice of claim was not extended by the CPLR 208 toll (citations omitted). However the 90-day period was tolled in this case by the continuous treatment doctrine.”).

CPLR 208 - Even where some of the decedent’s distributenees are infants, where the plaintiff was “also a distributee and was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion”, the infancy toll in unavailable.

_Has K’Paw Mu v. Lyon_, 158 A.D.3d 1084, 71 N.Y.S.3d 259 (4th Dep’t 2018) (“A wrongful death action has a two-year statute of limitations from the date of the decedent’s death (see EPTL § 5-4.1[1]). Where the sole distributee is an infant, the statute is tolled ‘until appointment of a guardian or the majority of the sole distributee, whichever is earlier’ (citation omitted). Where, however, the decedent is married and the surviving spouse is thus a distributee of the estate, the infancy toll does not apply because the spouse ‘was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion’ (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 208 - Infancy toll was not altered by earlier unsuccessful efforts of plaintiff’s father to pursue a claim on plaintiff’s behalf.

Sherb v. Monticello Cent. Sch. Dist., 163 A.D.3d 1130, 81 N.Y.S.3d 265 (3d Dep’t 2018) (“An application for leave to file a late notice of claim is a matter committed to Supreme Court’s discretion — provided such application is made prior to the expiration of the one year and 90-day statute of limitations’ (citations omitted). Here, as plaintiff was a minor, the statute of limitations was tolled until her 18th birthday (citations omitted). The toll was not altered by the earlier unsuccessful efforts of plaintiff’s father to pursue a claim on her behalf, as to do so would ‘cut[] against the strong public policy of protecting those who are disabled because of their age’ (citation omitted). As plaintiff’s motion was brought within one year and 90 days of her 18th birthday, Supreme Court correctly found that it was timely.”).

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, 162 A.D.3d 1706, 80 N.Y.S.3d 765 (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, 76 N.Y.S.3d 328 (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 - A lender can revoke an election to accelerate the mortgage by an affirmative act of revocation done during the six-year statute of limitations period after the initiation of a prior foreclosure action. A de-acceleration letter will be enforceable “if it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration.”

 Freedom Mtge. Corp. v. Engel, 163 A.D.3d 631, 81 N.Y.S.3d 156 (2d Dep’t 2018) (“Here, the defendant established that the six-year statute of limitations began to run on the entire debt on July 16, 2008, when the plaintiff accelerated the mortgage debt by commencing the prior foreclosure action (citations omitted). Since the plaintiff did not commence this action until February 19, 2015, the defendant sustained his prima facie burden on his motion (citations omitted). In opposition, the plaintiff failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period. Contrary to the Supreme Court’s determination, the plaintiff’s execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (citations omitted). The plaintiff’s alternate contention that the loan had never been accelerated since the defendant had not been served with the summons and complaint in the prior action is belied by the terms of the January 23, 2013, stipulation, which provide that the defendant was, in fact, served with the summons and complaint.”).

Milone v. US Bank Natl. Assn., 164 A.D.3d 145, 83 N.Y.S.3d 524 (2d Dep’t 2018) (“Determining precisely when a mortgage is accelerated is therefore a key aspect in any action or proceeding commenced pursuant to RPAPL 1501(4). Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner’s right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. Here, however, the de-acceleration letter containing a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations constitutes a de-acceleration in fact and cannot be viewed as pretextual in any way. Specifically, a de-acceleration letter is not pretextual if, as here, it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration (citation omitted). In contrast, a ‘bare’ and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations. Contrary to the plaintiff’s arguments, ‘[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action’ (citations omitted). Here, US Bank’s de-acceleration occurred on October 21, 2014, within six years
measured from the commencement of its foreclosure action on January 13, 2009. Accordingly, while the plaintiff, in support of her cross motion, established her prima facie entitlement to summary judgment on her RPAPL 1501(4) cause of action, US Bank’s timely de-acceleration notice raises a triable issue of fact requiring the denial of the plaintiff’s cross motion. As previously noted, the burden of proof governing a motion pursuant to CPLR 3211(a) is different from the burden of proof governing a motion pursuant to CPLR 3212. Therefore, US Bank’s de-acceleration notice, which raises a triable issue of fact sufficient to defeat the plaintiff’s cross motion for summary judgment, does not necessarily mandate dismissal of the complaint on the basis of that documentary evidence, because it fails to ‘utterly refute’ the plaintiff’s allegations as a matter of law. We hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well. Here, the de-acceleration notice dated October 21, 2014, does not establish that US Bank had standing to de-accelerate the earlier demand that the plaintiff’s mortgage debt be paid in its entirety, and no other evidence submitted in support of US Bank’s CPLR 3211(a)(1) motion to dismiss the complaint demonstrates that it had standing. This issue is particularly germane on this record, where US Bank had been directed to provide the original note under the terms of the preliminary conference order dated September 20, 2011, and the foreclosure action was thereafter dismissed on February 29, 2012. Had US Bank provided documentary evidence in support of its CPLR 3211(a)(1) motion establishing, inter alia, its standing to accelerate and de-accelerate the plaintiff’s mortgage debt, it might have been entitled to dismissal of the complaint. Failing that, the motion to dismiss was not accompanied by documents utterly refuting the allegation in the plaintiff’s complaint that US Bank’s efforts to collect on the debt were time-barred.”).

CPLR 213 - Claims based on alleged construction defects accrue upon completion of work.

New York Univ. v. Turner Constr. Co., 163 A.D.3d 416, 81 N.Y.S.3d 16 (1st Dep’t 2018) (“Accrual of claims based on alleged construction defects in the Smilow building began to run upon completion of the work (citation omitted). While ‘occupancy, partial or full, is simply a factor to be considered in ascertaining whether there has been completion’ (citation omitted), the building was completed, at the latest, upon issuance of the certificate of occupancy (citation omitted). Inasmuch as plaintiffs acknowledge that a final certificate of occupancy for the Smilow building was issued more than three years before commencement of this action, their negligence claims are time-barred.”).

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(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*, 162 A.D.3d 761, 78 N.Y.S.3d 247 (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 213-a - How to compute stabilized rent.

Matter of 333 E. 49th Partnership, LP v. New York State Div. of Hous. & Community Renewal, 165 A.D.3d 93, 83 N.Y.S.3d 461 (1st Dep’t 2018) (“[W]e find that DHCR erred to the extent that it used Thornton’s default method to set the stabilized rent. . . . The default formula ‘uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date’ (citation omitted). In Grimm, the Court of Appeals found that the rationale used in Thornton was not limited to illusory tenancies, and thus, where the overcharge complaint makes a colorable allegation of a fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization, DHCR must investigate the legality of the base date rent (citation omitted). Here, unlike in Thornton, the rent-stabilized lease that the owner entered into with the prime tenant was a legal one and it is not alleged to have included any improper provisions. While the lease served as a vehicle for the prime tenant’s fraud, the rent-stabilized rent set forth therein, in the subsequent renewals, and in the rent registration records, are reliable in their own right. Unlike in Thornton, here the fraud was carried out via a separate vehicle,
through the sublease. On this record, the base date rent was properly set by the RA in his December 4, 2009 order at $1,524.32, the rent in effect on the base date, February 27, 2005, pursuant to the 2003 lease renewal.”).

**CPLR 213-a** - The First Department has issued conflicting decisions with respect to the method for determining the legal base rent where there is no allegation of fraud, but where there are no stabilized leases and rent registrations available for the four-year period.

In *Taylor v. 72A Realty Assoc.*, 151 A.D.3d 95, 53 N.Y.S.3d 309 (1st Dep’t 2017), and *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dep’t 2012), the court suggested that it was appropriate to look beyond the four-year period to establish the legal base rent. However, recently in *Matter of Regina Metro. Co., LLC v. New York State Division of Housing & Community Renewal*, 164 A.D.3d 420, 84 N.Y.S.3d 91 (1st Dep’t 2018), in a 3-2 ruling the First Department held that in the absence of a showing of fraud, the court cannot look back at a unit’s rental history beyond the four-year limitation period.

*72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dep’t 2012) (“In light of the Court of Appeals’ decision in *Roberts v. Tishman Speyer Props., L.P.* (citations omitted) and subsequent case law giving retroactive effect to *Roberts* (citations omitted), tenant is entitled to rent-stabilized status for the duration of her tenancy and to collect any rent overcharges, as her apartment was improperly deregulated by landlord while it was receiving J-51 tax benefits. That the J-51 benefits subsequently expired does not support landlord’s claim that the apartment must be denied ongoing regulated status. Our determination that the tenancy is rent stabilized is not, as found by the lower courts, based on the failure of the owner to have provided notice as set forth in *Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504*, but is premised on the apartment having been improperly deregulated as of the time that the tenant took occupancy. Additionally, as we explained in *Gersten*, tenant’s challenge to the deregulated status of her apartment, which presents a ‘continuous circumstance’ (citation omitted), is not barred by the six-year statute of limitations period set forth in CPLR 213 (2). The courts below, however, erred in setting the base date rent for the overcharge counterclaim at the $2,250 per month rate based on the market rate in the lease effective for October 2004. While that date is correct under CPLR 213-a, in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above $2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate.”).

*Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 164 A.D.3d 420, 84 N.Y.S.3d 91 (1st Dep’t 2018) (“The dissent attempts to avoid CPLR 213-a’s four-year limitation by stating that it is ‘logical’ that CPLR 213-a’s reference to the ‘rental history’ means only the rental history found in the annual filings with DHCR. Using this unduly limited definition of ‘rental history,’ the dissent then argues that where, as here, there are no recent filings with DHCR (because the landlord thought that it had properly deregulated the apartment) courts may look back at evidence concerning rent charged before the base date, and that no predicate showing of fraud is necessary to do so. If the legislature had meant ‘rental history’ to mean ‘rental history found in the annual filings with DHCR,’ it could have easily so stated. A far more
reasonable interpretation of ‘rental history’ would embrace not just agency records but also the records of the landlord and the tenant, as embodied in ledger books, cancelled checks, rent receipts, expired leases, and the like. Thus, the absence in this case of DHCR rent registrations going back four years does not nullify the temporal strictures of CPLR 213-a.”).

Raden v. W 7879, LLC, 164 A.D.3d 440, 84 N.Y.S.3d 30 (1st Dep’t 2018) (“As we have explained in Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal (citation omitted), 9 NYCRR 2526.1(a)(2)(ii) and CPLR 213-a are ‘categorical in barring any examination of a unit’s rental history beyond the four-year limitations period,’ with the sole exception being cases in which there is evidence that the landlord committed fraud in order to avoid the regulatory scheme (citation omitted). In Todres v W7879, LLC (137 AD3d 597 [1st Dept 2016], lv denied 28 NY3d 910 [2016]), we considered the very building involved in this case and upheld a determination that this same landlord had not engaged in a fraudulent scheme to remove an apartment from the rent stabilization program and had not acted with willfulness. We therefore modified the ruling of Supreme Court to deny treble damages and to conclude that CPLR 213-a precluded examination of the rental history before the four-year period immediately preceding the filing of the action to recover overcharges. The same result should obtain here. We choose to follow our prior ruling to the same effect in Stulz v 305 Riverside Corp. (citations omitted) rather than our decision in Taylor v 72A Realty Assoc., L.P. (citation omitted), for the reasons stated in Regina Metropolitan __ AD3d __, supra.”).

CPLR 213-a - Fraudulent scheme to deregulate

Kreisler v. B-U Realty Corp., 164 A.D.3d 1117, 83 N.Y.S.3d 442 (1st Dep’t 2018) (“The record reflects evidence of a fraudulent scheme to deregulate plaintiffs’ apartment, as well as other apartments in the building, including evidence of defendants’ failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated Roberts v Tishman Speyer Props. L.P. (citation omitted), came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014. We reject defendants’ asserted reliance on a ‘pre-Roberts’ framework to justify their actions, given that the wrongdoing here occurred in 2010, after Roberts was decided. Moreover, and notwithstanding defendants’ arguments to the contrary, we find the evidence of other litigations by plaintiffs’ co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate (citation omitted). In turn, we find defendants have not shown that Supreme Court erred in directing the Special Referee to use the default formula of 9 NYCRR § 2522.6(b)(2) to determine plaintiffs’ base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment.”).
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).’”).
Minority 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 no-fault 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 self-insured 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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 ‘pertaining’ 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(6) - There is no indication of an ongoing, continuous, developing and dependent relationship between the client and the attorney or mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.

Knobel v. Wei Group, LLP, 160 A.D.3d 409, 70 N.Y.S.3d 839 (1st Dep’t 2018) (“The motion court correctly determined that the legal malpractice claim is barred by the three-year statute of limitations (citation omitted). No triable issue of fact exists as to whether the doctrine of continuous representation tolled the statute of limitations. It is undisputed that on March 12, 2012, plaintiff Steven M. Knobel sent defendant Eric Wei an email directing Wei ‘to cease all [ ] work’ and that shortly thereafter, Knobel sent an email to the court indicating his desire to appear pro se. Contrary to plaintiffs’ contention, there is no indication of ‘an ongoing, continuous, developing and dependent relationship between the client and the attorney’ or a ‘mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim after March 12, 2012 (citation omitted). Plaintiffs’ argument that the billing invoices show that defendants continued to represent them up until and after March 19, 2012 is unpersuasive. The invoices in the record do not indicate that after March 12, 2012 defendants performed any substantive legal work or provided any legal advice on the matters which plaintiffs allege defendants committed malpractice (citation omitted). Rather, the invoices show that plaintiffs were billed for work pertaining to communications with the court, client, and subsequent counsel, which did not toll the statute of limitations (citation omitted).”).

CPLR 214(6) - Equitable estoppel “will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations.”

Brean Murray, Carret & Co. v. Morrison & Foerster LLP, 165 A.D.3d 582, 87 N.Y.S.3d 178 (1st Dep’t 2018) (“Here, the alleged malpractice occurred in December 2010 when defendant issued its opinion letter that ‘nothing has come to our attention that leads us to believe’ that the registration statement ‘contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.’

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Thereafter, a public report which broke the news of Puda's fraud on April 8, 2011 confirmed that the fraudulent transfers of ownership of Shanxi Coal were documented in government filings. There was nothing preventing plaintiff from accusing defendant of substandard care in April 2011, based on defendant's opinion letter, when compared to statements made in the public report and the securities litigation that followed in April 2011.”).

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

**CPLR 214-a**


**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 treatment 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**


**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**


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 - Alleged sexualization of physician-patient relationship generally sounds in medical malpractice.**

*Stagnitta v. Ambrosino*, 166 A.D.3d 926, 87 N.Y.S.3d 565 (2d Dep’t 2018) (“The alleged sexualization of a physician-patient relationship generally sounds in medical malpractice (citations omitted), since the injuries incurred are not separate and distinct from the damages incurred for medical malpractice (citations omitted). Here, the alleged fraud and the alleged improper medical treatment were based upon the same alleged conduct. Therefore, the complaint sounds in medical malpractice and is governed by the 2½-year statute of limitations applicable to causes of action sounding in medical malpractice (citation omitted); that statute of limitations had already expired at the time the action was commenced. Accordingly, we agree with the Supreme Court's determination to grant the defendant's motion.”).

**CPLR 214-a - Defendant cannot defeat application of continuous treatment doctrine merely because of failure to make correct diagnosis as to underlying condition, if defendant treated plaintiff continuously over relevant time period for symptoms that are ultimately traced to that condition.**

*Cohen v. Gold*, 165 A.D.3d 879, 86 N.Y.S.3d 538 (2d Dep’t 2018) (“‘Treatment’ does not necessarily terminate upon the last visit, if further care or monitoring of the condition is explicitly anticipated by both physician and patient, as manifested by a regularly scheduled appointment for the near future (citation omitted). Thus, ‘[i]ncluded within the scope of continuous treatment is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment’ (citations omitted). Even the monitoring of an abnormal condition may be sufficient to support the application of the continuous treatment toll (citations omitted). The critical inquiry is not whether the defendant failed to make a diagnosis or undertake a course of treatment during the period of limitation, but whether the plaintiff continued to seek treatment for the same or related conditions giving rise to his or her claim of malpractice, during that period (citation omitted). Accordingly, a defendant cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, if the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately traced to that condition (citations omitted). Here, the plaintiff does not claim merely that the moving defendant failed to diagnose her condition and treat her for it (citation omitted). Rather, she alleged that between 2009 and 2015, she was treated continuously for symptoms ultimately traced to abnormal and severe periodontal disease. Both the plaintiff's affidavit and her expert's affidavit, which referred to numerous specific notations in the plaintiff's dental records, raised triable issues of fact as to whether a course of treatment for periodontal disease was established and therefore the continuous treatment doctrine would apply to toll the statute of limitations (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 214-a - Action was timely commenced within 2½ years of the cessation of defendants' continuous treatment of plaintiff's atrial fibrillation condition.

Phillips v. Buffalo Heart Group, LLP, 160 A.D.3d 1495, 75 N.Y.S.3d 732 (4th Dep’t 2018) (“We further agree with plaintiff that the record establishes that defendants provided continuous treatment to plaintiff for a condition, i.e., atrial fibrillation, until January 2, 2013; the alleged wrongful acts or omissions were related to that condition; and such treatment ‘gave rise to the . . . act, omission or failure’ complained of (citations omitted). Indeed, the record establishes that the alleged wrongful acts or omissions themselves ran continuously until January 2, 2013. We therefore reject defendants' contention that the statute of limitations began to run at the time of the first prescription of Pradaxa on January 10, 2011. We conclude that the court erred in granting the motion inasmuch as this action was timely commenced within 2½ years of the cessation of defendants' continuous treatment of plaintiff's atrial fibrillation condition (citations omitted). To the extent that the decision of this Court in Paten v Hamburg OB/GYN Group, P.C. (citation omitted) conflicts with our decision herein, it should no longer be followed.”).

CPLR 214-a - Continuous treatment doctrine: Issue of fact as to whether further treatment was explicitly anticipated by both patient and doctor.

Freely v. Donnenfeld, 150 A.D.3d 697, 54 N.Y.S.3d 66 (2d Dep’t 2017) (“In the present case, Donnenfeld testified at his deposition that when he discussed treatment options with the plaintiff, he advised the plaintiff that a new treatment process was available outside the United States and that he was cautiously optimistic that, at some time in the foreseeable future, he could offer it to the plaintiff in New York. The plaintiff, who was aware that the treatment process was the subject of a study aimed at obtaining FDA approval, testified at his deposition that he was waiting for the new treatment process to become available. After being told, in November 2008, that his only options were to wait for the new treatment or seek treatment outside the country, the plaintiff returned to the defendants for treatment of the same condition on March 9, 2011, and, in fact, received treatment for the same condition from the defendants continuing until December 2012. Under these circumstances, there are questions of fact as to whether further treatment was explicitly anticipated by both the defendants and the plaintiff after 2008, and whether, under the particular circumstances of this case, the March 9, 2011, visit constituted a timely return visit (citations omitted).”).

CPLR 214-a - Continuous treatment doctrine applied to doctor who left medical practice, where plaintiff continued to be treated by doctors in that practice.

Matthews v. Barrau, 150 A.D.3d 836, 55 N.Y.S.3d 282 (2d Dep’t 2017) (“With respect to failure-to-diagnose cases, a physician ‘cannot escape liability under the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where [he or she] treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition’ (citations omitted). The continuous treatment doctrine may be applied to a physician who has left a medical practice by imputing to him or her the continued treatment provided by subsequent treating physicians in that practice (citations omitted).”).
CPLR 214-a - Continuous treatment doctrine applies where prescriptions being issued and refilled by doctor and there is continuing relationship with the patient.

Murray v. Charap, 150 A.D.3d 752, 54 N.Y.S.3d 28 (2d Dep’t 2017) (“According to the defendant, during the relevant period prior to May 22, 2001, he prescribed and refilled the plaintiff’s prescriptions for cholesterol-lowering medications, told the plaintiff to resume his diet, explained to the plaintiff that he had elevated cholesterol and that it was a risk for heart disease, and had a conversation with the plaintiff to make sure he was taking his medication. ‘The continuous treatment rule applies to the period if prescriptions are being issued by the doctor where there is a continuing relationship’ with the patient’ (citations omitted). Therefore, the plaintiffs raised a question of fact as to whether their claims with respect to treatment prior to May 22, 2001, were barred by the statute of limitations.”).

CPLR 214-a - Continuous treatment doctrine does not apply to mother’s derivative claim.

Reeder v. Health Ins. Plan of Greater N.Y., 146 A.D.3d 996, 46 N.Y.S.3d 148 (2d Dep’t 2017) (Continuous treatment toll does not extend to mother’s derivative claim. “The continuous treatment toll is personal to the child and is not available to extend the time by which the plaintiff was required to assert her derivative claim. Accordingly, the Supreme Court properly granted those branches of the motions of Solaiman and BMG which were for summary judgment dismissing the plaintiff’s derivative claims against them (citations omitted).”).

CPLR 214-a / 2221 / 3212(a)


First Department Splits on Application of Continuous Treatment Doctrine

Disagree on Whether There Was Evidence of Ongoing Treatment for Headache-Related Complaints

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 Young v. New York...
In *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.

**CPLR 214-a/3211(a)(5) - The ureteral catheter/stent was not a "foreign object," and the action should have been dismissed as time-barred.**

_Livsey v. Nyack Hosp._, 2018 NY Slip Op 08289 (2d Dep’t 2018) (“Here, in opposition to the defendant’s prima facie showing that the time in which to commence this medical malpractice action had expired, the plaintiff failed to raise a triable issue of fact as to whether the ureteral stent/catheter allegedly inserted in his body was a ‘foreign object’ such that the discovery rule should apply. According to the parties' experts, a ureteral stent/catheter is a tube that bridges the kidney to the bladder, and is inserted and intentionally left in a patient for up to six months to assist in the draining of the kidney when the ureter is obstructed or when damage to the ureter was repaired and it is healing. The parties' experts agree that if a ureteral stent/catheter was inserted in the plaintiff's body during the 1993 procedure, then it was intentionally left in his body for the purpose of assisting in the draining of the kidney. Thus, the device was retained in the plaintiff's body (if inserted at all) for ‘postsurgery healing purposes’ and was not ‘analogous to tangible items’ or ‘surgical paraphernalia,’ such as clamps, scalpels, sponges, and drains, ‘introduced into a patient's body solely to carry out or facilitate a surgical procedure’ (citations omitted). For these reasons, the ureteral catheter/stent was not a ‘foreign object,’ and the action should have been dismissed as time-barred (citations omitted).”).

**CPLR 214-c- Discovery statute of limitations**

**CPLR 214 -c - More than three years prior to the commencement of action, plaintiff had objective level of awareness of dangers and consequences of asbestos exposure sufficient to place him on notice of the primary condition on which his claims were based.**

_O’Brien v. County of Nassau_, 164 A.D.3d 684, 83 N.Y.S.3d 311 (2d Dep’t 2018) (“The defendants demonstrated that, by September 18, 2012, the plaintiff had been made aware, through laboratory reports, that asbestos was present at the Nassau Coliseum and that he had come into direct contact with asbestos during his employment; that the plaintiff had filed a Workers’ Compensation claim alleging injuries sustained from exposure to asbestos; that the plaintiff had filed a notice of claim alleging severe and permanent injuries, including injuries to both lungs and other organs, and emotional distress, as a result of exposure to asbestos; that a breathing test had shown that the plaintiff was suffering from mild restriction of breathing; and that a CT scan had revealed nodules on the plaintiff’s lungs and a cyst on his liver. Thus, the defendants established that, more than
three years prior to the commencement of the instant action on November 12, 2015, the plaintiff had an objective level of awareness of the dangers and consequences of asbestos exposure sufficient to place him on notice of the primary condition on which his claims were based (citation omitted).”.

**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*, 162 A.D.3d 1377, 79 N.Y.S.3d 365 (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 217- Four month statute of limitations, “[u]nless a shorter time is provided in the law authorizing the proceeding.”**

**CPLR 217/7801/7804 - Action was untimely since proceeding commenced more than 4 months after petitioner was notified that there had been a final and binding determination to discharge him from the program.**

*Matter of Rodas v. RISC Program, Family Servs., Inc., of Dutchess County*, 163 A.D.3d 682, 81 N.Y.S.3d 135 (2d Dep’t 2018) (“A party seeking to assert the statute of limitations as a defense has the burden of establishing that the petitioner was notified of the determination more than four months before the proceeding was commenced (citation omitted). Here, the respondents established that, more than four months before this proceeding was commenced in January 2015, the petitioner was notified that there had been a final and binding determination to discharge him from the program. In support of their motion, the respondents submitted an affidavit from a clinician who worked with the petitioner in the program. The clinician stated that on March 19, 2013, she informed the petitioner that he had failed a polygraph examination, and therefore would be discharged from the program. The respondents also noted that, annexed to the petition as an exhibit, was a letter from the petitioner to the program administrator, dated April 25, 2014, asking why he had been discharged from the program. Further, in his papers submitted in opposition to the motion, the petitioner acknowledged that he became aware that he had been discharged from the program “in or about May-June of 2013.” This evidence was sufficient to establish that the petitioner was notified that there had been a final and binding determination to discharge him from
the program by June 2013, at the latest. Moreover, the petitioner’s correspondence with the administrators and clinicians of the program regarding the reasons for his discharge did not toll or revive the statute of limitations (citation omitted). Accordingly, we agree with the Supreme Court’s determination granting that branch of the respondents’ motion which was pursuant to CPLR 217 to dismiss the proceeding on the ground that it was time-barred (citations omitted).”.

**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, 77 N.Y.S.3d 533 (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, 76 N.Y.S.3d 523 (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/Article 78 - Petitioner’s request for reconsideration did not toll the statute of limitations.**

*Matter of Mercado v. Rodriguez,* 153 A.D.3d 1534, 60 N.Y.S.3d 699 (3d Dep’t 2017) (“Inasmuch as petitioner did not commence the instant CPLR article 78 proceeding within four months of receiving the June 2015 administrative determination as required, Supreme Court properly dismissed this proceeding as time-barred by the statute of limitations (citations omitted). Further, contrary to his contention, petitioner’s request for reconsideration did not toll or revive the statute of limitations (citations omitted). Accordingly, the merits of petitioner’s claims are not before us.”).
CPLR 217 - But limitation period extended where agency conducts fresh and complete examination of the matter based on newly presented evidence.

*Matter of Kaneev v. City of New York Envtl. Control Bd.*, 149 A.D.3d 742, 52 N.Y.S.3d 107 (2d Dep’t 2017) (“Generally, a request for discretionary consideration does not serve to extend the statute of limitations or change a final determination into a nonfinal one (citation omitted). ‘However, where the agency conducts a fresh and complete examination of the matter based on newly presented evidence,’ an aggrieved party may seek review in a CPLR article 78 proceeding commenced within four months of the new determination’ (citations omitted). Here, the ECB conducted a fresh and complete examination of the matter in response to the petitioner’s October 21, 2013, letter, in which he sought dismissal of the March NOVs due to the ECB’s dismissal of the June NOV. In its responsive letter to the petitioner dated November 8, 2013, the ECB expressly stated that the rejection of the appeal would become final on November 18, 2013. Thus, contrary to the Supreme Court’s finding that the ECB’s determination became final on September 4, 2008, it actually became final on November 18, 2013. Nonetheless, the proceeding was time-barred since the petitioner commenced this proceeding on April 8, 2014, more than four months after the determination became final on November 18, 2013.”).

CPLR 217 - Article 78 proceeding is appropriate where challenge is directed to the procedure followed in enacting, rather than the substance of legislation.

*Village of Islandia v. County of Suffolk*, 162 A.D.3d 715, 79 N.Y.S.3d 188 (2d Dep’t 2018) (“A proceeding pursuant to CPLR article 78 is unavailable to challenge the validity of a legislative act (citation omitted). However, when a challenge is directed to the procedure followed in enacting, rather than the substance of, legislation, a proceeding pursuant to CPLR article 78 may be maintained (citations omitted). Here, the plaintiff’s third cause of action alleged that the actions taken by the defendants in the formation of the agency were void, invalid, and illegal due to the failure of the defendants to comply with the requirements of the State Environmental Quality Review Act (citations omitted). ‘SEQRA challenges must be commenced within four months after the determination becomes final and binding upon the petitioner’ (citation omitted). The defendants' determination with regard to the formation of the agency became final and binding on the plaintiff more than four months prior to the commencement of the action. Accordingly, we agree with the Supreme Court's determination that the plaintiff's third cause of action was time-barred pursuant to CPLR 217 (citations omitted).”).

CPLR 217/7804 - Limitation period applicable to proceeding against body or officer can be less than four months.

*Matter of Beer v. Village of New Paltz*, 163 A.D.3d 1215, 80 N.Y.S.3d 713 (3d Dep’t 2018) (“Under CPLR 217 (1), ‘[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.’ To that end, a proceeding challenging a determination or order of a town board establishing a water district must be commenced within 30 days after such determination or order is recorded in the county clerk’s office (citation omitted). Our review of the petition’s allegations discloses that petitioners are
essentially challenging the establishment of Water District No. 5 and, therefore, the 30-day statute of limitations provided in Town Law § 195 (2) controls. Because over 30 days elapsed between the recording of the order and the commencement of this proceeding, Supreme Court correctly dismissed the petition as time-barred (citations omitted). Petitioners’ attempt to skirt the 30-day limitations period by characterizing the proceeding as a challenge to the Town Board’s SEQRA determination is unavailing (citations omitted).”

**CPLR 217 - 30-day statute of limitations applies**

_Matter of Woodworth v. Town of Groveland_, 160 A.D.3d 1373, 76 N.Y.S.3d 305 (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 - Challenge to university's academic and administrative decision**

_Dawson v. New York Univ._, 160 A.D.3d 555, 72 N.Y.S.3d 433 (1st Dep’t 2018) (“Although plaintiff alleges that he was subjected to unlawful discrimination, the complaint is actually ‘a challenge to a university's academic and administrative decision[]’ (citations omitted). Accordingly, it is barred by the four-month statute of limitations for a CPLR article 78 proceeding, which is the appropriate vehicle for such a challenge (citations omitted).”).

**CPLR 217 - No toll for plaintiff's invocation of defendant's voluntary student grievance procedure.**

_Donoso v. New York Univ._, 160 A.D.3d 522, 74 N.Y.S.3d 542 (1st Dep’t 2018) (“The four-month statute of limitations applicable to article 78 proceedings (citation omitted) was not tolled by plaintiff's invocation of defendant's voluntary student grievance procedure (citations omitted). Since this action was commenced some eight months after plaintiff was notified of defendant's decision to withdraw him from the JSD program, it is time-barred.”).

**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. CPLR 2001 cannot save petitioner.**

_Matter of Ennis v. Annucci_, 160 A.D.3d 1321, 75 N.Y.S.3d 347 (3d 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 - Application to file late notice of claim: Factors to consider**

*Matter of Diegelman v. City of Buffalo, 148 A.D.3d 1692, 51 N.Y.S.3d 279 (4th Dep’t 2017)* (‘In determining whether to grant claimants’ application, the court was required to consider ‘all relevant facts and circumstances,’ including the ‘nonexhaustive list of factors’ in section 50-e (5) (citations omitted). ‘[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative’ (citation omitted). The three main factors are whether the claimants have shown a reasonable excuse for the delay, whether respondents had actual knowledge of the facts surrounding the claim within 90 days of its accrual ‘or within a reasonable time thereafter,’ and whether the delay would cause substantial prejudice to the municipality (citations omitted). Here, even assuming, arguendo, that claimants failed to provide a reasonable excuse for their delay, we conclude that the remaining factors support the court’s exercise of discretion in granting their application. Although respondents did not obtain knowledge of the facts underlying the claim until approximately nine months after the expiration of the 90-day period, we conclude under the circumstances of this case that ‘this was a reasonable time, particularly in light of the fact that respondent[s] do[ ] not contend that there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of this action’ ‘ (citation omitted). Moreover, claimants made a sufficient showing that the late notice will not substantially prejudice respondents, and respondents failed to ‘respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed’ (Newcomb, 28 NY3d at 467). We therefore conclude that the court ‘properly exercised its broad discretion in granting [claimants’] application pursuant to General Municipal Law § 50-e (5)’ (citation omitted).’).

**CPLR 217-a - “Intentional tort causes of action asserted against municipal defendants must be commenced within the one-year-and-90-day statute of limitations contained in General Municipal Law § 50-i, which ‘takes precedence over the one-year period of limitations provided for in CPLR 215.’”**

*Williams v. City of New York, 153 A.D.3d 1301, 62 N.Y.S.3d 401 (2d Dep’t 2017)* (“However, the defendants correctly contend that they were entitled to dismissal of the state common-law causes..."
of action alleging false arrest and false imprisonment on the ground that they are time-barred. General Municipal Law § 50-i(1)(c) provides, in pertinent part, that no personal injury action shall be prosecuted or maintained against a city unless it is commenced within one year and 90 days after the happening of the event upon which the claim is based. Although causes of action to recover damages for intentional torts, such as false arrest and false imprisonment, are generally subject to a one-year period of limitations (citation omitted), intentional tort causes of action asserted against municipal defendants must be commenced within the one-year-and-90-day statute of limitations contained in General Municipal Law § 50-i, which ‘takes precedence over the one-year period of limitations provided for in CPLR 215’ (citations omitted). Here, the state common-law causes of action alleging false arrest and false imprisonment accrued upon the plaintiff’s release from confinement at Rikers Island on December 11, 2009 (citations omitted). The plaintiff did not file and serve his complaint until September 20, 2011. This was well beyond the one-year-and-90-day statute of limitations (citations omitted).”.

**CPLR 217-a - While one year and 90-day statute of limitations began to run upon plaintiff’s commencement of the proceeding, CPLR 204 (a) tolled remainder of statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again.**

*Kulon v. Liberty Fire Dist.*, 162 A.D.3d 1178, 77 N.Y.S.3d 788 (3d Dep’t 2018) (“Pursuant to General Municipal Law, a plaintiff must first serve a notice of claim against a municipality within 90 days after the claim arises (citation omitted) and commence any subsequent tort action against the municipality within one year and 90 days after the claim arises (citation omitted). Because plaintiff's claims against defendants, if any, arise from the fire that occurred on February 18, 2014, he was therefore required to file and serve a notice of claim by May 19, 2014 and commence any subsequent tort action by May 19, 2015. Having failed to file and serve his notice of claim by May 19, 2014, plaintiff was permitted to, and did, commence a special proceeding seeking leave to file a late notice of claim. While the applicable one year and 90-day statute of limitations began to run on February 18, 2014, upon plaintiff's commencement of the proceeding, the provisions of CPLR 204 (a) operated to toll the remainder of the statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again (citations omitted).”).

**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, 76 N.Y.S.3d 592 (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, 76 N.Y.S.3d 648 (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 - Lack of subject matter jurisdiction

Matter of Duran v. Mercado, 155 A.D.3d 725, 64 N.Y.S.3d 90 (2d Dep’t 2017) (“The Family Court properly dismissed the mother’s petition on the ground that it lacked subject matter jurisdiction. ‘Where a different state possesses exclusive, continuing jurisdiction, New York cannot take jurisdiction unless the foreign state declines, even [if] the parties clearly no longer have a significant connection with that state’ (citations omitted). Here, the record is clear that Pennsylvania had exclusive, continuing jurisdiction over the custody dispute, as the father continued to reside in Pennsylvania and the Pennsylvania court had not determined that New York would be a more appropriate forum (citations omitted).”).
CPLR 301 - No general jurisdiction over individual

IMAX Corp. v. Essel Group, 154 A.D.3d 464, 62 N.Y.S.3d 107 (1st Dep’t 2017) (“Additionally, petitioner failed to establish that New York courts have general jurisdiction over respondent Chandra individually pursuant to CPLR 301. New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state (citations omitted) or in an exceptional case where ‘an individual’s contacts with a forum [are] so extensive as to support general jurisdiction notwithstanding domicile elsewhere’ (citation omitted). In the present case, movant has failed to show either that Chandra was domiciled in New York or that Chandra’s contacts with New York were so extensive as to support general jurisdiction. Initially, the purchase of the apartment, even if attributable to him personally, is insufficient to establish that Chandra was domiciled in New York (citations omitted). Further, the evidence submitted by petitioner demonstrates that Chandra’s business activities in New York were undertaken on behalf of a corporate entity (citation omitted). No pretrial jurisdictional disclosure is warranted.”).

CPLR 301


Daimler “Doing Business” Standard Revisited

Majority Finds This Is Not an "Exceptional Case"

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


Daimler “At Home” Standard as Applied to Individuals

District Court Finds Baseball Player’s Contacts with New York Not so Extensive as to Render Him at Home

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 Yankee 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 - “At Home” Jurisdiction

Robins v. Procure Treatment Ctrs., Inc., 157 A.D.3d 606, 70 N.Y.S.3d 457 (1st Dep’t 2018) (“Plaintiff made a ‘sufficient start’ in establishing that New York courts have jurisdiction over PPM under CPLR 301 and 302(a)(1) to be entitled to disclosure pursuant to CPLR 3211(d) (citation omitted). With regard to general jurisdiction, codified in CPLR 301, it is not clear whether PPM’s ‘affiliations with the State [New York] are so continuous and systematic as to render [it] essentially at home in the [] State’ citation omitted). However, the record contains a State filing in which PPM identified itself as having a principal place of business in Manhattan — ‘tangible evidence’ upon which to question PPM’s claims to the contrary (citation omitted). With regard to specific jurisdiction (CPLR 302[a][1]), the record shows that PPM’s activities in New York were ‘purposeful and [that] there is a substantial relationship between the transaction and the claim asserted’ (citations omitted). PPM chose and marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium’s doctors with privileges at its facility. In contrast to Paterno v. Laser Spine Inst. (24 NY3d 370 [2014]), a medical malpractice action in which the plaintiff argued that New York courts had jurisdiction over a Florida-based facility and its doctors based on an advertisement and communications, in this case, plaintiff did not seek out PPM. She says that she was directed to PPM by her New York doctor, defendant Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava’s services.”).

CPLR 301 / 302


Business Corporation Law § 1314(b) Limits on Subject Matter Jurisdiction

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Court Finds CPLR 302 Exception Applies

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.


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**


**Business Corporation Law § 1314(b) Postscript**

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
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 301 - Subject matter jurisdiction and sovereign immunity**

*Cayuga Nation v. Campbell*, 163 A.D.3d 1500, 83 N.Y.S.3d 760 (4th Dep’t 2018) (“Although the sovereign nature of Indian tribes cautions the Secretary [of the Interior and the BIA] not to exercise freestanding authority to interfere with a tribe’s internal governance, the Secretary has the power to manage all Indian affairs and . . . all matters arising out of Indian relations’ (citations omitted). Therefore, ‘the BIA has the authority to make recognition decisions regarding tribal leadership, but only when the situation [has] deteriorated to the point that recognition of some government was essential for Federal purposes . . . “Thus, the BIA has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe”’ (citation omitted). That includes ‘the responsibility to ensure that the Nation’s representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole’ (citations omitted). Pursuant to federal law, ‘we owe deference to the judgment of the Executive Branch as to who represents a tribe’ (citation omitted). Here, the BIA determined that it will conduct government-to-government relations with plaintiff. Based on that determination, the BIA awarded an ISDA contract to plaintiff for the purpose, among others, of running the Nation’s office. In this action, plaintiff seeks several forms of relief, including possession of and the ability to run the Nation’s office. Thus, although we may not make a determination that will interfere with the Nation’s governance and right to self determination, we must defer to the federal executive branch’s determination that the Nation has resolved that issue, especially where, as here, that determination concerns the very property that is the subject of this action.”).

**CPLR 302 - Specific Jurisdiction**

**CPLR 302**

U.S. Supreme Court Tackles Specific Jurisdiction Issues

Holds That California Courts Lacked Jurisdiction Over Defendant for Nonresident Claims

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


Insurance Policy’s “Territory of Coverage” Clause Insufficient to Confer Personal Jurisdiction

Results in Dismissal of CPLR 3213 Action to Domesticate North Carolina Judgment

In Repwest Ins. Co. v. Country-Wide Ins. Co., 2018 N.Y. Slip Op. 06505 (1st Dep’t October 2, 2018), the defendant, Country-Wide Ins. Co. (Countrywide), a Delaware Corporation with its principal place of business in New York, issued a personal automobile insurance policy to nonparty Alexa Ancrum. The policy contained a "territory of coverage" clause, covering any accident "within the State of New York, or elsewhere in the United States in North America. ..." Ms. Ancrum, a New York resident, entered into a rental agreement with a U-Haul company in New York. That agreement provided that the insurance policy was excess or secondary to any other coverage. The plaintiff here, Repwest, is U-Haul’s excess liability carrier and is an Arizona corporation with its principal place of business in Arizona.

Ms. Ancrum was involved in a car accident in North Carolina. Countrywide reimbursed Repwest for the property damage settlement upon its demand; Repwest paid the personal injury settlement, and it demanded payment from Countrywide on equitable subrogation grounds. When Countrywide refused, Repwest sued Countrywide in North Carolina and entered a default judgment against it. Repwest then sought to domesticate the default judgment in New York via a CPLR 3213 motion. (Note that CPLR Article 54, which governs the enforcement of foreign judgments by filing an authenticated judgment, expressly excludes default judgments. See CPLR 5401.)

Countrywide cross-moved to dismiss on the ground that North Carolina lacked personal jurisdiction. The trial court granted Repwest’s motion.

The Appellate Division reversed. It focused on the territory of coverage clause, noting that it had never directly addressed whether such a clause provides sufficient connection between an insurer and the situs of the accident to confer personal jurisdiction. The court noted there has been a split authority in other jurisdictions as to whether the clause constitutes a sufficient contact with the forum to support specific jurisdiction. The First Department held that Countrywide did not have minimum contacts with the state and, thus, the North Carolina judgment was unenforceable.
Countrywide did not purposefully avail itself of conducting activities within North Carolina. It is undisputed that Countrywide has never been licensed or authorized to do business in any capacity in North Carolina. At all times relevant to this suit, Countrywide has only been licensed to issue insurance policies within New York State. Countrywide has never maintained an office or employees in North Carolina. It is a company incorporated under the laws of Delaware, with its principal place of business in New York. Countrywide has never conducted or solicited business in or from North Carolina. There is a qualitative distinction between contracting to cover an insured under a territory of coverage clause and the insurer of the policy being amenable to being haled into court anywhere in the United States in a dispute with another insurer. Countrywide cannot reasonably foresee being haled into court in a state where it did not purposefully direct its activities (citation omitted).

Id. at *4.

In addition, the court held that conferring jurisdiction did not comport with traditional notions of fair play and substantial justice because it would be a burden for Countrywide to litigate the subrogation claim in North Carolina with Repwest, an Arizona corporation. Moreover, North Carolina did not have a compelling interest in deciding an equitable subrogation claim between two foreign insurers.

CPLR 302(a)(3) - Specific Jurisdiction

Allen v. Institute for Family Health, 159 A.D.3d 554, 74 N.Y.S.3d 15 (1st Dep’t 2018) (“Plaintiff alleges that defendant Dauito, a radiologist, negligently read her sonogram, leading to a delay in the diagnosis and treatment of her breast cancer. Dr. Dauito avers that, at all relevant times, he was a New Jersey resident and worked only at an office in New Jersey. However, he acknowledges that he was licensed to practice medicine in New York and that he contracted with defendant Madison Avenue Radiology, P.C., a New York corporation, to provide radiology services to some of its New York patients. Plaintiff’s sonogram was performed in New York, Dr. Dauito relayed his diagnostic findings to Madison Avenue Radiology in New York, and Madison Avenue Radiology issued a report based on his findings that was allegedly relied upon by plaintiff and her doctors. Under these circumstances, New York courts may exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(1), notwithstanding his lack of physical presence in New York, because he transacted business with Madison Avenue Radiology and provided radiology services to patients in New York, including plaintiff, projecting himself into the State by electronically or telephonically transmitting his diagnostic findings (citations omitted). New York courts may also exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(3), because, as alleged, Dr. Dauito’s negligent misdiagnosis resulted in a delay in plaintiff’s treatment, thereby causing injury to plaintiff in New York, and Dr. Dauito should reasonably expect his out-of-state negligent misdiagnosis in plaintiff’s case to have consequences in New York (citations omitted). Dr. Dauito does not dispute that the other requirements of CPLR 302(a)(3) are met.”).
Williams v. Beemiller, Inc., 159 A.D.3d 148, 72 N.Y.S.3d 276 (4th Dep’t 2018) (Court holds that exercise of personal jurisdiction over an out-of-state seller of firearms who sold a gun that was transported to New York and used in a shooting, did not comport with federal due process. The court found that the first prong of CPLR 302(a)(3)(ii) was met with respect to the defendant’s out of state sales and that the second prong was “arguably” established in the record. However, the court ruled that the defendant lacked minimum contacts. “In seeking to establish the requisite minimum contacts with New York, plaintiffs rely upon Brown’s testimony that Bostic mentioned being from Buffalo and discussed his purported intention or desire to open a gun store in Buffalo in addition to one in Ohio. Plaintiffs contend that Brown’s knowledge that Bostic ostensibly planned or hoped to open a gun store in Buffalo gave Brown reason to believe that the guns would be resold in New York and indicated Brown’s intent to serve the market there. We conclude, however, that Brown’s knowledge that guns sold to Bostic might end up being resold in New York if Bostic’s ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York because such circumstances demonstrate, at most, Brown’s awareness of the mere possibility that the guns could be transported to and resold in New York (citation omitted). The Supreme Court has long rejected the notion that a defendant’s amenability to suit simply ‘travel[s] with the chattel’ (citations omitted). In addition, plaintiffs’ proposed approach would impermissibly allow the contacts that Bostic, a third party, had with Brown and New York ‘to drive the jurisdictional analysis’ (citations omitted). In short, Brown did not ‘purposefully avail[himself] of the privilege of conducting activities within [New York]’ (citation omitted) and, therefore, he lacks the requisite minimum contacts to permit the exercise of jurisdiction over him. Furthermore, for the foregoing reasons, although Brown may have derived substantial revenue from the sale of guns in Ohio to Bostic and his associates that were then transported to and ultimately used or consumed in New York (see CPLR 302 [a] [3] [i]), such ‘financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction[ where, as here,] they do not stem from a constitutionally cognizable contact with that State’ (citation omitted).

CPLR 302(a) - “Arising out of” requirement: There must be substantial relationship of activities to cause of action.

Hall v. City of Buffalo, 151 A.D.3d 1942, 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).”).

Leuthner v. Homewood Suites by Hilton, 151 A.D.3d 1042, 58 N.Y.S.3d 437 (2d Dep’t 2017) (“Here, the plaintiffs failed to make a prima facie showing that the defendants transacted business in New York. The plaintiffs did not rebut the evidence submitted by the defendants demonstrating that (1) the defendant Brantley Enterprises, Inc., which does business under the name Brantley Hotel Group (also named as a defendant), managed the subject hotel, which was known as

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Homewood Suites by Hilton (also named as a defendant), and (2) Brantley Enterprises, Inc., was a Virginia corporation with its principal office in Virginia, which did not conduct business or maintain any offices outside Virginia, and was not affiliated with any New York hotels. The plaintiffs also did not rebut the evidence demonstrating that the subject hotel was owned by nonparty Suite Venture Associates, LLC, a Virginia limited liability company with its principal office in Virginia, which did not conduct business or maintain any offices outside Virginia, and was not affiliated with any New York hotels. Contrary to the plaintiffs’ contention, even if there were other, separate hotels operating in New York under the licensed or franchised name Homewood Suites by Hilton, the plaintiffs failed to demonstrate that the defendants purposefully availed themselves of the privilege of conducting business in New York. Moreover, accepting as true the plaintiffs’ allegation that the defendants were involved in maintaining or operating a website that permitted consumers in New York to make reservations at the subject hotel in Virginia, they failed to make a prima facie showing that there was a substantial relationship between the causes of action asserted in the complaint and any alleged transaction of business through that website (citations omitted).

**CPLR 302(a) - Defendants did not conduct sufficient purposeful activities in New York, which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of New York's laws.**

*Abad v. Lorenzo*, 163 A.D.3d 903, 82 N.Y.S.3d 486 (2d Dep’t 2018) (“On November 10, 2012, the plaintiff was a passenger in a vehicle returning to New York from Mister East nightclub in New Jersey. While still in New Jersey, the plaintiff exited the vehicle and was allegedly struck by the vehicle, which was being operated by the defendant Stephen Lorenzo. The plaintiff thereafter commenced this action to recover damages for personal injuries in the Supreme Court, Queens County, against, among others, Mister East and its owners and operators, Amikle Restaurant, Inc., and Central Park Bar Restaurant Sushi (hereinafter collectively the Amikle defendants), alleging that the Amikle defendants were negligent and violated the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act (citation omitted), commonly known as the Dram Shop Act, for serving alcoholic beverages to Lorenzo while he was visibly intoxicated. The plaintiff is a resident of New York, Amikle Restaurant, Inc., is organized under the laws of New Jersey, and the Amikle defendants’ principal place of business is in New Jersey… We agree with the Supreme Court's determination to grant the Amikle defendants' motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction and to deny that branch of the plaintiff's cross motion which was to dismiss the Amikle defendants' affirmative defense of lack of personal jurisdiction. . . . In opposition to the Amikle defendants' motion, the plaintiffs failed to make a prima facie showing that personal jurisdiction over the Amikle defendants existed under CPLR 302(a)(1). The Amikle defendants did not conduct sufficient purposeful activities in New York, which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of New York's laws (citations omitted).”).
CPLR 302(a) - Plaintiff cites no authority to support its argument that New York courts may exercise jurisdiction over defendant because the policy insured the life of a New York resident.

AMT Capital Holdings, S.A. v. Sun Life Assur. Co. of Can., 161 A.D.3d 465, 77 N.Y.S.3d 18 (1st Dep’t 2018) ("Defendant issued a $10 million life insurance policy to a trust, designated on the policy application as the policy owner and beneficiary, which the record shows has its situs in New Jersey. The policy application was signed in New Jersey, and the receipt reflecting delivery of the policy identifies New Jersey as the place of execution. While the trustee may be a New York resident, he is neither the designated owner nor a beneficiary of the policy. Plaintiff cites no authority to support its argument that New York courts may exercise jurisdiction over defendant because the policy insured the life of a New York resident. Nor do defendant’s purported ties to New York suffice. Plaintiff points out that the medical portion of the application was signed in New York by the insured and the medical examiner and that, before it was delivered to the trustee, the policy passed through two New York intermediaries. These transactions are not only too fleeting to provide a jurisdictional foundation, but are also not the acts from which plaintiff’s claims arise (citations omitted). Even assuming, as the record suggests, that defendant assured plaintiff (which acquired ownership of the policy) of the incontestability of the policy by a letter faxed to a New York number, this is not sufficient to establish New York jurisdiction over defendant (citation omitted).”).

CPLR 302(a) - Defendants subject to jurisdiction because they were part of a conspiracy that involved the commission of tortious acts in New York.

Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgt. LLC, 160 A.D.3d 596, 76 N.Y.S.3d 121 (1st Dep’t 2018) ("The Supreme Court properly concluded that defendants are subject to jurisdiction under New York's long-arm statute because they were part of a conspiracy that involved the commission of tortious acts in New York (citations omitted). Defendants were directors on Gerova's board during most of the time when Gerova was involved in a fraudulent scheme. The amended complaint details the conspiracy to commit fraud using Gerova, the agreements between Gerova and Weston board members and insiders, among others, to loot Wimbledon, and Wimbledon's resulting insolvency (citation omitted). Although defendants did not reside or do business in New York, other Gerova defendants were in New York or interacted regularly with New York, including one of the masterminds of the fraudulent scheme, John Galanis. Regarding their overt acts in furtherance of the conspiracy, defendants' approval of a Gerova proxy statement on which they are listed and which seeks approval of the sham acquisition of a reinsurance company, their receipt of ‘hush money’ to ignore certain red flags at Gerova, and their failure to correct misrepresentations or disclose material information to the public sufficed at this stage. Although defendants did not mastermind the conspiracy, their receipt of ‘hush money’ allows the reasonable inference that they exerted ‘control’ to the extent that the fraud could not have been accomplished without their acquiescence to the proxy and other misconduct (citation omitted).").
CPLR 302(a)(1) - Transaction of business – distinguishes Fischbarg case

Coast to Coast Energy, Inc. v. Gasarch, 149 A.D.3d 485, 53 N.Y.S.3d 16, Footnote 1 (1st Dep’t 2017) (“As the dissent observes, the Court of Appeals concluded in Fischbarg that defendants’ retention and subsequent communications with plaintiff in New York established a continuing attorney-client relationship in this state and thereby constituted the transaction of business under CPLR 302(a)(1). However, in Fischbarg the record established that defendants called Fischbarg, a New York attorney, in order to represent them in an action in Oregon, entered into a retainer agreement, and participated in that relationship via telephone calls, faxes and e-mails over many months. Thus, the Court found that defendants purposefully projected themselves into New York. In contrast, here plaintiffs rely on conclusory allegations and have not demonstrated that Wampler engaged in sustained and substantial business with plaintiffs in New York.”).

CPLR 302(a) - Passive internet activity is generally insufficient to establish PJ.

Abad v. Lorenzo, 163 A.D.3d 903, 82 N.Y.S.3d 486 (2d Dep’t 2018) (“The plaintiff only adduced evidence that Mister East nightclub was promoted through various websites and on social media. Such passive internet activity, which merely imparts information without permitting a business transaction, is generally insufficient to establish personal jurisdiction (citations omitted).”).

CPLR 302(a)(3) - Situs of injury was in New Jersey, where the accident occurred, not New York, where the resultant damages were subsequently felt by the plaintiff.

Abad v. Lorenzo, 163 A.D.3d 903, 82 N.Y.S.3d 486 (2d Dep’t 2018) (“We also agree with the Supreme Court’s determination that personal jurisdiction over the Amikle defendants was not conferred pursuant to CPLR 302(a)(3) based upon alleged tortious activity occurring outside New York, causing injury within New York (citations omitted). The situs of the injury is New Jersey, where the accident occurred, not New York, where the resultant damages were subsequently felt by the plaintiff (citations omitted). Further, contrary to the plaintiff’s contention, the record does not demonstrate that the Amikle defendants regularly did or solicited business, or engaged in any other persistent course of conduct in New York as required by CPLR 302(a)(3)(i).”).

CPLR 302(a)(3) - Situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.

Deutsche Bank AG v. Vik, 163 A.D.3d 414, 81 N.Y.S.3d 18 (1st Dep’t 2018) (“In New York, ‘the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred’ (citations omitted). Here, the ‘original critical events’ giving rise to plaintiff’s injury were the 2012 and 2015 Transfers. As those transfers occurred outside of New York and did not involve New York assets, the situs of injury was not in New York (citations omitted). That plaintiff felt economic injury in New York, alone, is an insufficient basis to confer jurisdiction. To the extent plaintiff relies on Deutsche Bank, AG v Vik (2015 Slip Op 30163[U] [Sup Ct, NY County 2015]), that case relied on federal caselaw that did not apply the situs of injury test, and our decision affirming that order did not determine the issue of jurisdiction under CPLR 302(a)(3)(ii) (citation omitted). Furthermore, even if the
elements of CPLR 302(a)(3)(ii) have been met, asserting personal jurisdiction would not comport with due process (citation omitted). . . . Under the ‘effects test’ theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff’s claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant ‘expressly aimed’ its conduct at the forum (citation omitted). Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient (citation omitted).”).

**CPLR 302/313 - No immunity from service because personal jurisdiction could have been obtained over the defendant by serving him outside on NY.**

_Sandella v. Hill, 166 A.D.3d 924 (2d Dep’t 2018)_ (“Further, contrary to the defendant's contention, he was not immune from such service. ‘The doctrine of immunity from service protects nondomiciliaries of New York from civil process when they voluntarily appear in New York to participate in legal proceedings of any kind’ (citations omitted). However, to be entitled to such immunity, a defendant must demonstrate that she or he ‘was, in fact, a nonresident, that [her or] his sole purpose in appearing in New York was to [participate in the relevant legal] proceeding, and that there were no available means of acquiring jurisdiction over [her or] his person other than personal service in New York’ (citation omitted). Here, even assuming that the defendant's appearance in New York was voluntary (citation omitted), he was not entitled to immunity because personal jurisdiction could have been obtained over him by serving him outside of New York pursuant to CPLR 302 and 313 (citations omitted).”).

**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, 76 N.Y.S.3d 648 (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...

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 (3d 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 304(a) / 217-a - An action is commenced by the filing of a summons with notice or summons and complaint. The filing of a notice of claim does not toll the statute of limitations.**

*Bratge v. Simons*, 2018 NY Slip Op 08778 (4th Dep’t 2018) (“Plaintiffs contend that the court erred in dismissing the complaint on statute of limitations grounds because they timely commenced the action by serving a notice of claim within the relevant limitations periods. We reject that contention. ‘An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter’ (citation omitted). Moreover, ‘the filing of the notice of claim did not toll the statute of limitations’ (citations omitted).”

**SUMMONS**

**CPLR 305 - Summons**

**CPLR 305 - Amendment of summons permitted.**

*Chambers v. Prug*, 162 A.D.3d 974, 80 N.Y.S.3d 380 (2d Dep’t 2018) (“CPLR 305(c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended,

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
if a substantial right of a party against whom the summons issued is not prejudiced.’ Where the motion is to cure ‘a misnomer in the description of a party defendant,’ it should be granted even after the statute of limitations has run where ‘(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 sought’ (citations omitted). ‘Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue’ (citations omitted). Here, the evidence established that the correct defendants, Patrick Prue and Weir Welding Company, Inc., misnamed in the original process as Patrick Prug and Weir Welding Co., Inc., were properly served with process within 120 days after the action was timely commenced and, thus, the Supreme Court obtained jurisdiction over them (citations omitted). Moreover, there was no proof that the defendants would be prejudiced by allowing the caption to be amended to correct the misnomers.”

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- Second Department considers “application” for an extension of time without formal cross motion. BUT OTHER CASES HAVE HELD TO THE CONTRARY AND PROPER PRACTICE IS TO MAKE A FORMAL (CROSS) MOTION.

Silvering v. Sunrise Family Med., P.C., 161 A.D.3d 1021, 78 N.Y.S.3d 143 (2d Dep’t 2018) (“To the extent the Supreme Court concluded that it lacked discretion to consider the plaintiffs' application pursuant to CPLR 306-b to extend their time to serve the defendant, which was not presented in a proper cross motion pursuant to CPLR 2215, we disagree. Although ‘a party seeking
relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion,' courts ‘retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215’ (citations omitted). Nonetheless, the plaintiffs would not have been entitled to the requested relief had they made a cross motion pursuant to CPLR 2215”).

CPLR 306-b/403 - Beware of a potential danger associated with using an order to show cause where the statute of limitations is about to expire. The jurisdictional time limits established by CPLR 306-b for service of process apply. Thus, where the 15-day period following the expiration of the statute of limitations had expired prior to the date the court signed the order to show cause, it was held the lower court properly dismissed the action.

Matter of Genting N.Y., LLC v. New York City Envtl. Control Bd, 158 A.D.3d 684, 73 N.Y.S.3d 68 (2d Dep’t 2018) (“Contrary to the petitioner’s contention, the fact that CPLR 403(d) permits a court to grant an order to show cause to be served “in lieu of a notice of petition at a time and in a manner specified therein” does not abrogate the jurisdictional time limit established by CPLR 306-b, and the Supreme Court properly granted the respondents’ cross motion pursuant to CPLR 3211(a)(8) to dismiss the amended petition for lack of personal jurisdiction based upon the petitioner’s failure to comply with CPLR 306-b (citations omitted).”).

CPLR 306-b - Extension of time to serve granted

HSBC Bank USA, N.A. v. Tarek Oqlah, 163 A.D.3d 928, 82 N.Y.S.3d 584 (2d Dep’t 2018) (“We agree with the Supreme Court’s determination granting, in the interest of justice, the plaintiff’s first motion to extend the time to complete service on the defendant and denying the defendant’s motion pursuant to CPLR 306-b to dismiss the complaint insofar as asserted against him (citations omitted). The plaintiff demonstrated the existence of a potentially meritorious action, that it promptly moved for relief following the expiration of the 120-day period, and that there was no identifiable prejudice to the defendant as a consequence of the delay in service. We also agree with the Supreme Court’s determination granting the plaintiff’s subsequent cross motion to deem the service on the defendant on April 30, 2016, timely, nunc pro tunc, and denying the defendant’s motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him. The plaintiff demonstrated that it made the requisite reasonably diligent efforts to effect proper service within the 60-day extended period, thereby warranting a further extension for good cause (citations omitted). The plaintiff also demonstrated that proper service was effected only five days past the expiration of the 60-day extension, the existence of a potentially meritorious action, and no identifiable prejudice to the defendant as a consequence of the delay in service (citations omitted). The defendant’s contention that the April 30, 2016, service upon him was ineffective is without merit because the defendant failed to sufficiently rebut the presumption of proper service established by the process server’s affidavit. No hearing was warranted under the facts of this case (citations omitted).”).

Estate of Fernandez v. Wyckoff Hgts. Med. Ctr., 162 A.D.3d 742, 80 N.Y.S.3d 271 (2d Dep’t 2018) (“Contrary to the plaintiff's contention, an attempt at service that later proves defective cannot be the basis for a ‘good cause’ extension of time to serve process pursuant to CPLR 306-b (citations omitted). However, the more flexible ‘interest of justice’ standard accommodates late service that

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant (citation omitted). Indeed, the court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant (citations omitted). Here, several factors weighed in favor of granting the plaintiff's cross motion. The action was timely commenced, and the statute of limitations with respect to one of the two causes of action had expired when the plaintiff cross-moved for relief (citations omitted). The appellant also had actual notice of this action within 120 days after its commencement (citations omitted). Furthermore, an extension of time to serve the summons and complaint under CPLR 306-b in the interest of justice is available where, as here, ‘service is timely made within the 120-day period but is subsequently found to have been defective’ (citations omitted). Finally, we note that whether a plaintiff has demonstrated that he or she has a potentially meritorious cause of action is but one factor to be considered by a court in determining a CPLR 306-b motion (citation omitted).”

_Furze v. Stapen_, 161 A.D.3d 827, 77 N.Y.S.3d 506 (2d Dep’t 2018) (“Here, the record established that the plaintiff exercised diligence in timely filing, and in attempting to serve Nayak and notify Nayak and her insurance carrier of the summons and complaint within the 120-day period following the filing of the summons and complaint, although the attempt to serve Nayak was ultimately deemed defective (citation omitted). While the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the plaintiff promptly cross-moved for an extension of time to serve Nayak, and there was no identifiable prejudice to Nayak attributable to the delay in service (citations omitted).”).

_Nunez-Ariza v. Nell_, 161 A.D.3d 614, 78 N.Y.S.3d 38 (1st Dep’t 2018) (“Here, defendant’s insurer was on notice of the claim within months of the happening of the accident and plaintiff demonstrated a potentially meritorious action. ‘Because some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court’s discretion-laden determination’ (citations omitted).”)

_Chan v. Zoubarev_, 157 A.D.3d 851, 69 N.Y.S.3d 695 (2d Dep’t 2018) (“The defendant correctly contends that the plaintiff’s purported service of the summons and complaint upon him pursuant to CPLR 308(4) was defective, as the defendant submitted unrebutted evidence that the place where service was attempted and where the summons and complaint were affixed was not his dwelling place or usual place of abode at the relevant time (citations omitted). Nevertheless, the Supreme Court providently exercised its discretion in denying the defendant’s motion to dismiss the complaint and granting the plaintiff’s cross motion to extend the time to serve the summons and complaint upon the defendant. Generally, service of a summons and complaint must be made within 120 days after the commencement of the action (see CPLR 306-b). If service is not made within the time provided, the court, upon motion, must dismiss the action without prejudice, or ‘upon good cause shown or in the interest of justice, extend the time for service’ (citation omitted). ‘An extension of time for service is a matter within the court’s discretion’ (citation omitted). Here, while the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the timely service of process was subsequently found to have been defective, and the defendant had actual notice of the action within 120 days of commencement of...
the action (citations omitted). Moreover, there was no prejudice to the defendant attributable to the
delay in service (citations omitted).”

(2d Dep’t 2018) (“The Supreme Court providently exercised its discretion in granting, in the
interest of justice, the petitioner’s motion pursuant to CPLR 306-b to extend the time to complete
service of process on the appellants (citations omitted). The petitioner’s time to effect service of
process was properly extended since the verified petition demonstrated the merits of the
proceeding, the petition was timely filed, the statute of limitations had expired by the time the
petitioner moved to extend its time to complete service of process, and there was no demonstrable
prejudice to the appellants which would militate against granting the extension of time to serve
them (citations omitted).”).

**CPLR 306-b - Extreme lack of diligence**

N.Y.S.3d 53 (2d Dep’t 2017) (“Here, the plaintiff failed to demonstrate that she was entitled to an
extension of time to serve the appellant for good cause, as she failed to establish that she exercised
reasonably diligent efforts in attempting to effect proper service (citation omitted). Not only did
the plaintiff fail to make any further attempts to serve the appellant after her first attempt was
unsuccessful, as the summons was returned to her, but her complaint insofar as asserted against
the other defendants was dismissed because she failed to timely serve them with a complaint.
Further, the plaintiff failed to establish her entitlement to an extension of time for service in the
interest of justice, as she exhibited an extreme lack of diligence in attempting to effect proper
service, waited almost five months after the expiration of the 120-day period in which she was
required to serve the appellant to move for the extension of time, and failed to demonstrate a
potentially meritorious cause of action (citations omitted).”).

*Krasa v. Dial 7 Car & Limousine Serv., Inc.*, 147 A.D.3d 744, 46 N.Y.S.3d 196 (2d Dep’t 2017)
(“The plaintiff failed to show good cause for her failure to serve the defendants, since she
admittedly made no attempt to serve them within 120 days after the filing of the summons and
complaint (citations omitted). Furthermore, the plaintiff failed to establish that an extension of
time was warranted in the interest of justice. The plaintiff exhibited an extreme lack of diligence
in commencing the action, which was not commenced until one day before the expiration of the
statute of limitations, made a single attempt to effect service two months after the expiration of the
120-day period set forth in CPLR 306-b, failed to seek an extension of time until after the
defendants moved to dismiss the complaint for lack of personal jurisdiction, failed to offer any
excuse for the delay in serving the defendants, and failed to demonstrate a potentially meritorious
cause of action (citations omitted).”).
CPLR 306-b - Possible conflict in this area. Here, Court holds that CPLR 306-b does not permit an extension of time for service provided in an order to show cause. Is this an exception applicable to inmate circumstances or a true conflict? See Weinstein, Korn & Miller, CPLR 306-b.

_Matter of Sharp v. Annucci_, 164 A.D.3d 1580, 84 N.Y.S.3d 596 (3d Dep’t 2018) (“An inmate’s failure to serve papers as directed by an order to show cause requires dismissal of the petition on jurisdictional grounds, absent a showing that imprisonment presented an obstacle to compliance’ (citations omitted). As noted previously, petitioner does not dispute that he failed to provide an affidavit of service documenting service of the amended petition upon respondent and the Attorney General, nor has he articulated any impediment to doing so. Instead, petitioner argues that, because Supreme Court’s July 2017 judgment — directing that he serve the amended petition within a particular time frame — was silent as to the manner of service or the need to document proof thereof, no affidavit of service was required and, hence, the absence of such affidavit does not warrant dismissal of this proceeding. Petitioner’s argument is misplaced, however, in that he overlooks the fact that he simply failed to establish — via any means — that respondent and the Attorney General were in fact served with the amended petition as required. Stated another way, even assuming, without deciding, that Supreme Court’s July 2017 judgment permitted petitioner to deviate from the manner of service set forth in the order to show cause, petitioner still failed to establish that he actually served respondent and the Attorney General with the amended petition. Accordingly, Supreme Court properly dismissed this proceeding (citations omitted). Finally, and contrary to petitioner’s assertion, ‘CPLR 306-b does not permit an extension of time for service provided in an order to show cause’ (citation omitted).”).

CPLR 306-b - Interest of justice extension denied

_Wells Fargo Bank, NA v. Barrella_, 166 A.D.3d 711, 88 N.Y.S.3d 36 (2d Dep’t 2018) (“Here, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was to extend its time to serve Joseph. The plaintiff failed to establish that it exercised reasonably diligent efforts in attempting to effect proper service of process upon Joseph and, thus, failed to show good cause (citations omitted). Further, the plaintiff failed to establish that an extension of time was warranted in the interest of justice (citations omitted). Where the plaintiff's delay in serving a defendant is protracted, and the defendant has no notice of the action for a protracted period of time, an inference of substantial prejudice arises (citations omitted). The plaintiff failed to rebut the inference of substantial prejudice that arose due to its protracted delay in serving Joseph, as it failed to come forward with any proof that Joseph had notice of this action prior to being served more than 5½ years after the action was commenced (citations omitted). Moreover, the plaintiff failed to explain its more than six-month delay in moving for relief pursuant to CPLR 306-b after it effectuated service upon Joseph (citations omitted). Under these circumstances, the plaintiff failed to establish its entitlement to an extension of time to serve Joseph under the interest of justice standard (citation omitted), and its motion should have been denied.”).

_Rodriguez v. Consolidated Edison Co. of N.Y., Inc_,., 163 A.D.3d 734, 81 N.Y.S.3d 404 (2d Dep’t 2018) (“Furthermore, the plaintiff failed to establish her entitlement to an extension of time for service in the interest of justice, given the lack of diligence in commencing the action, which was
not commenced until 10 days before the statute of limitations expired; the lack of diligence in effecting service; the more than 6-month delay between the time the summons and complaint were filed and the time the plaintiff’s motion for an extension was made; the more than 5½-month delay between the expiration of the statute of limitations and the defendant’s receipt of notice of the action; the more than 2-month delay between the expiration of the 120-day period set forth in CPLR 306-b and the defendant’s receipt of notice of the action; and the lack of an excuse, other than law office failure, for the failure to effect timely service (citations omitted).

**CPLR 306-b - Waiting for 18 months after service was contested to move for extension, deemed not unreasonable under circumstances.**

_Deutsche Bank, AG v. Vik, 149 A.D.3d 600, 50 N.Y.S.3d 291 (1st Dep’t 2017) (“The motion court exercised its discretion in a provident manner in granting the extension both for ‘good cause shown’ and ‘in the interest of justice’ (citation omitted). Although plaintiff waited to move for the extension until 18 months after service was contested, this was not unreasonable under the circumstances presented. Furthermore, other relevant factors weighed in favor of granting the motion including plaintiff’s diligence, the expiration of the statute of limitations on a number of the plaintiff’s claims and the absence of prejudice to defendant in light of his actual notice of the summons and complaint (citation omitted). Where ‘some factors weigh in favor of granting an interest of justice extension and some do not,’ ‘this Court will not disturb the motion court’s “discretion-laden determination”’ (citations omitted).”)

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

_Encarnacion v. Ogunro, 162 A.D.3d 981, 80 N.Y.S.3d 156 (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, 162 A.D.3d 831, 79 N.Y.S.3d 201 (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.”).

Silvering v. Sunrise Family Med., P.C., 161 A.D.3d 1021, 78 N.Y.S.3d 143 (2d Dep’t 2018) ("Having failed to investigate whether the defendant still worked at Sunrise, the plaintiffs failed to demonstrate that they exercised reasonable diligence in attempting to effect service. Thus, the plaintiffs were not entitled to an extension of time for ‘good cause’ (citations omitted). Nor did the plaintiffs demonstrate circumstances warranting an extension of time ‘in the interest of justice’ (citation omitted). The plaintiffs did not exercise diligence in serving the defendant, the defendant had no notice of the action until over two years after expiration of the statute of limitations, and there was no showing of merit to the plaintiffs’ causes of action (citation omitted).”).

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

Schwartz v. Chan, 162 A.D.3d 408, 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 - Extension denied; factors considered**

Holbeck v. Sosa-Berrios, 161 A.D.3d 957, 77 N.Y.S.3d 516 (2d Dep’t 2018) ("Here, the plaintiff failed to demonstrate ‘good cause’ for an extension of time, as he did not show that he exercised reasonable diligence in attempting to effect service (citations omitted). The plaintiff resorted to affix and mail service after only two attempts to deliver the summons and complaint on a weekday, at approximately the same time of day, when the defendant reasonably could have been expected to be at work (citations omitted). Further, the affirmation of the plaintiff’s counsel does not indicate that he made any effort to verify that the defendant still resided at the address listed on the three-year-old police report, particularly after efforts to deliver the summons and complaint were unsuccessful (citations omitted). In addition, the Supreme Court did not improvidently exercise its discretion in declining to grant the plaintiff an extension of time in the interest of justice. … Here, as a result of the plaintiff’s lack of diligence in serving the defendant, the defendant did not receive the summons and complaint until approximately 3 months and 3 weeks after expiration of the 120-day period for service, and approximately 7½ months after expiration of the statute of limitations. Significantly, there is no evidence that the defendant had any notice of the action until that time. Further, the plaintiff did not adduce evidence tending to show a lack of prejudice to the defendant, and there was no showing of merit to the plaintiff’s claim of having sustained a serious injury, including even a recitation of the injuries he suffered.”).
CPLR 306-b - Plaintiff’s bare assertion that his pro se and incarcerated status constituted good cause to extend his time to effectuate service rejected.

*Stegemann v. Rensselaer County Sheriff’s Off.*, 155 A.D.3d 1455, 67 N.Y.S.3d 304 (3d Dep’t 2017) (“First, Supreme Court correctly rejected plaintiff’s bare assertion that his pro se and incarcerated status constitutes good cause to extend his time to effectuate service (citations omitted). Plaintiff has made no effort to demonstrate how his imprisonment prevented his compliance with statutory service requirements. Moreover, we note that he has commenced two other very similar civil actions and engaged in extensive motion practice in this case and the other two actions, despite his incarceration and pro se status.”).

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 denied; lack of reasonable diligence: Plaintiff should have known person served was not authorized to receive service, and made no effort to learn the identity of the current officers.

*Goldstein Group Holding, Inc. v. 310 E. 4th St. Hous. Dev. Fund Corp.*, 154 A.D.3d 458, 62 N.Y.S.3d 105 (1st Dep’t 2017) (“Plaintiff then requested an extension of time for service in opposition to defendant’s motion to dismiss, instead of formally cross-moving for an extension (citation omitted). We need not reach the disputed procedural issue regarding whether a formal cross motion was required because the court providently exercised its discretion in denying the request for an extension on its merits (citation omitted). By attempting service on Brandstein, who plaintiff should have known was not authorized to receive service, and making no effort to learn the identity of the current officers, plaintiff failed to act with reasonable diligence in trying to effect service, and thus failed to establish good cause in support of its request (citations omitted). Nor is
an extension of time to serve warranted in the interest of justice, given plaintiff’s failure to act with any due diligence to ensure that the instant action was not dismissed for exactly the same reason for which the prior action was dismissed. While the statute of limitations on plaintiff’s claim may have expired, defendant’s low-income tenants have lived through two foreclosure actions and beyond the statute of limitations with the uncertainty whether they may remain in their homes, and plaintiff waited until after expiration of the 120-day period to serve defendant or seek an extension of time (citation 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) - Service on 15-year-old as person of “suitable age and discretion” within the meaning of CPLR 308(2)**

*Marathon Structured Asset Solutions Trust v. Fennell,* 153 A.D.3d 511, 61 N.Y.S.3d 232 (2d Dep’t 2017) (“The Supreme Court properly denied that branch of the defendants’ motion which was to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction based on improper service. The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) (citations omitted). In opposition, the affidavits submitted by the defendants were insufficient to rebut the presumption of proper service created by the process server’s affidavit (citation omitted). Although the defendants demonstrated that service was effected on their then 15-year-old daughter, they failed to establish that their daughter was not ‘objectively . . . of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to [her]’ (citation omitted) and, thus, not a person of ‘suitable age and discretion’ within the meaning of CPLR 308(2).”)

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 308(2) - Service upon person of suitable age and discretion - defendant entitled to a hearing

*Cach, LLC v. Ryan*, 158 A.D.3d 1193, 71 N.Y.S.3d 237 (4th Dep’t 2018) (“Here, the affidavit of plaintiff’s process server constitutes prima facie evidence that defendant was validly served pursuant to CPLR 308 (2) inasmuch as the process server averred that he personally served the summons and complaint on a male named ‘Larry,’ a person of suitable age and discretion who refused to provide his relationship with defendant but was present at defendant’s residence, and that he thereafter mailed the summons and complaint to defendant at the residential address (citations omitted). In response, however, defendant submitted a specific and detailed affidavit in which she averred that she was not, and could not have been, served as described in the process server’s affidavit inasmuch as she did not know anyone, including any neighbors, named ‘Larry,’ no one by that name was present at her residence at the time of the alleged service, and the only male that would have been in her home was her husband, whose name was not ‘Larry’ and who did not fit the physical and age descriptions provided by the process server. We conclude that defendant’s affidavit rebutted the presumption of proper service established by the process server’s affidavit (citations omitted). We therefore reverse the order and remit the matter to Supreme Court to conduct an evidentiary hearing to determine whether defendant was properly served pursuant to CPLR 308 (2).”).

*HSBC Bank USA, N.A. v. Archibong*, 157 A.D.3d 662, 66 N.Y.S.3d 625 (2d Dep’t 2018) (“Here, the Supreme Court erred in determining that branch of the motion of the defendant Delia Archibong (hereinafter the defendant) which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction without first conducting a hearing. The defendant demonstrated her entitlement to a hearing on the issue of service through her affidavit, in which she denied that she knew anyone by the name of Tom Jonel, the person allegedly served at her house, that no one by that name or with that physical description lived in her house, and that she was the only person at home when the summons and complaint were allegedly served (citations omitted).”).

CPLR 308(2) - Service on behalf of hospital employees

*Rahhal v. Downing*, 157 A.D.3d 446, 67 N.Y.S.3d 619 (1st Dep’t 2018) (“Although appellants contend that their actual place of business is located in the Bronx Lebanon buildings where they provide medical services, for purposes of service of process pursuant to CPLR 308(2), Bronx Lebanon’s Risk Management Office constitutes their ‘actual place of business’ (citations omitted). The Risk Management Coordinator accepted service on behalf of defendant Bronx Lebanon, which was sued as the individual appellants’ employer, to be liable for their actions pursuant to respondeat superior (citation omitted). The Risk Management Department was well suited to accept process on behalf of the hospital’s employees (citations omitted). In the cases relied on by appellants, the defendant doctors were not employed by the hospital where service was attempted, and thus service was not proper pursuant to CPLR 308(2) (citations omitted).”).
CPLR 308(2) - “Outer bounds” of defendant’s dwelling – Service not refused

*Wells Fargo Bank, N.A. v. Ferrato*, 150 A.D.3d 546, 55 N.Y.S.3d 191 (1st Dep’t 2017) (“Plaintiff’s process server attempted to serve defendant at her apartment, which was a loft accessed directly from an elevator. The process server averred that a woman was standing inside holding a baby and a party was in progress, so he dropped the papers. Denying that service was properly made pursuant to CPLR 308(2), plaintiff submitted the affidavit of a woman who stated that she was at the entrance to the apartment and holding a baby at the time specified by the process server, but that he never identified himself, did not ask her to take the papers, did not attempt to gain access, and did not hand any papers to her or drop papers near her. Instead, the elevator door closed with the process server and the papers still inside. Under this version of the events, service was not properly made pursuant to CPLR 308(2). While plaintiff argued that the ‘outer bounds’ of defendant’s dwelling extended to include the elevator, it did not establish either that its process server was not permitted to proceed or that service was made upon ‘a person of suitable age and discretion’ (citation omitted). Further, since plaintiff did not establish that service was refused upon the process server informing the person at the apartment that service was being made by leaving a copy of the summons outside the door (inside the elevator) of the person to be served, plaintiff did not demonstrate that the process server made the person aware that such service was being made (citation omitted). In light of the factual issues as to the validity of service, the threshold issue of personal service should have been resolved with a traverse hearing (citation omitted.”).

CPLR 308(2) - Service on defendant’s mother while she was inside her own apartment in same multiple dwelling as defendant is insufficient.

*Thacker v. Malloy*, 148 A.D.3d 857, 49 N.Y.S.3d 165 (2d Dep’t 2017) (“Here, at a hearing to determine the validity of service of process, the plaintiff failed to meet her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process. Evidence showed that the process server walked up to the window of the defendant’s mother’s ground-floor apartment to give her the summons and complaint as he stood on the sidewalk and she stood inside her apartment. Although the defendant resided in the same multiple-dwelling building as his mother, his apartment was on a higher floor, and it was separate and distinct from his mother’s apartment. Hence, in serving the defendant’s mother with the summons and complaint while she was inside her own apartment, service was not made at the defendant’s actual dwelling place (citations omitted). Accordingly, the Supreme Court properly, in effect, granted that branch of the defendant’s cross motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction.”).

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

*Divito v. Fiandach*, 160 A.D.3d 1404, 76 N.Y.S.3d 322 (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(2) - Mailing to residence via certified mail was sufficient.**

*Zabari v. Zabari*, 154 A.D.3d 613, 63 N.Y.S.3d 364 (1st Dep’t 2017) (“Because the documents were mailed to defendant’s residence (in addition to his place of business), plaintiff was not required to send them by first class mail, and the use of certified mail was sufficient (citations omitted).”).

**CPLR 308(2) - Default Judgment was premature since 30 day period following completion of service had not expired yet.**

*Watson v. City of New York*, 157 A.D.3d 510, 69 N.Y.S.3d 294 (1st Dep’t 2018) (“CPLR 320 provides that when service is made pursuant to CPLR 308(2), the defendant has 30 days from the
time service is complete to answer the complaint. Here, Diaz’s nullity argument may be considered by this Court as it is a purely legal argument and the record on appeal is sufficient to permit review. The record contains a copy of plaintiff’s affidavit of service, which plainly states on the first line: ‘FILED Oct 18 2010 Bronx County Clerk.’ Thus, service upon Diaz was not complete until October 28, 2010, 10 days after the affidavit of service was filed. Diaz then had 30 days, exclusive of the two holidays during that period, to answer the complaint, i.e., November 29, 2010. The motion court’s granting of plaintiff’s motion for a default judgment on November 24, 2010 was premature as it was five days before Diaz’s time to answer would have expired. Accordingly, the default judgment entered against Diaz should be vacated and plaintiff is directed to accept the City defendants’ second amended answer.”).

CPLR 308(4) - Five attempts to effect service at different times and on different days met due diligence requirement.

_Bank United, FSB v. Verbitsky_, 2018 NY Slip Op 08624 (2d Dep’t 2018) (“Here, the process server's affidavit, which, inter alia, reflects that he made five attempts to effect personal service at the defendant's residence, at different times and on different days when the defendant could reasonably be expected to be home, constituted prima facie evidence of proper service pursuant to CPLR 308(4) (citations omitted). Contrary to the defendant's contention, in light of her attestation, in an affidavit in support of her prior motion, inter alia, to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction, that the subject residence was her "only" home and the "only" place where she lived, the process server was not required to make genuine inquiries concerning her whereabouts. Moreover, the defendant failed to submit an affidavit from a person with personal knowledge denying receipt of the summons and complaint or challenging the accuracy of the allegations in the affidavit of service (citations omitted).”).

CPLR 308(4) - Due diligence requirement met

_Nationstar Mtge., LLC v. Dekom_, 161 A.D.3d 995, 78 N.Y.S.3d 148 (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, 162 A.D.3d 744, 79 N.Y.S.3d 249 (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).”).

Greene Major Holdings, LLC v. Trailside At Hunter, LLC, 148 A.D.3d 1317, 49 N.Y.S.3d 769 (3d Dep’t 2017) (“Here, the record reflects that plaintiff’s process server attempted to serve defendant at a particular residence in Evanston, Illinois on three occasions — on December 10, 2013 at 8 - 59 p.m., on December 11, 2013 at 5 -17 p.m. and on December 13, 2013 at 4 -19 p.m. Although the parties debate whether the subject residence actually constituted Rem’s dwelling place or usual place of abode and, hence, whether the documents in question were properly affixed thereto, this issue need not detain us, as we agree with Supreme Court that the underlying service attempts — all of which occurred on weekdays and two of which occurred during hours that Rem reasonably could be expected to be either at or in transit from work — fall short of establishing due diligence in the first instance (citations omitted). For this reason alone, Supreme Court properly concluded that plaintiff, having failed to comply with the service requirements of RPAPL 1371 (2) and CPLR 308 (4), did not obtain personal jurisdiction over Rem. Accordingly, the court was well within its discretion in granting Rem’s motion to vacate the deficiency judgment entered against him and, as such, Supreme Court’s June 2015 order is affirmed.”).

**CPLR 308(4) - Failure to file proof of service is not jurisdictional defect and may be cured by motion or sua sponte by court. However, the court cannot “make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order.”**

First Fed. Sav. & Loan Assn. of Charleston v. Tezzi, 164 A.D.3d 758, 84 N.Y.S.3d 239 (2d Dep’t 2018) (“The plaintiff allegedly served process on the defendant pursuant to CPLR 308(4). Once the ‘affixing and mailing’ was accomplished, the plaintiff was required to file proof of service with the clerk of the court within 20 days of either the affixing or mailing, whichever was later (citation omitted). Once such timely filing is accomplished, service is deemed completed 10 days thereafter (citation omitted). Here, the affidavit of service was not filed within 20 days of either the mailing or affixing; thus, service was never completed (citation omitted). Since service was never completed, the defendant’s time to answer the complaint had not yet started to run and, therefore, she could not be in default (citations omitted). However, the ‘failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004’ (citations omitted). Thus, we agree with the Supreme Court’s determination to deem the affidavit of service timely filed, sua sponte, pursuant
In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced (citation omitted). The court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order (citations omitted), ‘nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur’ (citations omitted). Rather, the defendant must be afforded an additional 30 days to appear and answer after service upon her of a copy of the decision and order (citations omitted).

CPLR 308(4) - General Business Law § 13 - Need a hearing to determine whether service on a Sabbath observer on Saturday was done with malice.

_JPMorgan Chase Bank, N.A. v. Lilker_, 153 A.D.3d 1243, 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(4) - Issue of fact as to whether pleadings were affixed to door of condominium unit, or exterior door of condominium complex.

_Sinay v. Schwartzman_, 148 A.D.3d 1068, 50 N.Y.S.3d 141 (2d Dep’t 2017) (“Service was made by ‘affix and mail’ service pursuant to CPLR 308(4), which permits such service only where personal delivery or delivery to a person of suitable age and discretion ‘cannot be made with due diligence.’ Attempts at service at different times, including a Saturday, which the process server claimed were accomplished in this case, have been deemed sufficient to establish that service by personal delivery or delivery to a person of suitable age and discretion ‘cannot be made with due
diligence’ (citations omitted). However, the defendants raised issues of fact as to whether ‘affix and mail’ service was properly made, i.e., whether the summons and complaint were affixed to the door of their condominium unit, rather than the exterior door of the condominium complex (citations omitted). Under the circumstances, a hearing to determine the validity of service upon the defendants was warranted.

**CPLR 308(5)**


**This Time Service of Process by Facebook Is Not Permitted Under CPLR 308(5)**

**Insufficient Proof That Defendant Used Site and Communicated and Received Messages There**

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, 78 N.Y.S.3d 68 (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 308(5) - Service via certified mail, return receipt requested, plus regular mail permitted.

Matter of Hunter v. Brown-Ledbetter, 160 A.D.3d 955, 75 N.Y.S.3d 499 (2d Dep’t 2018) (“Although the mother is correct that the father had the burden to demonstrate that he properly served her and that the Family Court had acquired jurisdiction over her (citations omitted), her claim that the father failed to meet that burden is without merit. The court providently exercised its discretion in authorizing the father to serve the mother via certified mail, return receipt
requested, plus regular mail, in light of the evidence that the mother was deliberately evading service (citations omitted). Likewise, the father met his burden of establishing service by proffering the return receipt and an affidavit of service by mailing, and the mother proffered no evidence rebutting this showing (citations omitted.”).
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.”).

CPLR 317

CPLR 317 - Defendant must establish lack of actual notice.

Dwyer Agency of Mahopac, LLC v. Dring Holding Corp., 164 A.D.3d 1214, 82 N.Y.S.3d 118 (2d Dep’t 2018) (“Here, the defendant failed to establish that it did not personally receive notice of the summons in time to defend the action. The affidavit of the defendant’s ‘representative,’ who appears to be its attorney, stated that the complaint was not delivered ‘personally’ to the defendant, but rather, ‘to an inaccurate address through the Secretary of State,’ which address had not been valid ‘for several years.’ This representative’s affidavit does not appear to be based on personal knowledge. Furthermore, there is no allegation contained in this affidavit that the defendant, in fact, never received the summons and complaint, nor is there any detail as to where the defendant moved to and when, nor whether the defendant made any efforts to update its address on file with the Secretary of State. Under these circumstances, the defendant did not demonstrate lack of actual notice of the action (citations omitted).”).

Stevens v. Stepanski, 164 A.D.3d 935, 84 N.Y.S.3d 1 (2d Dep’t 2018) (“Here, Greenville did not contend that the address it kept on file with the Secretary of State was incorrect, and its shareholders effectively claimed ignorance as to why the summons and complaint were ‘unclaimed,’ without offering any details as to how Greenville ordinarily received mail at that address. Further, Greenville offered no explanation as to why it did not receive any of the other correspondence from the plaintiff, all of which were sent to the same address. Under these circumstances, Greenville’s conclusory and unsubstantiated denial of service of the certified mailing card and other correspondence from the plaintiff was insufficient to establish that it did not have actual notice of the action in time to defend (citations omitted). Although the return of a
summons and complaint to the Secretary of State as ‘unclaimed’ may be sufficient to warrant a hearing on the issue of whether a defendant had notice of the action in time to defend (citation omitted), here, Greenville’s failure to offer any details as to why it did not receive the certified mailing card or any of the other correspondence from the plaintiff during the pendency of the action was insufficient to raise a triable issue of fact warranting a hearing (citations omitted). In light of the foregoing, it is unnecessary to determine whether Greenville demonstrated the existence of a potentially meritorious defense (citation omitted.”).

Evans v. City of Mt. Vernon, 163 A.D.3d 770, 81 N.Y.S.3d 176 (2d Dep’t 2018) (“Limited Liability Company Law § 303 provides that the Secretary of State is the statutory agent for service of process for domestic limited liability companies. A failure to file a change of address with the Secretary of State ‘does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317’ (citation omitted). Although the Supreme Court may consider CPLR 317 as a basis for vacating the default, ‘the defendant’s mere denial of receipt of the summons and complaint is . . . insufficient to establish lack of actual notice of the action in time to defend for purposes of CPLR 317’ (citation omitted). The fact that copies mailed to the defendant were not returned to the plaintiff indicates that the defendant did receive notice, which, absent rebuttal, may be grounds to deny relief pursuant to CPLR 317 (citation omitted). Under the circumstances, the LLC failed to demonstrate that it did not receive notice of the action in time to defend against it.”).

CPLR 317 - Failure to update service address with Secretary of State

Acqua Capital, LLC v. Camarella Contr. Co., Inc., 164 A.D.3d 1197, 82 N.Y.S.3d 122 (2d Dep’t 2018) (“Contrary to the plaintiff’s contention, the Supreme Court did not improvidently exercise its discretion in granting that branch of Camarella’s motion which was pursuant to CPLR 317 to vacate the judgment of foreclosure and sale on the condition that it pay all amounts owed within 30 days of the date of the order. Service of the summons and complaint in the foreclosure action was made upon Camarella by delivering the pleadings to the Secretary of State (citation omitted), which did not constitute personal delivery (citations omitted), and Camarella’s submissions in support of the motion established that it did not receive actual notice of the foreclosure action in time to defend (citations omitted). Moreover, under the circumstances of this case, Camarella succeeded in setting forth a potentially meritorious defense to the foreclosure action. Finally, the evidence does not suggest that Camarella’s failure to update its service address with the Secretary of State constituted a deliberate attempt to evade notice; hence, that failure did not preclude the granting of relief to it under CPLR 317 (citations omitted.”).

Acqua Capital, LLC v. 510 W. Boston Post Rd, LLC, 164 A.D.3d 1195, 84 N.Y.S.3d 180 (2d Dep’t 2018) (“[T]he evidence does not suggest that 510’s failure to update its service address with the Secretary of State while its principal offices were undergoing renovations constituted a deliberate attempt to evade notice; hence, that failure did not preclude the granting of relief to it under CPLR 317 (citations omitted.”).

Evans v. City of Mt. Vernon, 163 A.D.3d 770, 81 N.Y.S.3d 176 (2d Dep’t 2018) (“A failure to file a change of address with the Secretary of State ‘does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317’ (citation omitted.”).
DEFENDANT’S APPEARANCE

CPLR 320 - Defendant’s appearance

CPLR 320 / 3012(b)


The Potential Trap of Serving a Notice of Appearance

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., *Tsonis v. Erriora 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 320/3211 - A defect in personal jurisdiction can be waived when a party stipulates to settling an action or makes payments on a judgment.

Eastern Sav. Bank, FSB v. Campbell, 2018 NY Slip Op 08465 (2d Dep’t 2018) (“Although a court has control over stipulations and has the power to relieve a party from the terms of a stipulation, that power is not unlimited. ‘Where both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it’ (citation omitted). Further, ‘[o]nly where there is a legally sufficient cause to invalidate a contractual obligation, such as where it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable or constitute fraud, collusion, mistake, or accident, will a party be relieved from the consequences of the bargain struck with the stipulation’ (citation omitted). Here, in
vacating the settlement of the deficiency judgment ‘in the interests of justice,’ the Supreme Court incorrectly determined that Campbell was not represented by counsel. In fact, Campbell was represented by counsel when she settled and made payment on the deficiency judgment. As part of the settlement, the plaintiff agreed not to proceed in other pending foreclosure actions against Campbell. Additionally, Campbell retained the same attorney with respect to other actions arising out of the settlement. By settling the deficiency judgment, Campbell clearly submitted to the court's jurisdiction and acknowledged the validity of the judgment (citations omitted). Therefore, we disagree with the court's determination granting Campbell's motion to vacate the judgment of foreclosure and sale, the subsequent foreclosure sale, the order of reference, the referee's deed, and the settlement of the deficiency judgment, the terms of which had been fully performed. Contrary to the position of our dissenting colleague, a formal stipulation of settlement need not be contained in the record. Here, the terms of the settlement were contained in contemporaneous emails between the plaintiff's attorney and Campbell's attorney, and by a check in the amount on which they had agreed. Campbell does not deny that she paid the amount for which she agreed to settle the deficiency judgment. That fully performed settlement two years before Campbell moved to vacate her default effectively waived her defense that the court lacked personal jurisdiction over her (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).”).
ARTICLE 4 - SPECIAL PROCEEDINGS

CPLR 402 - Pleadings in special proceedings

CPLR 402 - Cross claim is not permitted in a special proceeding without leave of court.

*Matter of Espinal v. Sosa*, 153 A.D.3d 819, 61 N.Y.S.3d 566 (2d Dep’t 2017) (“The Supreme Court properly dismissed Sosa’s cross claim to validate his designating petition. Although the cross claim was denominated as a counterclaim, it was properly a cross claim because it sought relief against the Board, which was a respondent in the proceeding (citation omitted). Pursuant to CPLR 402, the pleadings in a special proceeding are limited to a petition, an answer, and a reply to any counterclaim asserted. ‘The court may permit such other pleadings as are authorized in an action upon such terms as it may specify’ (citation omitted). ‘[A] cross claim is not permitted in a special proceeding without leave of court’ (citations omitted). Here, Sosa did not seek leave to interpose a cross claim, and thus, the cross claim was not properly before the court (citations omitted). In any event, Sosa’s cross claim was insufficiently pleaded as a matter of law (citation omitted).”).

CPLR 402 - Although petitioner did not file or serve a document denominated as a verified petition, her papers “fulfilled the purposes of a verified petition and were the functional equivalent of a verified petition.”

*Matter of Levine v. Suffolk County Dept. of Social Servs.*, 164 A.D.3d 1446, 84 N.Y.S.3d 218 (2d Dep’t 2018) (“[A] document that is not denominated a verified petition may satisfy CPLR 304 and 7804 if it is the functional equivalent of a verified petition (citation omitted). Here, none of the papers filed and served by the petitioner was denominated a verified petition. However, the petitioner’s papers, particularly her affidavit and the affirmation of her attorney, gave notice as to what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought (citations omitted). Therefore, the papers fulfilled the purposes of a verified petition and were the functional equivalent of a verified petition (citations omitted). Accordingly, the Supreme Court should have denied the County’s motion to dismiss.”).

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 501 - Written agreement fixing venue

Tower Broadcasting, LLC v. Equinox Broadcasting Corp., 160 A.D.3d 1435, 76 N.Y.S.3d 335 (4th Dep’t 2018) (“Pursuant to CPLR 501, a ‘written agreement fixing [the] place of trial, made before an action is commenced, shall be enforced upon a motion for change of [the] place of trial.’ Here, the two written agreements that form the basis of plaintiff's causes of action fix the place of trial as Monroe County. We reject defendant's contention that plaintiff cannot enforce the forum selection provision of the amended settlement agreement entered into between defendant and plaintiff's predecessor in interest. Plaintiff, as the assignee of its predecessor in interest, may enforce the forum selection provisions of that contract inasmuch as an assignee stands in the shoes of the assignor and is thus subject to all the benefits and burdens of the assignor (citations omitted). Moreover, because plaintiff alleges that it owns the tower as the result of the asset purchase agreement executed by plaintiff and its predecessor in interest, the forum selection provision in that agreement may also be enforced. Defendant contends that Chemung County is the ‘proper’ forum on the ground that the tower and the real property upon which it is situated are both located in Chemung County (citations omitted). We reject that contention. First, this action concerns a broadcasting tower, which is a trade fixture and therefore retains its character as personal property (citation omitted). Thus, CPLR 507, which concerns actions involving real property, is inapplicable. Second, although CPLR 508 provides that the ‘place of trial of an action to recover a chattel may be in the county in which any part of the subject of the action is situated at the time of the commencement of the action’ (emphasis added), that section is permissive and not mandatory. Thus, it does not preclude an action in another venue, particularly where, as here, there is a written agreement fixing the place of trial in that other venue.”).

CPLR 503(c)


Residency for Venue Purposes of Domestic or Authorized Foreign Corporation Determined by Designation of Principal Office in Application for Authority

Can Biennial Statement "Change" Residence?

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, 161 A.D.3d 1253, 76 N.Y.S.3d 648 (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).”).

CPLR 503/510/511 - Where there are factual issues on a change of venue motion as to the plaintiff’s residency that cannot be resolved on the papers alone, the court should order a hearing on the residency issue.

Bikel v. Bakertown Realty Group, Inc., 157 A.D.3d 924, 69 N.Y.S.3d 876 (2d Dep’t 2018) (“Since the factual questions could not have been properly resolved on the papers alone, the Supreme Court should have held a hearing on the issue of the plaintiff’s residency prior to its determination of the motion (citations omitted).”).

CPLR 507 - Does not apply to action seeking determination of individual parties’ rights as shareholders of corporation.

Fish v. Davis, 146 A.D.3d 485, 45 N.Y.S.3d 46 (1st Dep’t 2017) (“While CPLR 507 mandates that venue of an action involving title to or possession, use or enjoyment of real property be the county where the property is located (citations omitted), here, the action essentially seeks a determination of the individual parties’ rights as shareholders of defendant corporation, which owns real property in Rockland County (citation omitted). In opposition to the motion, plaintiff demonstrated that subdivision of the property is not possible, and that the complaint seeks either rescission of the shareholders agreement or specific enforcement of its provision requiring the parties to implement a cooperative ownership plan. Accordingly, the court providently exercised its discretion in denying the motion to transfer venue to Rockland County.”).

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 510/511**


**Effect of Five-Day Response Period on Motion to Change Venue on Improper County Grounds**

**Does It Limit Defendant’s Right to Move Before That Period Expires?**

CPLR 511 provides a strict set of requirements where a defendant seeks a change of venue as of right on improper county grounds. The defendant must serve a written demand (before or with the answer) that the venue be changed to a "proper" county. CPLR 511(a). The defendant must then move to change venue within 15 days thereafter "unless within five days after such service [of the demand], plaintiff serves a written consent" to change the venue to that specified by the defendant. If the plaintiff does not consent and does not serve an opposing affidavit within that fiveday period showing either that the county proposed by the defendant is improper or that plaintiff’s choice was proper, the defendant can notice the motion in the county he or she designated as proper. CPLR 511(b). When a defendant fails to comply with the demand procedure, an application to change venue on improper county grounds is committed to the court’s discretion.

*Matter of Aaron v. Steele*, 85 N.Y.S.3d 634 (3d Dep’t 2018), presented a very interesting statutory interpretation issue: is that five-day window for the plaintiff’s "response" to defendant’s demand a limit only on the plaintiff or must the defendant refrain from making the venue motion during that period?

The underlying dispute arose out of unpaid legal fees owed by Aaron to the Steeles. The law firm sued Aaron and others in Oswego County and obtained a judgment against him. They then issued subpoenas to depose and compel the production of documents from Aaron, his wife and his son. The Aarons then brought a special proceeding under CPLR 5240 in Ulster County seeking to quash or limit the subpoenas. The Steeles issued a demand to change venue to Oswego County, but moved within four, rather than five, days thereafter by order to show cause in Ulster County to change venue.

Approximately two months later, Aaron brought a separate tort action in Ulster County in connection with the Steeles’ enforcement actions. The Steeles again served a demand to change
venue, Aaron timely rejected the demand, and the Steeles then moved to change venue to Oswego County via order to show cause after the 15-day period.

The trial court granted the Steeles’ motion in the special proceeding as a matter of right, and in the tort action as a matter of discretion. Aaron appealed both orders.

Of interest to us here, is the special proceeding. The Aarons asserted that the Steeles’ motion was premature because it was served before the end of the five-day period in which the Aarons could have consented to change the venue. They maintained that the Steeles forfeited their opportunity to obtain a change of venue as of right, by failing to comply with the statutory procedure.

A majority of the Third Department rejected that argument, finding that the five-day period is a limit on the plaintiff only, and that the defendant is not constrained from "doing anything" during that time period. The court stressed that the significance of the period related to whether the plaintiff consents, not how much time passes. Thus, if the plaintiff consents, the defendant cannot make the motion.

In a situation where the defendant made a motion before the end of the plaintiff’s five-day response window and the plaintiff thereafter consented, the defendant would have to withdraw the motion (which would be unnecessary at that point anyway). Although an apparent purpose of the statute is to avoid unnecessary motions where consent can be obtained, a defendant who files the motion early will have wasted his or her own time and energy, but not have seriously disrupted or wasted the time of others in the judicial system. Any motion filed within the five-day window essentially causes no harm, no foul. Moreover, if the plaintiff does not file a written consent within the required time frame, it is irrelevant when within the 15-day limit the defendant filed a motion.

*Id.* at *2–3. 

Here, the majority noted, it was clear from the Aarons’ actions that they had no intention to consent, including their contest of venue in prior related proceedings, their failure to consent in either of the motions here, and their continuing challenge to the change of venue on appeal.

Dissenting on this particular issue, Judge Lynch read the five-day provision as a restriction on the defendant’s ability to make a motion until the expiration of that time period. He maintained that the time period permitted the plaintiff to consent so as to avoid unnecessary motion practice. He also pointed to the end of CPLR 511(b), which refers to the same five-day period but there in the context of where the venue motion needs to be made. Judge Lynch concluded that,

[i]n effect, whether a motion needs to be made, and where a motion can be made, is determined by a plaintiff’s response during the five-day period. Here, the Steeles filed and served their motion four days after serving the demand. Because the motion was made within the Aarons’ five-day response window, the Steeles did not precisely comply with
the statutory procedures, rendering their application a matter addressed to Supreme Court’s discretion (citations omitted).

*Id.* at *4.*

The dissent advised that it would have exercised its discretion to deny the Steeles’ motion.

The majority countered by emphasizing that, in either usage of the five-day period, the statute never requires the defendant to wait until the five-day period expired to move. The court again saw no significant repercussions in an early motion, perhaps brought in the wrong county:

If the defendant moves within that early time frame in the county where the action was commenced, the court can simply address the merits of the motion, with the benefit of the information from the affidavit. If, however, the defendant moves in his or her preferred county within that early time frame and the plaintiff thereafter files the required affidavit, the defendant should withdraw the motion. Even absent a withdrawal, the motion would simply be denied because the chosen county does not have jurisdiction to consider that motion (citations omitted).

*Id.* at *3.*

The majority’s opinion would appear to be at odds with the pronouncements of the Court of Appeals in cases such as Brill v. City of New York, 2 N.Y.3d 648 (2004), against ignoring statutory deadlines. All the more so here, where the defendants were in total control of the deadline they ignored.

**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, 77 N.Y.S.3d 355 (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) / 511 - Motion denied; insufficient showing on convenience of witnesses**

*Gorodetsky v. Bridgewater Wholesalers, Inc.*, 161 A.D.3d 722, 77 N.Y.S.3d 82 (2d Dep’t 2018) (“Here, the defendants failed to disclose the addresses of all but one of the prospective witnesses, made only conclusory statements that the prospective witnesses would be inconvenienced, and failed to establish the manner or extent to which those witnesses would be inconvenienced (citations omitted). With regard to those witnesses who were New York State police officers, while ‘the convenience of local government officials, such as police officers, is of paramount importance because they should not be kept from their duties unnecessarily’ (citation omitted), here, only conclusory statements, without any details, were provided as to how those witnesses would be inconvenienced. As such, these statements were insufficient to establish that those witnesses would be inconvenienced if venue were not changed. Accordingly, the Supreme Court providently exercised its discretion in denying the defendants’ motion for a change of venue from Richmond County to Warren County.”).

**CPLR 510/511 - Motion to change venue on improper county grounds made after initial demand period.**

*Gordillo v. Champ Hill LLC*, 157 A.D.3d 470, 66 N.Y.S.3d 436 (1st Dep’t 2018) (“The untimeliness of defendant’s demand for a change of venue and the subsequent motion is excusable because the summons improperly indicated that plaintiff resided in Bronx County (citations omitted). The parties do not contest the fact that while plaintiff does not reside on the island of Manhattan, his Marble Hill building is located in New York County, and not the Bronx. The record shows that defendant promptly moved after ascertaining that the statement made by plaintiff was incorrect (citation omitted). Plaintiff’s arguments that defendant failed to show due diligence and was guilty of laches are unpersuasive, as the motion was made pursuant to CPLR 510(1) (improper county) and not CPLR 510(3) (convenience of the witnesses).”).

**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*, 162 A.D.3d 855, 80 N.Y.S.3d 1 (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.

CPLR 511 - Where demand e-filed, election to serve via U.S. mail does not extend time to bring motion to change venue.

Woodward v. Millbrook Ventures LLC, 148 A.D.3d 658, 49 N.Y.S.3d 303 (1st Dep’t 2017) ("Supreme Court properly concluded that defendants’ motion was untimely. Having consented to electronic filing, defendants were required to serve their papers electronically (Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b[d][1]), and indeed served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015 (22 NYCRR 202.5-b[f][2][iii]). Having served their demand, defendants were required to bring their motion to change venue within 15 days, or by July 29, 2015 (CPLR 511). However, defendants did not bring their motion until July 31, 2015, rendering it untimely. That defendants also elected to serve their demand via United States mail did not extend the deadline for their motion under CPLR 2103(b)(2). Because they consented to participate in Supreme Court’s e-filing system, defendants were bound by the applicable rules governing service.

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).


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, 162 A.D.3d 804, 79 N.Y.S.3d 227 (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 16

CPLR 1601/1603 - The courts are split as to whether the plaintiff can demand a bill of particulars of a defendant with respect to the application of CPLR 1601. In the Second Department, the defendant cannot be compelled to respond to a demand for a bill of particulars looking for additional parties liable. In the Fourth Department, such a bill of particulars may be required. Third Dep’t agrees with Second Dep’t that Article 16 does not have to be pled as an affirmative defense. Nevertheless, it would be prudent to plead Article 16 as an affirmative defense, at least in the Fourth Department.

Palmatier v. Mr. Heater Corp., 159 A.D.3d 1084, 71 N.Y.S.3d 717 (3d Dep’t 2018) (“Contrary to the arguments of the Wal-Mart defendants, the Enerco defendants were entitled to bring this appeal because they were aggrieved by Supreme Court’s order (see CPLR 5511). Pursuant to CPLR 1601 (1), when a verdict in a personal injury action determines that two or more tortfeasors are jointly liable and a defendant is found to be responsible for 50% or less of the total liability, that defendant will not be required to pay the claimant for more than that defendant’s share of the noneconomic loss (citation omitted). CPLR article 16 applies automatically, even if a defendant does not plead it as an affirmative defense, though the Enerco defendants did raise this defense in their answer (citations omitted). Although liability can be apportioned between any tortfeasors, whether they are codefendants or nonparties, if an alleged tortfeasor was a codefendant whom the court had dismissed from the case, the law of the case doctrine would preclude the remaining defendants from introducing at trial any evidence regarding the same type of defect or error by that alleged tortfeasor that was previously litigated (citation omitted). Thus, the Enerco defendants were entitled to challenge motions by any codefendants seeking to be released from the action, they were aggrieved by any orders granting dismissal and they could, therefore, appeal any such orders.”).

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

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

Patel v. S. & S. Props., Inc., 165 A.D.3d 827, 86 N.Y.S.3d 194 (2d Dep’t 2018) (“Contrary to the plaintiff's contention, the Supreme Court did not err in considering the merits of the defendant's motion even though the defendant failed to include with its motion papers the plaintiff's reply to the counterclaims (citations omitted). The record was sufficiently complete, since the plaintiff included the pleading with his opposition, and there is no proof that a substantial right of the plaintiff's was impaired by the defendant's failure to submit the reply with its motion papers (citations omitted).”).
NYCTL 2011-A Trust v. Kahn, 163 A.D.3d 837, 81 N.Y.S.3d 475 (2d Dep’t 2018) (“The Supreme Court should have granted that branch of the plaintiffs’ motion which was to amend the caption of the complaint by correcting the spelling of the name of the defendant Sonala Kahn to Sonala Khan and removing the defendants John Doe No. 1 through John Doe No. 100 from the caption (citations omitted).”).

Lipinsky v. Yarusso, 164 A.D.3d 896, 82 N.Y.S.3d 518 (2d Dep’t 2018) (“Contrary to the defendant’s contention, Walters’ affidavit was admissible, notwithstanding that it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), as such a defect is not fatal, and no substantial right of the defendant was prejudiced by disregarding the defect (citations omitted). The defendant’s contention that Walters’ affidavit should not be considered because Walters had not previously been disclosed as a witness, raised for the first time on appeal, is not properly before this Court (citations omitted).”).

First Fed. Sav. & Loan Assn. of Charleston v. Tezzi, 164 A.D.3d 758, 84 N.Y.S.3d 239 (2d Dep’t 2018) (“The plaintiff allegedly served process on the defendant pursuant to CPLR 308(4). Once the ‘affixing and mailing’ was accomplished, the plaintiff was required to file proof of service with the clerk of the court within 20 days of either the affixing or mailing, whichever was later (citation omitted). Once such timely filing is accomplished, service is deemed completed 10 days thereafter (citation omitted). Here, the affidavit of service was not filed within 20 days of either the mailing or affixing; thus, service was never completed (citation omitted). Since service was never completed, the defendant’s time to answer the complaint had not yet started to run and, therefore, she could not be in default (citations omitted). However, the ‘failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004’ (citations omitted). Thus, we agree with the Supreme Court’s determination to deem the affidavit of service timely filed, sua sponte, pursuant to CPLR 2004. In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced (citation omitted). The court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order (citations omitted), ‘nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur’ (citations omitted). Rather, the defendant must be afforded an additional 30 days to appear and answer after service upon her of a copy of the decision and order (citations omitted).”).

Sensible Choice Contr., LLC v. Rodgers, 164 A.D.3d 705, 83 N.Y.S.3d 298 (2d Dep’t 2018) (“The defendants’ contention that the plaintiff’s failure to annex the pleadings to its motion papers was a fatal defect is without merit. CPLR 3212(b) requires, inter alia, that a moving party support its motion for summary judgment by attaching a copy of the pleadings. However, 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 (citation omitted). Here, the pleadings were not only electronically filed and available to the Supreme Court and the parties, but the answer was submitted by the defendants in opposition to the motion, and the summons and complaint were submitted in reply by the plaintiff. The defendants did not assert that they were prejudiced by the omission. Under such circumstances, the court properly disregarded the plaintiff’s omission (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Tokar v. Weissberg, 163 A.D.3d 1031, 83 N.Y.S.3d 76 (2d Dep’t 2018) (“In an action to recover damages for medical malpractice, etc., nonparty Stanley Tokar, as administrator of the estate of Patricia Tokar, deceased, appeals from a judgment of the Supreme Court, Suffolk County (William B. Rebolini, J.), entered June 22, 2016. The judgment dismissed the complaint. The appeal brings up for review an order of the same court dated March 28, 2016, which, upon reargument, adhered to a prior determination of the same court in an order dated October 5, 2015, denying the motion of nonparty Stanley Tokar, as administrator of the estate of Patricia Tokar, deceased, to be substituted as the party plaintiff in the action and to amend the caption accordingly, and granting the defendant’s motion to dismiss the complaint pursuant to CPLR 1021 for failure to seek a timely substitution of parties on behalf of Patricia Tokar, deceased. ORDERED that on the Court’s own motion, the notice of appeal dated July 20, 2016, is deemed to be a notice of appeal by nonparty Stanley Tokar, as administrator of the estate of Patricia Tokar, deceased (citations omitted).”).

Status Gen. Dev., Inc. v. 501 Broadway Partners, LLC, 163 A.D.3d 740, 82 N.Y.S.3d 34 (2d Dep’t 2018) (“The Supreme Court erred in denying the defendant’s unopposed motion on the ground that Dunne’s affidavit was not properly signed. The fact that Dunne’s signature and the jurat appeared on a page separate from the rest of the affidavit did not render it inadmissible. If anything, the separate signature page amounted to an irregularity that the court should have disregarded, as doing so did not prejudice the plaintiff (citations omitted), which was deemed to have waived the issue by failing to timely raise it after service of the defendant’s motion papers (citation omitted). In the interest of judicial economy, we deem it appropriate, under the circumstances of this case, to address the defendant’s motion on the merits, rather than remitting the matter to the Supreme Court, Queens County, to do so (citations omitted).”).

Matter of Duck v. Mannion, 164 A.D.3d 1103, 83 N.Y.S.3d 775 (4th Dep’t 2018) (“At the outset, we note that, although the notice of appeal indicates that petitioners are the appellants, the cover of the appellate brief, the CPLR 5531 statement, and the CPLR 5532 stipulation all indicate that they were submitted on behalf of petitioners-objectors only. Nonetheless, accepting the representations made to this Court at oral argument that the failure to identify petitioner-candidate as an appellant in those papers constitutes a mere mistake or omission and, in the absence of prejudice to a substantial right of a party, we disregard the mistake or omission and treat the appeal as perfected by petitioners-objectors and petitioner-candidate (citations omitted).”).

Young v. City of New York, 164 A.D.3d 711, 81 N.Y.S.3d 547 (2d Dep’t 2018) (“Aside from a deposition conducted on March 17, 2005, this action was dormant until January 26, 2015, when the plaintiffs moved by order to show cause, inter alia, to restore the action to the active calendar and to deem their late notice of claim timely served nunc pro tunc. Unbeknownst to the plaintiffs, the Kings County Clerk’s Office encountered some type of error when scanning and uploading the signed order to show cause to the eCourts system. The digital copy of the order to show cause omitted the page containing the return date of February 27, 2015, among other things, although the remaining pages feature the handwritten notation ‘2/27/15.’ The plaintiffs printed the faulty digital copy without noticing the error and served that copy on the defendants with supporting papers, using the method specified in the order to show cause. In response, seven days before the
return date, the defendants cross-moved to dismiss the complaint. They argued, among other things, that the plaintiffs’ service of the faulty digital copy of the order to show cause constituted a jurisdictional defect, and that the Supreme Court should dismiss the complaint based on the plaintiffs’ failure to timely serve the notice of claim. The defendants thereafter appeared on the return date. In an order dated September 11, 2015, the court denied the plaintiffs’ motion by order to show cause as ‘defectively served,’ and granted the defendants’ cross motion to dismiss the action. The plaintiffs appeal. ‘The failure to give proper notice of a motion deprives the court of jurisdiction to hear the motion’ (citations omitted). However, the defect in service here was ‘merely technical’ (citations omitted). Under these circumstances, given that no substantial right of the defendants was prejudiced, the Supreme Court should have disregarded the irregularity and determined the motion on the merits (citation omitted).’

_Galluccio v. Grossman_, 161 A.D.3d 1049, 78 N.Y.S.3d 196 (2d Dep’t 2018) (“Although the plaintiffs initially opposed the motion with physician affirmations that did not comply with CPLR 2106, the court providently disregarded the defect after the plaintiffs replaced the affirmations with affidavits (citation omitted). However, the court should have granted that branch of the motion which was for summary judgment dismissing the cause of action alleging lack of informed consent insofar as asserted against those defendants, since, as elucidated in the bill of particulars, the claim does not involve an affirmative violation of the plaintiff’s physical integrity as is required to state a cause of action for lack of informed consent (citation omitted).”).

_Matter of Secaira v. Caluna_, 159 A.D.3d 826, 69 N.Y.S.3d 828 (2d Dep’t 2018) (“Under the circumstances of this case, the Family Court erred in dismissing the petition based on the father’s failure to timely serve the mother with the petition. The mother consented, inter alia, to ‘waive the issuance of service of process in this matter,’ and since no substantial right of a party was prejudiced by the inartful language in the second waiver form, which referred to custody, the court should have disregarded any mistake and conducted a hearing on the petition (citations omitted).”).

_Northern Blvd Corona, LLC v. Northern Blvd Prop., LLC_, 157 A.D.3d 893, 70 N.Y.S.3d 515 (2d Dep’t 2018) (“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 (citation omitted). In addition, CPLR 5019(a) gives trial courts the discretion to cure mistakes, defects, and irregularities that do not affect substantial rights of parties (citations omitted). Here, the appellants failed to establish that a substantial right of theirs was prejudiced by the court’s sua sponte, inter alia, deeming the property to have been sold as one lot as of July 11, 2014 (citations omitted).”).

_Abreu v. Casey_, 157 A.D.3d 442, 68 N.Y.S.3d 447 (1st Dep’t 2018) (“This action for personal injuries arises from a motor vehicle accident that occurred on September 7, 2012. Defendant was operating one of the vehicles involved in the accident. On August 25, 2015, 13 days before the statute of limitations expired, plaintiff moved to amend the complaint to, among other things, add defendant as a party. A copy of the proposed amended summons and complaint were annexed to plaintiff’s moving papers. By order dated February 4, 2016, and entered on February 5, 2016, the court granted plaintiff’s motion. Upon entry of the order granting leave, plaintiff had until February 18, 2016 to serve defendant with the amended pleadings within the applicable statute of limitations
On February 10, 2016, plaintiff served all parties including defendant with a copy of the February 4, 2016 order with notice of entry, annexing the amended summons and amended verified complaint. Those papers were filed with the Clerk of the Court on that same date. Contrary to defendant’s contention, plaintiff was not required to serve him with the motion to amend before the Supreme Court could decide the motion (citation omitted). Plaintiff’s filing of the motion to amend and annexed proposed amended pleadings tolled the applicable statute of limitations (citation omitted). In addition, the record shows that plaintiff’s claims against defendant were interposed eight days before the statute of limitations expired, as the amended pleadings were annexed to the February 4, 2016 order with notice of entry, which was served upon defendant and filed with the Clerk of the Court on February 10, 2016. **Plaintiff's failure to file the amended pleadings as a separate docket entry is not fatal to his maintaining the action against defendant, because the amended pleadings were timely filed with the Clerk of the Court after being served upon defendant (citation omitted), and defendant has not shown any prejudice (citation omitted). Further, CPLR 2001 authorizes the court to direct plaintiff to correct this type of filing mistake (citation omitted).**

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

*Matter of Dougherty v. County of Greene*, 161 A.D.3d 1253, 76 N.Y.S.3d 648 (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


Overnight Delivery Means Overnight Delivery

Dropping Off Papers on Friday with Federal Express for Monday Delivery Does Not Suffice

While many of the concerns associated with the service of interlocutory papers under CPLR 2103 in an action have been mitigated by electronic filing, they have not been eliminated. Electronic filing has not been adopted in all courts. Moreover, there are other documents, for example, those that are discovery-related, that are still served in the traditional manner.

Thus, CPLR 2103(b), which governs service upon an attorney, comes into play. In many circumstances, service by mail under CPLR 2103(b)(2) will suffice. Where the mailing is done in New York, five days are to be added to the “prescribed period” for service. Moreover, as we discussed in the February, 2016 edition of the Digest, that subsection was amended to permit service by mail outside of the state, adding an extra day (totaling six days). Another alternative is to serve “by dispatching the paper to the attorney by overnight delivery service.” CPLR 2103(b)(6). The statute defines an “overnight delivery service” as “any delivery service which regularly accepts items for overnight delivery to any address in the state.” When using overnight delivery, one business day is added to the prescribed period.

Clearly the statute’s message is that when one uses an overnight delivery service, the additional day is meant to take into account the one extra day required to effect service (overnight). Thus, in Moran v. BAC Field Servs. Corp., 164 A.D.3d 494 (2d Dep’t 2018), the Second Department ruled that the defendant’s deposit of its motion papers with Federal Express on Friday for weekday delivery on Monday constituted a failure to use Federal Express’s overnight delivery service. Also note the statute’s use of the phrase “one business day,” suggesting that weekend days are not to be counted.
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) 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).”). 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 - Deficient Notice of Motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds.**

*Abizadeh v. Abizadeh*, 159 A.D.3d 856, 72 N.Y.S.3d 566 (2d Dep’t 2018) (“CPLR 2214(a) provides that a notice of motion shall ‘specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor’ (citations omitted). Here, the Supreme Court providently exercised its discretion in denying the plaintiff’s cross motion on the ground that the plaintiff’s notice of cross motion was deficient (see CPLR 2214[a]; 2215). The plaintiff’s notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor (see CPLR 2214[a]). Although the plaintiff’s supporting papers supplied the missing information, a court is not required to comb through a litigant’s papers to find information that is required to be set forth in the notice of motion (citations omitted).”).

**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*, 162 A.D.3d 1061, 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 - Plaintiff’s failure to properly serve copy of summary judgment order with notice of entry did not render that order null and void.

*Wells Fargo Bank, N.A. v. Frierson*, 150 A.D.3d 1045, 55 N.Y.S.3d 332 (2d Dep’t 2017) (“Here, the summary judgment order indisputably affected the rights of the defendant. Consequently, it was incumbent upon the plaintiff, in moving to confirm the referee’s report and for a judgment of foreclosure and sale, to demonstrate that the order was properly served upon the defendant’s attorney of record (citations omitted). Indeed, the summary judgment order provided that proof of such service ‘must accompany any application for final judgment of foreclosure and sale.’ The plaintiff failed to do so. Contrary to the defendant’s contention before the Supreme Court, the plaintiff’s failure to properly serve a copy of the summary judgment order with notice of entry did not render that order null and void (citation omitted). However, since the plaintiff failed to establish that a copy of the summary judgment order with notice of entry was properly served upon the defendant, its motion to confirm the referee’s report and for a judgment of foreclosure and sale was properly denied on that ground (citation omitted). In light of our determination, we need not reach the plaintiff’s remaining contention.”).
CPLR 2219 / 2220 - Appeal not was properly before the court because order was neither filed nor entered.

*Matter of Merrell v. Sliwa*, 156 A.D.3d 1186, 67 N.Y.S.3d 685 (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 2219/2220 - Failure to settle order in accordance with 22 NYCRR 202.48(a).

*Lasalle Bank N.A. v. Benjamin*, 164 A.D.3d 1223, 83 N.Y.S.3d 592 (2d Dep’t 2018) (“Here, the decision entered September 16, 2009, directed the plaintiff to ‘settle order.’ Accordingly, pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed order within 60 days after September 16, 2009. Contrary to the plaintiff’s argument, its notice to David that it was presenting the Supreme Court with a proposed order for settlement and signature did not satisfy the requirements of 22 NYCRR 202.48(a), because that order was not accompanied by all the required papers. Nor did the plaintiff offer good cause for its substantial delay in submitting the required papers (citations omitted). Accordingly, we agree with the court’s determination that, pursuant to 22 NYCRR 202.48, the plaintiff’s motion for summary judgment was abandoned, thus warranting the vacatur of the decision entered September 16, 2009 (citations omitted).”).

CPLR 2221 - Motions to reargue or renew

CPLR 2221 - Reasonable justification for failure to submit affidavit on original motion.

*Antiohos v. Morrison*, 159 A.D.3d 527, 69 N.Y.S.3d 798 (1st Dep’t 2018) (“Plaintiff’s original motion for a default judgment was denied not because plaintiff failed to show defendant Morrison’s default but because he failed to submit an affidavit detailing the underlying personal injury action by ‘a party with personal knowledge of the merits of the claim’ (citation omitted). In support of his renewal motion, plaintiff submitted his own affidavit as well as a reasonable justification for his failure to submit one with the original motion papers, namely, his cognitive deficits and his inability to read (citation omitted). As this Court observed in Wattson, ‘[C]ases should be decided on the merits, wherever possible, and not on the basis of technical procedural requirements’ (citation omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 2221 - “The plaintiff demonstrated reasonable justification for failing to present the photograph and affidavit on the defendant’s prior motion for summary judgment by establishing that the photograph, on which the affidavit relied, was not served upon it by the defendant until after the motion was made.”

Vyrtle Trucking Corp. v. Browne, 157 A.D.3d 842, 69 N.Y.S.3d 332 (2d Dep’t 2018) (“A motion for leave to renew ‘shall be based upon new facts not offered on the prior motion that would change the prior determination’ (CPLR 2221[e][2]) and ‘shall contain reasonable justification for the failure to present such facts on the prior motion’ (CPLR 2221[e][3]). The plaintiff demonstrated reasonable justification for failing to present the photograph and affidavit on the defendant’s prior motion for summary judgment by establishing that the photograph, on which the affidavit relied, was not served upon it by the defendant until after the motion was made. However, on a postappeal motion to renew, the movant ‘bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court in order to imbue the appellate decision with a degree of certainty’ (citations omitted). Here, the photograph was obtained by the plaintiff in January 2012, and the affidavit was obtained in January 2014. Yet, the plaintiff’s renewal motion was not made until February 2015. Under these circumstances, the plaintiff failed to meet its heavy burden of showing due diligence in presenting the new evidence to the Supreme Court (citations omitted).”).

CPLR 2221 - Motion for leave to renew based on deposition completed after prior motion had been decided.

Donovan v. Rizzo, 149 A.D.3d 1038, 53 N.Y.S.3d 193 (2d Dep’t 2017) (“The new evidence included a transcript of the plaintiff’s deposition testimony, which had not been submitted to the court on the prior motion, as her deposition had not been completed until after the prior motion had been decided. Therefore, the motion was correctly denominated by the defendant as one for leave to renew his opposition to the plaintiff’s motion for summary judgment.”).

CPLR 2221 - Motions to reargue or renew: Motion could be decided by another justice.

Matter of Pettus v. Board of Directors, 155 A.D.3d 485, 65 N.Y.S.3d 21 (1st Dep’t 2017) (“Petitioners’ motion denominated as one for leave to renew and reargue was not based on new facts unavailable at the time of the original motion, and thus was actually a motion for leave to reargue, the denial of which is not appealable (citations omitted). That the motion was decided by a Justice other than the Justice who signed the underlying order of dismissal does not compel a different result, given that the CPLR permits sua sponte recusals and reassignments of such motions (citations omitted).”).

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

Leary v. Bendow, 161 A.D.3d 420, 76 N.Y.S.3d 519 (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 a motion to vacate under CPLR 5015(a)(1), and not a CPLR 2221 motion to renew or reargue.

Hutchinson Burger, Inc. v. Bradshaw, 149 A.D.3d 545, 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.”).

CPLR 2221


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).


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!

ARTICLE 23 - SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2303-a - Service of a trial subpoena

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

Chicoine v. Koch, 161 A.D.3d 1139, 78 N.Y.S.3d 431 (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).”).

CPLR 2304 - Motions to quash

CPLR 2304 / 4503 - A claim of privilege with respect to testifying witness cannot be made until question is propounded implicating the privilege.

Matter of Empire Wine & Spirits LLC v. Colon, 145 A.D.3d 1157, 43 N.Y.S.3d 542 (3d Dep’t 2016) (citing Weinstein, Korn & Miller) (“Turning first to the subpoena directed to Flug, respondents claim that, given her role as SLA’s general counsel, petitioner’s questions will necessarily elicit information protected by the attorney-client privilege, which applies to ‘confidential communication[s] made to [an] attorney for the purpose of obtaining legal advice or services’ (citations omitted). However, although a subpoena duces tecum can be vacated in advance on the basis of privilege, a different analysis applies to a subpoena that seeks testimony rather than documents (citation omitted). Where, as here, a witness has been served with a subpoena ad testificandum, ‘a claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information’ (Matter of Holmes v. Winter, 22 NY3d 300, 319 [2013], cert denied ___ US ___, 134 S Ct 2664 [2014]; see Matter of Beach v. Shanley, 62 NY2d at 248; 4-2304 Weinstein-Korn-Miller, NY Civ Prac ¶ 2304.13). Flug is entitled to invoke the attorney-client privilege if and when

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
petitioner propounds questions that implicate protected information, but we agree with Supreme Court that she must first comply with the subpoena by appearing at the administrative hearing. ‘Only in this context can an intelligent appraisal be made as to the legitimacy of the claim of privilege’ (citations omitted).”).

**CPLR 2305 - 2018 Amendment**


**CPLR Amendments**

**CPLR 2305(d) - Documents Delivered to Attorney Pursuant to a Trial Subpoena**

While obtaining documents from parties in discovery is fairly simple by merely serving a notice on a party’s counsel, seeking documents for use at trial has been more difficult. A 2018 amendment adding CPLR 2305(d) provides that where a trial subpoena directs service of subpoenaed documents to the attorney (or self-represented party) at the return address noted in the subpoena (rather than to the court clerk), a copy of the subpoena needs to be served on all parties simultaneously. In addition, the party that receives the records "in any format" is required to deliver "forthwith" a complete copy of the records in the same format to all opposing attorneys (and self-represented parties, where applicable). L.2018, ch. 218.

The Sponsor’s memorandum discussed the logic behind the legislation:

Our Advisory Committee has studied the procedures by which records intended for use at trial are produced pursuant to a subpoena duces tecum; and is of the view that counsel should have the option of having trial material delivered to the attorney or self-represented party at the return address set forth in the subpoena, rather than to the clerk of the court. This is especially true where the materials are in digital format and can be delivered on a disk or through other electronic means.

The amendment became effective August 24, 2018, and applies to all actions pending on or after that date.

**CPLR 2309**

**CPLR 2309 - A defective acknowledgment of a prenuptial agreement can be remedied by extrinsic proof provided by the notary public who took a party’s signature.**

*Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep’t 2018) ("In Galetta v Galetta (21 NY3d 186), the Court of Appeals left unanswered the question of whether a defective acknowledgment of a prenuptial agreement could be remedied by extrinsic proof provided by the
notary public who took a party’s signature. For the reasons that follow, we conclude that such proof can remedy a defective acknowledgment. Accordingly, we affirm the order of the Surrogate’s Court, which denied the appellant’s motion to dismiss a petition to invalidate her notice of spousal election. . . . The acknowledgment requirement fulfills two goals. First, it ‘serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person’ (citations omitted). Second, it imposes on the person signing a ‘measure of deliberation in the act of executing the document’ (citation omitted). When there is no acknowledgment at all, this second requirement has not been fulfilled (citation omitted.”).

ARTICLE 30 – REMEDIES AND PLEADINGS

CPLR 3001- Declaratory judgment

CPLR 3001 - In action by a licensed physician against her medical malpractice insurer, seeking to recover damages that allegedly resulted when defendant settled a malpractice claim on her behalf, “the medical malpractice claimants were parties to the settlement agreement and received a monetary payment pursuant to it, and thus they are necessary parties to any declaration as to its validity. In the absence of those necessary parties, we will not issue a declaration in favor of any party.”


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.


CPLR 3012 - Service of pleadings and demand for complaint

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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 3016 - particularity in specific actions**

**CPLR 3016 / 3211 - Failure to plead properly**

*Jackie's Enters., Inc. v. Belleville*, 165 A.D.3d 1567, 87 N.Y.S.3d 124 (3d Dep’t 2018) (“These allegations lack the specificity required by CPLR 3016 (a). Plaintiff improperly qualified the allegedly defamatory statements with the phrase ‘or words to that effect,’ indicating that the quotations are not, in fact, the exact or ‘particular words complained of’ (citations omitted). ‘Merely paraphrasing the statements, notwithstanding the use of quotation marks to suggest a quotation where none in fact exists, warrants dismissal of [a] defamation action’ (citations omitted). Further, the complaint does not sufficiently identify the specific third persons to whom the statements were allegedly made or identify which of the three defendants made any of the alleged statements (citations omitted). Moreover, Keto's affidavit submitted in response to the motion was ‘insufficient to overcome the failure of the complaint to set forth the particular words alleged to be defamatory as required by CPLR 3016 (a)’ (citation omitted).”).

*SSG Door & Hardware, Inc. v. APS Contr., Inc.*, 166 A.D.3d 704, 87 N.Y.S.3d 651 (2d Dep’t 2018) (“Here, the complaint failed to comply with CPLR 3016(f). The three invoices failed to state the price of each individual invoice item, or the date when each item was delivered. Although it was acknowledged that partial payment was made, the plaintiff did not specify what the partial payment was for. The plaintiff also alleged that the defendant made a partial payment toward one invoice without specifying to which of the invoiced items the defendant's payment was applied (citations omitted). In any event, even assuming CPLR 3016(f) was complied with, a general denial is sufficient where a defense to the cause of action pursuant to CPLR 3016(f) speaks to the ‘entirety of the parties' dealings’ (citations omitted). In this case, the defense—that the plaintiff breached the contract by untimely delivering the items in the contract—goes to the entirety of the parties' dealings. Further, damages awarded on the counterclaim may offset liability for goods sold and delivered if the circumstances warrant it (citations omitted).”).

*Rssm CPA LLP v. Bell*, 162 A.D.3d 554, 80 N.Y.S.3d 21 (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_, 162 A.D.3d 865, 80 N.Y.S.3d 300 (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 an answer amended via a motion in the absence of prejudice._

_Charles v. William Penn Life Ins. Co. of N.Y., 162 A.D.3d 490, 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 / 3211(e) - Preserving affirmative defenses in a pre-answer motion or in a 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 - Cannot later assert in state court, “compulsory counterclaim” in prior federal action.** See discussion below, CPLR 3211, of *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).*

**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**


Further Appellate Division Conflicts, and One Resolved

Agreement on Standard to Apply On a Motion to Amend

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 - Amendment contradicting allegation in original complaint does not render proposed amendment patently without merit.**

*Brannigan v. Christie Overhead Door*, 149 A.D.3d 892, 53 N.Y.S.3d 106 (2d Dep’t 2017) ("Here, the plaintiff’s proposed amendment contradicted an allegation in the original complaint, but that inconsistency simply raises an issue of credibility that may be addressed later in the action; it does not, contrary to the third-party defendants’ contention, render the proposed amendment patently without merit.").

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

*Golia v. Vieira*, 162 A.D.3d 864, 80 N.Y.S.3d 97 (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, 78 N.Y.S.3d 719 (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(b) - Plaintiff’s motion to amend denied as delay prejudiced the defendants.

Otero v. Walton Ave. Assoc. LLC, 166 A.D.3d 539 (1st Dep’t 2018) (“The motion court providently exercised its discretion in denying plaintiff's motion, as defendants demonstrated that the delay in notifying them that plaintiff had incorrectly identified the date of the accident prejudiced their ability to investigate the incident and to defend the action using surveillance videotapes of the hallway (citations omitted). Defendants showed that, after learning of plaintiff's claim, they retrieved surveillance tapes of the alleged accident date of October 13th, which showed that no accident occurred on that date, but that they were no longer able to retrieve videotapes from August 2012 by the time plaintiff informed them of the claimed error in the pleadings. Furthermore, the August 2012 hospital record plaintiff relies upon reflects that she sought treatment from a podiatrist for an unrelated foot condition, and does not reference any fall the previous day (citation omitted).”).

CPLR 3025 - Motion to amend granted; prejudice not established.

Central Amusement Intl. LLC v. Lexington Ins. Co., 162 A.D.3d 452, 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, 77 N.Y.S.3d 255 (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 - In a legal malpractice action, the trial court providently exercised its discretion in granting the plaintiff’s motion for leave to amend the complaint to substitute herself in her representative capacity in place of herself in her individual capacity.

D’Angelo v. Kujawski, 164 A.D.3d 648, 83 N.Y.S.3d 283 (2d Dep’t 2018) (“[A]n amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense’ (citations omitted). The Supreme Court providently exercised its discretion in granting the plaintiff leave to amend the complaint to substitute herself in her representative capacity as the plaintiff in place of herself in her individual capacity. The proposed amendment, which only sought to shift the causes of action from the plaintiff in her individual capacity to herself in her representative capacity, was proper since the allegations set forth in the complaint gave the appellants notice of the legal malpractice causes of action being asserted against them in the amended complaint (citations omitted). Moreover, the appellants’ contention that they would be prejudiced by the amendment because the applicable statute of limitations had expired by the time the plaintiff sought leave to amend the complaint is without merit, since the original complaint was timely filed and gave the appellants notice of the transactions and occurrences pleaded in the amended complaint (citations omitted).”).

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.”).

CPLR 3025/3212 - Here, the court should not have awarded the plaintiff summary judgment on the issue of liability on the causes of action in the amended complaint before the defendant answered the amended complaint.

R&G Brenner Income Tax Consultants v. Gilmartin, 166 A.D.3d 685 (2d Dep’t 2018) (“However, the Supreme Court should not have awarded the plaintiff summary judgment on the issue of liability on the first, third, and fourth causes of action in the amended complaint, while simultaneously allowing the plaintiff to serve the amended complaint (citations omitted). ‘When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case’ (citations omitted). ‘Since an amended complaint supplants the original complaint, it would unduly prejudice a defendant if it were bound by an original answer when the original complaint has no legal effect’ (citation omitted). As a result, ‘an amended complaint should ordinarily be followed by an answer’ (citation omitted). Here, the court should not have awarded the plaintiff summary judgment on the issue of liability on the causes of action in the amended complaint before the defendant had answered the amended complaint (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 – Majority of Court Rejects Redacted Disclosure Regime in FOIL situation**


**Majority of Court of Appeals Holds That NYPD Disciplinary Proceeding Records Are Exempt From Disclosure**

**Rejects Redacted Disclosure Regime**

New York’s Freedom of Information Law (FOIL) requires that, when requested, government agencies provide access to records within their control, subject to certain exemptions. One exemption, applicable here, is Public Officers Law § 87(2)(a), which permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." In *Matter of New York Civ. Liberties Union v. New York City Police Dept.*, 2018 N.Y. Slip Op. 08423 (December 11, 2018), the pertinent state statute was Civil Rights Law § 50-a, which provides that "[a]ll personnel records used to evaluate performance toward continued employment or promotion, … shall be considered confidential and not subject to inspection or review…."

In this case, the New York Civil Liberties Union (NYCLU) made a FOIL request to the New York Police Department (NYPD) seeking copies of 10 years of final disciplinary rulings in individual police officer abuse cases in which the New York City Civilian Complaint Review Board (CCRB) had substantiated the charges and documents identifying the final discipline imposed. The CCRB, an independent City agency, investigates allegations of police misconduct against NYPD officers.

The NYPD denied the request, arguing that the documents were exempt. Specifically, it asserted that the documents were protected under § 50-a because they "are used to evaluate the continued employment of police officers by the NYPD." *Id.* at *2.* After an administrative appeal, the NYPD produced more than 700 pages of documents with the identifying information of the subject officers and complaints redacted. It did not produce "final opinions," asserting that § 50-
a’s procedure and process were "the exclusive means for obtaining records that fall within its
purview." Id. That statute requires notice to the subject police officer and a court order directing
disclosure.

The NYCLU then brought this Article 78 proceeding. The trial court denied the NYPD’s
motion to dismiss, and ordered the NYPD to select and produce five decisions randomly, redact
the identities, and notify the officers of the proceeding and redactions. The NYPD then produced
the redacted documents to the court for an in camera inspection, but argued that even in a redacted
form they violated § 50-a, because the redactions "could not adequately conceal the officers’
identities." Id. Although the trial court deemed the redactions to be adequate and ordered disclosure
of redacted copies of all the rulings covered by the FOIL request, the Appellate Division reversed
and dismissed the proceeding.

A majority of the Court of Appeals affirmed. Judge Garcia, writing for the majority,
initially stated that the disciplinary records sought by the NYCLU were "quintessential ‘personnel
records’ protected by” § 50-a. Id. at *3. He rejected the NYCLU’s claim that § 50-a’s protections
were limited to actual or potential litigation. In fact, that section "seeks to prevent any ‘abusive
exploitation of personally damaging information contained in officers’ personnel records." Id.
(citation omitted). Judge Garcia concluded that the records requested here presented the potential
for such abusive exploitation, because they "are replete with factual details regarding misconduct
allegations, hearing judges’ impressions and findings, and any punishment imposed on officers—
material ripe for ‘degrad[ing], embarras[ing], harass[ing] or impeach[ing] the integrity of [an]
officer.’" Id. at *4 (citation omitted). Section 50-a "does not merely guarantee confidentiality in
the abstract." It contains specific procedural rights and mechanisms to carry out its goals.
Specifically, without an officer’s consent, § 50-a provides for court-ordered disclosure of relevant
and material records, but only in the context of a pending litigation, which was not the case here.
The majority rejected an "alternative ‘redacted disclosure’ regime proposed by the parties" because it
would eviscerate the Legislature’s mandate. Civil Rights Law § 50-a sets up a "legal
process whereby the confidentiality of the records may be lifted by a court, but only after
an in camera inspection and affording affected parties notice and an opportunity to be
heard." The parties’ proposal would, instead, enable an agency to circumvent the host of
statutory protections belonging to covered officers by simply applying redactions that the
agency, in its sole discretion, deems adequate. That scheme would transform Civil Rights
Law § 50-a into an optional mechanism applicable only when (and if) the agency chooses
to invoke it (citation omitted).

Id. at *5.

Significantly, POL § 87(2)(b), which exempts records that "if disclosed would constitute
an unwarranted invasion of personal privacy," permits redaction. Thus, the majority concluded
that the omission of such statutory authority to redact in POL § 87(2)(a) reflected the legislature’s
intention to allow redaction only in the former category.
In dissent, Judge Rivera stated that the majority wrongly concluded that all police officer employment records "are concealed from public review, even if an officer’s identifying information is redacted, except in the limited circumstances where the specific records are material to pending litigation." *Id.* at *7. In fact, "the Court has never, as the majority has here, untethered the confidentiality requirement of section 50-a from its legislative intent to protect officers from harassment based on records specific to them." *Id.* at *11. Where all identifying information is redacted, the concerns protected by § 50-a are not implicated because the subject of the records is kept unknown. Moreover, Judge Rivera contended that an agency has the "absolute right" to disclose records that can fall within a FOIL exemption. She concluded that "[t]he majority’s conclusion to the contrary is based on an interpretation of Civil Rights Law § 50-a that does nothing to serve the purpose of that statute and instead undermines New York State’s strong public policy of open government, transparency, and public access to government records." *Id.* at *13. She called for the legislature to "correct the majority’s error."

Judge Wilson, in a separate dissenting opinion, agreed that redaction of confidential information was permissible here and that "nonconfidential information subject to FOIL cannot be withheld even if the redactions might cause a reader to be misled." *Id.* He saw nothing violative of the statutory protections by permitting FOIL disclosure of documents disclosed at disciplinary hearings open to the public, while permitting redaction of information which was kept confidential at the hearing.

**CPLR 3101**


**First Department Articulates New Test Where Deposition of Opposing Counsel Is Sought**

**In Addition To Materiality and Necessity, Subpoenaing Party Must Show Good Faith Basis and That the Information Sought Is Unavailable From Another Source**

The primary issue in *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep’t 2018), involved a rather rare occurrence: seeking a deposition of opposing counsel. The plaintiffs were distributors of wholesale motor fuel to gas stations. They sued Cumberland, parent company of defendant, Gulf Oil, a seller of wholesale motor fuel, and Anjon, a licensed distributor of Gulf fuel. They sought damages for tortious interference with contract, arising out of the defendants’ alleged role in rebranding five nonparty franchise gas stations from Mobil to Gulf fuel. The plaintiffs had been supplying Mobil fuel to the stations from 2010 until mid-2012, when the defendants negotiated with the stations to supply them with Gulf fuel. Shortly thereafter, the stations stopped buying Mobil fuel from the plaintiffs, rebranded themselves to Gulf stations, and began selling Gulf fuel, purchased from Anjon.

The plaintiffs served a subpoena on defendants’ counsel seeking both documents and deposition testimony about communications with Gulf or Cumberland. There was no evidence that
defendants’ counsel here had represented Gulf or Cumberland prior to this litigation commenced in 2015.

When defendants’ counsel ignored the subpoena, plaintiffs moved to strike the answer under CPLR 3126. In addition to opposing the motion, defendants cross-moved for a protective order. The trial court granted defendants’ cross-motion and denied plaintiffs’ motion.

The First Department agreed with the trial court’s determination to the extent that it denied plaintiffs’ motion and quashed the subpoena seeking documents. It diverged, however, on the issue of the defendants’ counsel’s deposition. Specifically, it took exception to the trial court’s reliance on Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), a federal court case.

Initially, the Appellate Division focused on the burden of proof on a motion for a protective order. Under New York law, the individual or entity seeking a protective order bears the initial burden to establish either that the discovery sought is "utterly irrelevant," or that the "futility of the process to uncover anything legitimate is inevitable or obvious." Matter of Kapon v. Koch, 23 N.Y.3d 32, 34 (2014). Should that burden be met, the subpoenaing party is then required to "establish that the discovery sought is ‘material and necessary’ to the prosecution or defense of an action, i.e., that it is relevant." Id. Moreover, when the motion asserts attorney-client privilege or work product, "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d 371, 377 (1991).

By contrast, the court in Shelton, applying federal law, placed the initial burden on the party seeking the disclosure. The First Department acknowledged that neither it nor the Court of Appeals had established a "clear rule" to deal with the situation presented here, which it characterized as "appropriately rare." It noted that the deposition of opposing counsel is disfavored because it "hardly seems calculated to assist" trial preparation, it is offensive to the adversarial process, and it raises the possibility of attorney disqualification.

In arriving at its own standard, the First Department adopted the Second Department’s requirement of demonstrating "a good faith basis":

In addition to showing that the information sought is material and necessary, the subpoenaing party must demonstrate good cause, in order to rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose

Liberty Petroleum, 164 A.D.3d at 406.

However, the court did not stop there. It added yet another requirement: that the information sought is not available from another source. This requirement of unavailability would seem to be at odds with the Kapon decision, which explicitly held (to the satisfaction of many) that a party seeking disclosure from a nonparty need not show that the information is unavailable elsewhere. The First Department acknowledged that this was the "general rule" enunciated by the
Court of Appeals, but insisted that the Court did not address the "special situation" here and did not overrule the First Department’s decision in *Equitable Life Assurance Soc’y v. Rocanova*, 207 A.D.2d 294, 296 (1st Dep’t 1994), which held that, absent a "showing of necessity," communications with counsel are immune from disclosure.

With respect to the facts here, the First Department found that defendants’ counsel arguably met his burden of showing that the information sought was irrelevant or that a deposition would not lead to legitimate discovery. He asserted that plaintiffs’ "true intention" was to attempt to disqualify him, that there would be nothing he could testify about that would be relevant to the tortious interference issues, and that questioning him about the rebranding of the stations would involve privileged communications with Anjon. The court noted, however, that an assertion that contemplated testimony is privileged does not "usually" justify quashing the subpoena, and that such an assertion must await an objectionable question at the deposition. Moreover, as noted above, a court must narrowly construe an invocation of privilege.

The Appellate Division concluded that because the trial court had proceeded under Shelton, "it was not clear to plaintiffs that they had the burden to demonstrate that they seek from defendants’ counsel is material and relevant (citation omitted). Moreover, they did not have an opportunity to show that they met the two criteria that we establish today." *Liberty Petroleum*, 164 A.D.3d at 408. Thus, the court remanded the case to the trial court for further proceedings in accordance with the test it articulated here. If the motion court permitted the deposition to move forward, counsel would still be able to object to specific questions that sought privileged information.

In a concurring opinion, Justice Singh wrote that the matter should be remanded specifically on the defendants’ counsel’s role prior to representing Gulf Oil and Cumberland on the rebranding issue. In addition, he maintained that it had not been resolved whether defendants’ counsel acted as a negotiator when he represented Anjon and communicated with Gulf Oil and Cumberland on the rebranding issue, and that the privilege would not apply when an attorney acts as a negotiator or an agent. Finally, the concurrence disagreed with the majority’s "new test" and maintained that the "material and necessary" standard and "the well-developed body of law addressing the rare circumstances under which attorney discovery may be obtained sufficiently addresses the majority’s valid concern over any mischief that can be caused by noticing a deposition of opposing counsel." *Id.* at 411.

**CPLR 3101 -The Fourth Department holds that any documents in a claim file created after commencement of an action in a supplementary underinsured motorist (SUM) benefits case in which there has been no denial or disclaimer of coverage are not per se protected.**

*Rickard v. New York Cent. Mut. Fire Ins. Co.*, 164 A.D.3d 1590, 84 N.Y.S.3d 619 (4th Dep’t 2018) (Rather, “a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears ‘the burden of establishing any right to protection’ (citations omitted). ‘[A] court is not required to accept a party’s characterization of material as privileged or confidential’ (citation omitted). Ultimately, ‘resolution of the issue whether a particular document is . . . protected is necessarily a fact-specific determination . . ., most often requiring in camera review’

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
(citations omitted). Here, we conclude that defendant failed to meet its burden inasmuch as it relied solely upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contain protected material. We nonetheless further conclude that, under the circumstances of this case, the court abused its discretion by ordering the production of allegedly protected documents and instead should have granted the alternative relief requested by defendant, i.e., allowing it to create a privilege log pursuant to CPLR 3122 (b) followed by an in camera review of the subject documents by the court (citations omitted). We therefore reverse the order insofar as appealed from, vacate the first and second ordering paragraphs, grant the motion for a protective order insofar as it seeks an in camera review, and remit the matter to Supreme Court to determine the motion and the cross motion following an in camera review of the allegedly protected documents.”).

CPLR 3101/3121 - Majority of First Department holds that plaintiff here did not affirmatively waive physician-patient privilege with respect to prior knee injuries (sustained in a prior accident) not raised in this action, where plaintiff limited injuries to her cervical spine, lumbar spine, and left shoulder. Dissent argues that since the condition of the knees is essential to actions of walking and standing, plaintiff placed at issue the condition of her knees. First Department and Second Department conflict in this area.

Brito v. Gomez, 2018 NY Slip Op 08105 (1st Dep’t 2018) (“We are asked on this appeal to decide whether a litigant in a personal injury action who makes a claim for lost earnings and loss of enjoyment of life waives the physician-patient privilege with respect to prior injuries not raised in the lawsuit. Based on our settled precedent, we find that the privilege is waived only for injuries affirmatively placed in controversy….Contrary to defendants' argument, neither plaintiff's bill of particulars nor her deposition testimony places her prior knee injuries in controversy. In paragraph 10 of her bill of particulars, plaintiff limits the injuries she sustained in the 2014 accident to her cervical spine, lumbar spine, and left shoulder. Accordingly, the specified bodily injuries that are affirmatively placed in controversy are the spinal and shoulder injuries. The claims for lost earnings and loss of enjoyment of life alleged in the bill of particulars are limited to these specified injuries. Plaintiff does not mention her prior knee treatments. Nor does she claim that the injuries to her knees were exacerbated or aggravated as a result of the 2014 automobile accident…Here, as we noted earlier, plaintiff does not claim that her prior knee injuries were exacerbated or aggravated as a result of the 2014 accident. Accordingly, plaintiff's claim for lost earnings does not affirmatively place the condition of her knees in controversy (citation omitted)…We are not persuaded by the reasoning of the Second Department. In our view, the Second Department's precedent cannot be reconciled with the Court of Appeals' rulings that the physician-patient privilege is waived only for injuries affirmatively placed in controversy. The dissent acknowledges that, unlike the Second Department, "we do not regard generalized allegations of loss of enjoyment of life or of the ability to work as opening the door to a plaintiff's entire medical history" and argues that we need not adopt the Second Department's expansive view. Instead, the dissent would find that medical records pertaining to a preexisting condition that is relevant to a functional deficit — here plaintiff's alleged difficulty in walking and standing — should be discoverable. We are not persuaded by this reasoning. Plaintiff has not affirmatively placed the condition of her knees at issue. Therefore, the privilege is not waived. In fact, the dissent's argument endorses the expansive view the Second Department has taken on the issue of waiver.”).
CPLR 3101(a) – Tax related documents, such as K-1s, are discoverable where material and necessary.

_Norddeutsche Landesbank Girozentrale v. Tilton_, 165 A.D.3d 447, 86 N.Y.S.3d 12 (1st Dep’t 2018) (“The court properly denied defendants' motions for protective orders barring the use of all tax-related discovery and tax-related discovery post-dating April 2012, because the produced and requested tax-related discovery satisfies the liberally interpreted standard for disclosure (citations omitted). It is material to plaintiff's fraudulent inducement claim. While a party seeking disclosure of tax returns must make a strong showing that the information contained in the returns is necessary and unavailable from other sources (citations omitted), the underlying financial information, when contained in documents other than tax returns, such as in Form K-1s, is typically discoverable if material and necessary (citation omitted). This Court's decisions in MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC (citation omitted) and Haenel v November & November (citation omitted) should not be read to hold otherwise.”).

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) - “Since the plaintiff offered only a vague excuse for the unavailability of the intended expert, without offering any details as to when the plaintiff learned of that expert's unavailability, she failed to establish good cause to offer the testimony of the substitute expert.”

_Geffner v. Mercy Med. Ctr.,_ 2018 NY Slip Op 08280 (2d Dep’t 2018) (“Furthermore, contrary to the plaintiff's contention, the Supreme Court did not improvidently exercise its discretion in precluding her from proffering the testimony of a ‘substitute expert’ at trial. Pursuant to CPLR 3101(d)(1)(i), ‘where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph’ (emphasis added). ‘A determination regarding whether to
preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with CPLR 3101(d)(1)(i) is left to the sound discretion of the court’ (citation omitted). Here, since the plaintiff offered only a vague excuse for the unavailability of the intended expert, without offering any details as to when the plaintiff learned of that expert's unavailability, she failed to establish good cause to offer the testimony of the ‘substitute expert’ (citations omitted). Moreover, the plaintiff had previously been unprepared to proceed with trial due to, inter alia, the unavailability of experts (citation omitted.).”

**CPLR 3101(d) - Late expert disclosure**

*Lasher v. Albany Mem. Hosp.*, 161 A.D.3d 1326, 77 N.Y.S.3d 544 (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) - 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*, 162 A.D.3d 142, 147-148, 77 N.Y.S.3d 234, 238 (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)**


**Expert Disclosure in Medical, Dental or Podiatric Malpractice Actions**

**Appellate Division Conflict on Whether Expert’s Qualifications May Be Withheld to Avoid Learning of Identity**

CPLR 3101(d)(1)(i) sets forth the information that must be disclosed with respect to experts that are expected to testify at trial. That section provides an exception in medical, dental or podiatric malpractice actions, where a responding party may omit the expert’s name. This was prompted by concerns that medical experts could be intimidated and/or discouraged by their colleagues.

Over the years, however, with advanced technology, and particularly the broad access to the internet, the provision of the expert’s qualifications required by the statute (including names of educational institutions, locations of residences and internships, areas of prior practice and dates of graduation, licensure and board certifications), has enabled demanding parties to learn the identity of the expert.

Responding counsel, particularly plaintiffs’ counsel, have thus tried to limit their disclosure of an expert’s qualifications. Back in 2002, the Second and Fourth Departments came to differing conclusions as to a remedy. In *Thomas v. Alleyne*, 302 A.D.2d 36 (2d Dep’t 2002), the Second Department relied on the statute’s language, which provides for the disclosure of an expert’s qualifications “in reasonable detail” *without exception*. Moreover, the court noted that virtually every jurisdiction in the United States, except New York, allows for the disclosure of the expert’s identity. To deal, however, with the concerns that prompted the omission of an expert’s identity in a medical, dental or podiatric malpractice action, the court proposed the following solution:

Although, for the foregoing reasons, we conclude that defendants will ordinarily be entitled to full disclosure of the qualifications of a plaintiff's expert, notwithstanding that such disclosure may permit such expert's identification, this does not prevent a plaintiff from seeking a protective order under the provisions of CPLR 3103 (a). . . . Upon a factual showing that there exists a concrete risk, 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, then relief may be sought under this statute. In order to make such a showing without revealing the expert's name in doing so, the party seeking such relief may redact the expert's name from any affidavit submitted in support of such a motion, or may submit evidence in camera. The Supreme Court could then decide whether the expert in question has an objectively reasonable belief that, if his or her identity were revealed prior to trial, then he or she would be subject to threats or pressure from other physicians, from representatives of a malpractice insurance carrier, or from any other source.
Conversely, in *Thompson v. Swiantek*, 291 A.D.2d 884 (4th Dep’t 2002), the Fourth Department came to a vastly different conclusion, permitting the responding party to *withhold* the expert’s medical school education and the location of his or her internships, residences and fellowships, to avoid disclosure of the expert’s identity.

Previously, the Third Department’s standard had been to require the disclosure of all information, except the expert’s identity, unless the request was “so detailed that disclosure would have the net effect of disclosing the experts’ identities.” *Pizzi v. Muccia*, 127 A.D.2d 338, 340 (3d Dep’t 1987). Recently, however, in *Kanaly v. DeMatino*, 162 A.D.3d 142 (3d Dep’t 2018), the Third Department reassessed its position and joined the Second Department. The *Kanaly* court stated that the standard, permitting a party to withhold the expert’s qualifications, had “devolved into a quagmire for trial courts exercising oversight of disclosure; the standard has encouraged the withholding of information and the filing of motions by both sides, and requires determinations of what information would reveal the identity of each particular expert on a case-by-case basis.” *Id.* at 152. In fact, “in most cases our current standard would permit a party to withhold vast amounts of information and reveal so little about its expert that the opposing party would be unable to adequately prepare for trial.” *Id.*

The court reiterated that New York was the only state that permitted the withholding of an expert’s identity. Thus, “[i]nasmuch as this state's expert disclosure statute is already the most restrictive in the nation, there is no reason for this Court to continue to interpret the statute in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses.” *Id.* at 153.

Trial court decisions in the First Department have been mixed, although leaning toward the Second Department standard articulated in *Thomas v. Alleyne*. See, e.g., *Kowalski v Ritterband*, 2012 N.Y. Slip Op. 30197(U) at **7 (Sup. Ct. N.Y. Co. 2012) (Citing to *Thomas*, the court noted that “[w]hile, in New York, parties are not obligated to disclose their expert's name, they must disclose the expert's qualifications. C.P.L.R. § 3101(d)(1)(i). If they are seeking to protect those qualifications from disclosure, they must show that the information disclosed would likely lead to the identification of the witness, and that there is a real risk that the witness would be subject to threats or harassment if his or her identity were revealed. The court agrees that plaintiffs have failed to meet their burden in showing that a real risk of threats or harassment exists as to their expert in this particular case.”). See also *Yablon v. Coburn*, 219 A.D.2d 560, 561 (1st Dep’t 1995) (Appellate Division affirms trial court’s order directing the plaintiff to disclose expert’s medical school, residency and fellowships and States in which expert was licensed to practice medicine. “The demands in dispute are proper inquiries bearing upon the qualifications of the expert, the need for which outweighs the unlikelihood that the information would allow identification of the expert's name.”).
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)

David L. Ferstendig, _Another Conflict Among Appellate Division Departments_, 680 N.Y.S.L.D. 4 (2017)

Another Conflict Among Appellate Division Departments

Third Department Continues to Rule That Expert Disclosure Is Required for Treating Physician Called as an Expert at Trial

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), _iv. 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] Cicoria’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, 65 N.Y.S.3d 616 (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)**


**Plaintiff’s Motion at Trial Seeking to Preclude Defense Expert’s Testimony on Causation Denied as Untimely**

**Plaintiff Failed to Object Initially to Defendant’s CPLR 3101(a) Expert Disclosure**

*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(d)(1) - No evidence that failure to disclose experts was intentional or willful and
no showing of prejudice.**

*Yampolskiy v. Baron*, 150 A.D.3d 795, 53 N.Y.S.3d 677 (2d Dep’t 2017) (“[A] party’s failure to
disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and
certificate of readiness does not divest a court of the discretion to consider an affirmation or
affidavit submitted by that party’s experts in the context of a timely motion for summary judgment’
(citation omitted). Under the circumstances of this case, the Supreme Court properly denied the
plaintiff’s cross motion to preclude the expert materials submitted by the defendants in support of
their motion for summary judgment, as there was no evidence that the failure to disclose the experts
was intentional or willful, and there was no showing of prejudice to the plaintiff (citations
omitted).”).

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

*Torres v. Hickman*, 162 A.D.3d 821, 79 N.Y.S.3d 62 (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.*, 162 A.D.3d 566, 75 N.Y.S.3d 419 (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 did not accompany errata sheets.**

*Gonzalez v. Abreu*, 162 A.D.3d 748, 79 N.Y.S.3d 245 (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, 78 N.Y.S.3d 297 (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 3116 - Unsigned deposition transcript could be used.**

*Luna v. CEC Entertainment, Inc.*, 159 A.D.3d 445, 71 N.Y.S.3d 80 (1st Dep’t 2018) (“Pursuant to CPLR 3116(a), plaintiff’s unsigned deposition transcript may be used as though fully signed, as defendant submitted proof that the certified transcript was provided to her attorneys for execution
and not returned. Moreover, an unsigned but certified transcript may be used as an admission (citation omitted), especially where, as here, there is no dispute as to the accuracy of the transcript (citation omitted).”).

**CPLR 3117**

CPLR 3117 - Witness’s testimony was admissible under CPLR 3117(a)(3)(1) because he was deceased by the time of trial.

*International Fin. Corp. v. Carrera Holdings Inc.*, 159 A.D.3d 465, 73 N.Y.S.3d 528 (1st Dep’t 2018) (“The court erred in concluding that Carrera S.P.A.’s principal Vivek Jacob’s deposition testimony was admissible under CPLR 3117(a)(2), which permits deposition testimony of an officer of a party for use ‘by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence.’ Carrera, which offered the testimony in evidence, was not a party adverse to Jacob at the time when he was deposed or at trial. Nevertheless, the court correctly concluded that Jacob’s testimony was admissible under CPLR 3117(a)(3)(I) because he was deceased by the time of trial. To the extent portions of Jacob’s testimony were not based on his personal knowledge of the Tajik government’s interference with operations at Giavoni (citations omitted), there is other evidence to support those facts, and plaintiff was not prejudiced by any error in admitting that testimony (see CPLR 2002).”).

**CPLR 3119 - Uniform interstate depositions and discovery**

CPLR 3119 - Applies in action pending outside NY, not the other way around.

*Matter of 91 St. Crane Collapse Litig.*, 159 A.D.3d 511, 74 N.Y.S.3d 3 (1st Dep’t 2018) (“CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state or territory within the United States (citation omitted), not the other way around. Thus, it is not applicable in this case, in which parties to an action pending in New York seek discovery from out-of-state witnesses. In any event, the court providently exercised its discretion in denying the relief sought since the moving defendants failed to show that the testimony they seek is unrelated to diagnosis and treatment and is the only avenue of discovering the information sought (citations omitted).”).
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*, 162 A.D.3d 142, 145-46, 77 N.Y.S.3d 234, 236-37 (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 3122 - Objections to disclosure, inspection or examination

CPLR 3122 - Examination of detailed privilege log

*Ural v. Encompass Ins. Co. of Am.*, 158 A.D.3d 845, 73 N.Y.S.3d 91 (2d Dep’t 2018) (“Further, the Supreme Court properly granted that branch of the plaintiff’s cross motion which was for relief

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
pursuant to CPLR 3126(3) based upon Encompass’s failure to comply with the prior order of this Court directing it to produce a detailed privilege log for in camera inspection (citations omitted). Examination of the detailed privilege log in camera is necessary before a determination of whether certain items demanded in the third notice of discovery and inspection should in fact be disclosed. If such a log does not exist, then Encompass should so state to the Supreme Court as the reason for failing to produce it (citations omitted). However, if such a log does not exist, Encompass cannot claim that the items demanded were privileged.”).

CPLR 3124 - Motion to compel disclosure

CPLR 3124 - Affirmation of good faith satisfied by counsel’s actions

Rodriguez v. Nevei Bais, Inc., 158 A.D.3d 597, 73 N.Y.S.3d 135 (1st Dep’t 2018) (“Plaintiff’s motion to strike defendant’s answer was not defective. Under the circumstances, where plaintiff’s counsel had long endeavored to resolve the discovery issues in and out of court, the affirmation of good faith satisfied 22 NYCRR 202.7 (citation omitted).”).

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

CPLR 3126 - Because defendants improperly failed to suspend their document retention policy or place a litigation hold, resulting in the negligent destruction of a personnel file, the proper sanction was an adverse inference, not striking the defendants’ answer.

Squillacioti v. Independent Group Home Living Program, Inc., 2018 NY Slip Op 08343 (2d Dep’t 2018) (“In support of their motion, the plaintiffs established that the defendants improperly failed to ‘suspend [their] routine document retention/destruction policy and put in place a litigation hold' to ensure the preservation of relevant documents’ (citations omitted), resulting in the negligent destruction of Escajadillo's personnel file. However, the plaintiffs did not demonstrate that they were deprived of the ability to establish their case. Accordingly, the drastic sanction of striking the defendants' answer is not appropriate (citations omitted), but the lesser sanction of directing that an adverse inference charge be given at trial with respect to Escajadillo's personnel file is warranted (citations omitted). Therefore, we reverse the order and grant the plaintiffs' motion to that extent.”).

CPLR 3126 - Spoliation: “Although that evidence was relevant to the plaintiff’s claims, the plaintiff failed to establish that it was the defendants who discarded that evidence and that the defendants had an obligation to preserve the evidence at the time the evidence was destroyed.”

Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino, 164 A.D.3d 1309, 84 N.Y.S.3d 195 (2d Dep’t 2018) (“Furthermore, the Supreme Court improvidently exercised its discretion in granting
the plaintiff’s cross motion pursuant to CPLR 3126 to impose sanctions on the defendants for spoliation of evidence. ‘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’ (citations omitted). ‘[T]he Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence’ and may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation’” (citation omitted). ‘As the party seeking sanctions for spoliation, the plaintiff was required to demonstrate 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 . . . such that the trier of fact could find that the evidence would support that claim’ (citations omitted). ‘Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed [evidence] is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence was] relevant to the party’s claim or defense’ (citation omitted). Here, it was undisputed that the gas pipes installed by the plaintiff that purportedly contained lamp wick and improper threads were not preserved. Although that evidence was relevant to the plaintiff’s claims, the plaintiff failed to establish that it was the defendants who discarded that evidence and that the defendants had an obligation to preserve the evidence at the time the evidence was destroyed (citations omitted). Under the circumstances of this case, the obligation to preserve the pipes would be on the SCA or the DOE, not the defendants. Accordingly, the court should have denied the plaintiff’s cross motion to impose sanctions on the defendants for spoliation of evidence.”).

CPLR 3126 - Where there is an absence of pending litigation or notice of a specific claim, a party should not be sanctioned for failing to preserve items in good faith and pursuant to its normal business practices.

Page v. Niagara Falls Mem. Med. Ctr., 2018 NY Slip Op 08764 (4th Dep’t 2018) (“Based on the foregoing, the record establishes that defendant had no notice that the adverse event experienced by plaintiff related to any malfunction of the pump such that defendant would have an obligation to act beyond its normal business practices by immediately sequestering the pump in anticipation of litigation or by recording its serial number (citations omitted). Where, as here, there is an ‘absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding [or failing to preserve] items in good faith and pursuant to its normal business practices’ (citation omitted). Furthermore, even assuming, arguendo, that the court properly considered certain evidence submitted by plaintiffs for the first time in their reply papers because that evidence was directly responsive to defendant's opposition (citation omitted), we conclude that none of that evidence warrants a contrary result.”).
CPLR 3126 - Appellate Court settles on lesser sanction of adverse inference for failure to preserve scaffold and plank.

McDonnell v. Sandaro Realty, Inc., 165 A.D.3d 1090 (2d Dep’t 2018) (“Under the circumstances of this case, we disagree with the Supreme Court's determination granting that branch of J & R's motion which was pursuant to CPLR 3126 to impose sanctions for spoliation to the extent of striking Howell's third-party complaint and precluding Howell from introducing at trial any evidence as to the condition of the scaffold or plank (citation omitted). Even if the failure to preserve the broken plank was intentional, the spoliation at issue did not merit the drastic sanctions imposed (citations omitted). Here, Howell did not own the scaffold and there is no evidence that, at the time the scaffold was disassembled, litigation resulting from the fall would be contemplated. Moreover, the other parties' abilities to prove their claims and defenses is not fatally compromised by the failure to preserve the scaffold and plank; the deposition testimony of the J & R foreman who inspected and disassembled the scaffold, and photographs of the broken scaffold and plank, allow the other parties to pursue their claims and defenses (citations omitted). Accordingly, although some sanction is appropriate, striking Howell's third-party complaint and precluding it from introducing any evidence at trial as to the condition of the scaffold or plank was an improvident exercise of the court's discretion. Under the circumstances of this case, the sanction should be limited to the issuance of an adverse inference charge against Howell with respect to the scaffold or plank if Howell were to present evidence at trial as to the condition of the scaffold or plank (citations omitted).”).

CPLR 3126 - Appropriate sanction for spoliation here was not to strike complaint, but rather to direct that adverse inference charge be given against plaintiff at trial with respect to unavailable evidence.

Richter v. BMW of N. Am., LLC, 166 A.D.3d 1029 (2d Dep’t 2018) (“Here, we disagree with the Supreme Court's determination to deny that branch of the defendant's motion which was to impose sanctions for spoliation of evidence. The defendant sustained its burden of establishing that the plaintiff was obligated to preserve the soft-close automatic door mechanism on the driver's side door at the time of its destruction in September 2015, when the plaintiff had the mechanism replaced, that the evidence was negligently destroyed before the defendant had an opportunity to inspect it, and that the destroyed evidence was relevant to the litigation (citations omitted). Nevertheless, since the defendant's ability to prove its defense was not fatally compromised by the destruction of the evidence (citations omitted), the appropriate sanction for the spoliation herein is not to strike the complaint, but rather to direct that an adverse inference charge be given against the plaintiff at trial with respect to the unavailable evidence (citations omitted).”).

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

SM v. Plainedge Union Free Sch. Dist., 162 A.D.3d 814, 79 N.Y.S.3d 215 (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 - 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 - Non-intentional or willful spoliation of physical evidence merits adverse inference charge and reimbursement of costs.**

*Smith v. Cunningham*, 154 A.D.3d 681, 62 N.Y.S.3d 434 (2d Dep’t 2017) (“Here, although the plaintiff demonstrated that the defendant hired contractors to alter and redo the plaintiff’s work, the plaintiff failed to demonstrate that the defendant’s conduct rose to the level of being intentional or willful (citations omitted). Nevertheless, it was undisputed that the evidence was relevant to the plaintiff’s claim (citation omitted). Under the circumstances of this case, the appropriate sanction was to give an adverse inference charge at trial against the defendant with respect to the spoliation of physical evidence (citations omitted). Likewise, to the extent the defendant appeals from so much of the order as directed him to reimburse the plaintiff the sum of $2,695, which the plaintiff had paid his expert to inspect the premises and issue a report, we find that this sanction was properly imposed.”).

**CPLR 3126 - Willful and contumacious conduct merits striking pleadings.**

*Suarez v. Dameco Indus., Inc.*, 2018 NY Slip Op 08576 (1st Dep’t 2018) (“The motion court providently exercised its discretion in granting plaintiffs motion to strike Dameco's answer for willful failure to comply with discovery orders (citation omitted). Dameco's counsel offered a barebones affirmation disclosing that Dameco was now defunct and claiming that counsel's attempts to contact unnamed former officers of Dameco through an investigative service had been unsuccessful, which was insufficient to establish good-faith efforts to comply (citations omitted). Although Dameco was apparently still in business when the action was commenced, defense counsel provided no explanation for Dameco's failure to preserve any records relating to its repair,
service, and maintenance of the elevator that allegedly caused plaintiff’s injuries, including inspection records that Dameco was statutorily required to prepare. In light of plaintiff’s showing of willful failure to comply, and since the complete absence of records impedes plaintiff’s ability to prove his case, the sanction of striking Dameco’s answer was appropriate under the circumstances.”).

Westervelt v. Westervelt, 163 A.D.3d 1036, 82 N.Y.S.3d 447 (2d Dep’t 2018) (“The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court” (citations omitted). ‘The drastic remedy of striking a pleading is warranted where the party’s failure to comply with court-ordered discovery is willful and contumacious’ (citations omitted). ‘The willful or contumacious character of a party’s conduct can be inferred from the party’s repeated failure to respond to demands or to comply with discovery orders’ (citation omitted) and the absence of a reasonable excuse for these failures (citations omitted). ‘Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed’ (citations omitted). Here, the willful and contumacious character of the plaintiff’s conduct may be inferred, initially, from his inadequate verified bill of particulars and response to the notice for discovery and inspection, both served nearly one year after service of the demand for a verified bill of particulars and the notice for discovery and inspection. Thereafter, the plaintiff failed to comply with the Supreme Court’s directive at the January 8, 2016, conference to produce any outstanding discovery within 30 days, and this failure to comply was followed by further noncompliance after the February 24, 2016, conference. Moreover, the plaintiff failed to respond in any manner to the other discovery demands. Accordingly, the Supreme Court providently exercised its discretion in granting the branch of the defendant’s motion which was pursuant to CPLR 3126 to dismiss the complaint (citations omitted).”).

Rosengarten v. Born, 161 A.D.3d 515, 76 N.Y.S.3d 549 (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.”).

Honghui Kuang v. MetLife, 159 A.D.3d 878, 74 N.Y.S.3d 88 (2d Dep’t 2018) (“Here, the remedy of precluding the plaintiff from offering testimony at trial had already been granted in the November 6, 2014, order as a result of the plaintiff’s failure to provide complete responses to certain requests set forth in the Yangs’ document demands within the time frame provided by the Supreme Court. ‘A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order’ (citations omitted). ‘If the party fails to produce the discovery by the specified date, the conditional order becomes absolute’ (citations omitted). In this case, the November 6, 2014, order provided that the plaintiff was to supplement her responses within 30 days after service of a copy of that order with notice of entry. According to an affirmation of service, the Yangs served a copy of the November 6, 2014, order with notice...
of entry upon the plaintiff by regular mail on November 12, 2014. Consequently, the plaintiff had until December 17, 2014, to provide a supplemental response (see CPLR 2103[b][2]). Since the plaintiff never provided a supplemental response, that part of the November 6, 2014, order which precluded her from offering testimony at trial became absolute upon her failure to comply with the directive that she supplement her discovery responses (citations omitted). Thus, when the order appealed from was issued, the plaintiff had already been precluded from offering testimony at trial. Consequently, the Supreme Court imposed no additional penalty upon the plaintiff for her ongoing practice of flouting discovery orders. Given the history of this case and the plaintiff’s willful and contumacious conduct in trying to frustrate the discovery process, the Supreme Court improvidently exercised its discretion in not granting that branch of the Yangs’ motion which was to strike the plaintiff’s complaint (citations omitted). The plaintiff repeatedly failed to comply with the court’s discovery orders by not providing supplemental responses to certain document demands, refusing to answer questions at the first and second court-ordered depositions, not acting with decorum at the second court-ordered deposition, and failing to appear for a third court-ordered deposition. The plaintiff’s excuse that she wanted proof that counsel represented the Yangs before continuing to answer counsel’s questions at the first deposition or answering any questions at the second deposition was not reasonable. Similarly, her excuse for failing to appear at the third court-ordered deposition, that she did not receive notice, was not reasonable given all of the means by which counsel communicated the date to her. Consequently, the court should have granted that branch of the Yangs’ motion which was to strike the plaintiff’s complaint (citations omitted).

Clark v. Allen & Overy, LLP, 159 A.D.3d 478, 73 N.Y.S.3d 144 (1st Dep’t 2018) (“Contrary to plaintiff’s contention, she failed to comply with a court order that she undergo an independent medical examination (IME order). Plaintiff appealed from the IME order, and this Court affirmed (citations omitted). Nevertheless, plaintiff continued to refuse to schedule or sit for the IME. At a compliance conference held on September 29, 2015, the court ordered plaintiff to undergo an audiotaped IME on November 11, 2015, or face sanctions, including the dismissal of the complaint. On November 11, 2015, plaintiff appeared at the examiner’s office. However, she refused to take the microphone to be audiotaped, and she informed the examiner that she would go to the police and charge him with false imprisonment and assault if he proceeded with the examination without her consent. The examiner stopped the examination. Under the circumstances, the court properly dismissed the complaint for noncompliance pursuant to CPLR 3126 (citations omitted).”)

Rodriguez v. Nevei Bais, Inc., 158 A.D.3d 597, 73 N.Y.S.3d 135 (1st Dep’t 2018) (“The motion court providently exercised its discretion in striking defendant's answer on the ground of defendant's willful and contumacious failure to meet multiple court-ordered discovery deadlines (citations omitted)….We reject defendant's argument that the lesser penalties for noncompliance with discovery, set forth in the January 28, 2016 order, precluded the relief sought in the motion to strike. Defendant does not dispute that it failed to meet the deadlines set forth in that order. Nor does it describe any effort to comply with the order after the expiration of the deadlines. Moreover, the order did not provide that the stated penalties for noncompliance were exclusive or barred other relief.”).
Watson v. City of New York, 157 A.D.3d 510, 69 N.Y.S.3d 294 (1st Dep’t 2018) (“Based on such dilatory conduct and the City defendants’ failure to comply with multiple court orders, forcing the plaintiff to make multiple motions seeking discovery which the City defendants were ordered to produce years prior, the motion court properly exercised its discretion in striking the City defendants’ answer and this Court will not substitute its discretion for that of the motion court. The dissent contends that striking of the City defendants’ answer was not warranted because plaintiff was not prejudiced by defendants’ dilatory conduct. However, prejudice is not the standard by which a court determines whether to strike the answer of a party. Rather, the standard is whether the conduct of the offending party is willful, contumacious and in bad faith. Thus, even if plaintiff has not established prejudice, such factor is not dispositive here. The dissent also contends that the motion court abused its discretion in striking the City defendants’ answer because the City defendants substantially complied with the discovery orders and that they acted in good faith in redacting privileged and confidential material. However, even if the August 9, 2013 order improperly ordered unredacted disclosure of privileged and confidential material and even if the motion court should have instead required an in camera inspection of the records to assess the redactions, the motion court still did not abuse its discretion in striking the City defendants’ answer. The City defendants could have appealed from the August 9, 2013 order to the extent they believed that it was issued in error or they could have timely sought a protective order from the court prior to the deadline for providing discovery, but they failed to do so. Instead, they willfully and purposefully ignored the court’s order on the ground that they disagreed with the scope of discovery the order required them to produce. However, the law does not leave it up to the litigants to decide which portions of a court order they will follow and which portions they will ignore. Moreover, the City defendants’ very belated attempt to obtain a protective order, nearly a year after the order was issued, was improper as it was untimely. Although the dissent suggests that the City defendants’ dilatory behavior should be overlooked, it was within the discretion of the motion court to strike the City defendants’ answer based on the fact that the City defendants disobeyed multiple court orders.”).

CPLR 3126 - Penalty of dismissal warranted where plaintiffs’ conduct was willful and contumacious.

Rosenblatt v. Franklin Hosp. Med. Ctr., 165 A.D.3d 862, 85 N.Y.S.3d 488 (2d Dep’t 2018) (“Here, the plaintiffs’ willful and contumacious conduct can be inferred from their repeated failures—over an extended period of time and without an adequate excuse—to produce a supplemental bill of particulars and HIPAA-compliant authorizations and to schedule Pattishaw’s deposition, including before the April 6, 2016, order and up until the defendant moved to dismiss the complaint at the end of July 2016. Under these circumstances, the Supreme Court did not improvidently exercise its discretion in determining that the penalty of dismissal was warranted (citations omitted).”).

CPLR 3126 - Striking complaint after failure to comply with conditional order.

Anderson & Anderson LLP-Guangzhou v. North Am. Foreign Trading Corp., 165 A.D.3d 511, 87 N.Y.S.3d 180 (1st Dep’t 2018) (“The motion court properly granted defendant's motion to strike the complaint after plaintiffs failed to comply with a conditional order striking the complaint unless they produced the written discovery and witnesses for depositions within a specified period

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Plaintiffs failed to demonstrate that they were entitled to relief from the conditional order. Their proffered excuses for their noncompliance - including their claimed difficulties in locating suitable counsel - are not reasonable (citation omitted). Plaintiffs had plenty of time and opportunities to obtain new counsel but failed to do so (citations omitted). Plaintiffs moved for an appellate stay of discovery (which was ultimately denied) and requested that the court permit depositions to be conducted via written questions. However, they were not free simply to do nothing while awaiting rulings on those motions. As they did not submit an affidavit of merit by someone with personal knowledge of the evidentiary facts, plaintiffs also failed to demonstrate that they had a meritorious claim (citations omitted)."

**CPLR 3126 - Sanction of dismissal of complaint without prejudice.**

*U.S. Bank Natl. Assn. v. Harrington*, 160 A.D.3d 1230, 75 N.Y.S.3d 638 (3d Dep’t 2018) (‘Footnote 1: Inasmuch as the abuse of discretion calculus must take into consideration ‘the nature and degree of any penalty imposed on a motion pursuant to CPLR 3126’ (citations omitted), we note that, in this case, Supreme Court dismissed the complaint without prejudice, or ‘[w]ithout loss of rights [and] in a way that does not harm or cancel the legal rights or privileges of a party’ (citation omitted). Thus, the remedy employed by Supreme Court for plaintiff’s failure to adequately comply with its discovery obligations does not amount to the drastic and severe remedy of ‘dismissal of the complaint with prejudice’ (citations omitted), which would have ‘“the effect of preventing a party from asserting its claim”’ (citations omitted).”)

**CPLR 3126 - Adverse inference charge sanction did not obviate the need for a trial on liability issue.**

*Neve v. City of New York*, 164 A.D.3d 1458, 84 N.Y.S.3d 516 (2d Dep’t 2018) (“By order dated May 8, 2012 (hereinafter the sanction order), the Supreme Court, inter alia, granted the plaintiff’s motion in part ‘to the extent of directing an adverse inference charge at trial.’ The sanction order was upheld by this Court (citation omitted). Thereafter, the plaintiff moved for summary judgment on the issue of liability on the ground that the sanction order was sufficient, in and of itself, to warrant judgment as a matter of law. Johnston and Seats, in turn, separately moved for summary judgment dismissing the City’s third-party and fifth third-party complaints, respectively, on the ground that if summary judgment were granted in favor of the plaintiff based on the sanction order, Johnston and Seats would be severely prejudiced in their ability to defend the third-party and fifth third-party actions, respectively. The City opposed all three motions. By order entered March 23, 2016, the Supreme Court denied the motions in their entirety. The plaintiff and Johnston separately appeal. Contrary to the plaintiff’s contention, the sanction order does not obviate the need for a trial on the issue of liability. Even assuming that the sanction order can be interpreted as relieving the plaintiff from having to establish the City’s constructive notice—an issue that was neither addressed nor considered by this Court on the prior limited appeal from the sanction order (citation omitted)—the sanction order should not be read as relieving the plaintiff from the burden of establishing the remaining elements of his negligence cause of action, including the existence of the alleged defect and the causal relationship between the defect and the accident. Since the plaintiff submitted no evidentiary proof in support of his motion, the Supreme Court properly denied it, regardless of the sufficiency of the City’s opposing papers (citation omitted). In light of
the foregoing, the Supreme Court also properly denied Johnston’s motion for summary judgment dismissing the third-party complaint, which was contingent upon the success of the plaintiff’s motion. We note that in this Court’s decision and order on the prior appeal, we described the sanction order as having ‘granted the plaintiff’s motion to the extent of precluding the defendants from establishing at trial that they lacked constructive notice of the defective nature of the bolt and seat’ (citation omitted). That description, which is dicta, does not accurately reflect the language actually used in the sanction order, and should not be read as modifying the sanction order in any way.”).

**CPLR 3126 - Sanction of preclusion order**

*Maliah-Dupass v. Dupass*, 166 A.D.3d 873 (2d Dep’t 2018) (“Here, the defendant demonstrated that the plaintiff failed to comply with court-ordered discovery over an extended period of time. The willful and contumacious character of the plaintiff's conduct may be inferred from her failure to respond to the defendant's letter dated July 16, 2014, despite two court orders directing her to do so, and her failure to proffer any excuse for her failure. Accordingly, that branch of the defendant's motion which was to preclude the plaintiff from producing physical evidence or testimony at trial relating to certain limited items previously requested but not disclosed should have been granted.”).

*Heins v. Public Stor.*, 164 A.D.3d 881, 83 N.Y.S.3d 199 (2d Dep’t 2018) (“The plaintiff rented a storage unit owned and/or maintained by the defendants, who allegedly wrongfully sold the contents of the storage unit at an auction. The defendants allegedly mistakenly believed that the plaintiff failed to pay the rental fees for the unit. Once the error was discovered, the auction sale was rescinded and control and possession of the unit reverted back to the plaintiff. However, according to the plaintiff, various valuable items that he had been storing within the unit were removed from the unit and/or damaged while he did not have control over the contents of the unit. After he regained control of the unit, the plaintiff removed its remaining contents over a period of time, ultimately disposing of the vast majority of the items, despite the defendants’ requests to inspect the items. . . . We conclude that the Supreme Court providently exercised its discretion in denying that branch of the defendants’ motion which was pursuant to CPLR 3126 to dismiss the complaint. However, the court improvidently exercised its discretion in determining the sanction to impose. Although the defendants demonstrated that the plaintiff disposed of the majority of the items remaining in the storage unit after he regained control and possession of the unit, the defendants failed to demonstrate that the plaintiff’s conduct rose to the level of being intentional or willful (citations omitted). Nevertheless, the evidence was relevant to the plaintiff’s claim (citations omitted). Under the circumstances of this case, the appropriate sanction is to preclude evidence of the items disposed by the plaintiff that were not available for inspection by the defendants (citation omitted).”).

**CPLR 3216 - Trial court abused discretion in precluding plaintiff, where there was no willfulness.**

*Hypercel Corp. v. Stampede Presentation Prods., Inc.*, 158 A.D.3d 1237, 72 N.Y.S.3d 273 (4th Dep’t 2018) (“Here, the court’s remedy of precluding primary and secondary evidence related to
the former employee effectively precludes plaintiff from asserting its claim. Such a remedy is ‘reserved for those instances where the offending party’s lack of cooperation with disclosure was willful, deliberate, and contumacious’ (citations omitted). Generally, where there is no evidence that a corporation exercises control over a former employee, that corporation cannot be held responsible for the former employee’s refusal to appear for a deposition (citations omitted). Here, however, the firm representing plaintiff undertook the representation of that former employee, implicitly conceding control over the former employee (citation omitted). When the court ordered plaintiff’s attorney to make every reasonable effort to secure the former employee’s appearance for a deposition, plaintiff’s attorney merely sent a letter notifying the former employee that the attorney was supposed to make additional efforts to secure her presence. There is no evidence that any actual efforts to secure her appearance were made. We thus agree with the court that plaintiff should be precluded from presenting testimony from the former employee. We conclude, however, that the court abused its discretion in precluding plaintiff from relying on any secondary or hearsay evidence related to the former employee. There was no order compelling the production of such evidence that plaintiff was alleged to have violated, and the court did not find a willful failure to disclose such evidence. We therefore modify the order accordingly.”).

**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, 162 A.D.3d 845, 81 N.Y.S.3d 63 (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 – 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, 78 N.Y.S.3d 433 (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 - Plaintiff failed to issue a litigation hold or take precautions to preserve the documents before the date of the alleged theft, which was well after the commencement of litigation, and failed to notify defendants upon discovery of the alleged theft.

International Brain Research Found., Inc. v. Cavalier, 158 A.D.3d 464, 72 N.Y.S.3d 38 (1st Dep’t 2018) (“Defendants demonstrated that, despite their repeated requests, plaintiff failed to produce responsive, relevant documents, many of which were favorable to defendants, as was discovered when they were provided to defendants by a third party. This failure to disclose is sufficient to support an inference of willfulness (citations omitted). Plaintiff failed to proffer an excuse for its failure to disclose (citations omitted). Its claim that a former employee stole the subject documents and deleted them from its servers is not credible. However, even if this claim were true, it would be unavailing, since plaintiff had failed to issue a litigation hold or take precautions to preserve the documents before the date of the alleged theft, which was well after the commencement of litigation, and failed to notify defendants upon discovery of the alleged theft. The fact that defendants ultimately obtained these documents from a third party does not diminish plaintiff’s culpability. Had the third party not come forward, defendants would never have known these documents existed. Moreover, it is impossible to know whether there are additional relevant documents that still have not been turned over.”).

CPLR 3126 - Sanction of attorneys’ fees’ and costs permitted.

Estate of Savage v. Kredentser, 2018 NY Slip Op 08976 (3d Dep’t 2018) (“[A] trial court is authorized by CPLR 3126 to fashion an appropriate remedy for a party's failure to cooperate with discovery, and the sanction imposed is not disturbed in the absence of a clear abuse of discretion (citations omitted). ‘Although not specifically listed, a monetary sanction, including costs and counsel fees, may be imposed under the statutory language permitting any order that the court finds “just”’ (citations omitted). Further, while this Court's discretion to award counsel fees is as broad as that of the trial court, ‘[Supreme Court] is obviously in a far superior position to judge those factors integral to the fixing of counsel fees’ (citations omitted). Despite awarding plaintiffs significantly less in counsel fees and costs than was requested, we do not find an abuse of discretion by Supreme Court. The court determined that it was unreasonable to seek reimbursement for litigating issues outside the scope of the court's October 2016 order; ‘such requested amount does not reflect attorneys' fees and costs associated with [defendants'] and their counsel's failure to diligently supply requested discovery documents, but appears to essentially seek sanctions to recover the fees and costs of litigating the instant action to date.’ Therefore, the court, in a very thorough and detailed decision, painstakingly calculated the number of hours it found to be reasonable given many factors, including the time and labor required, difficulty of the questions involved and skill required to handle such issues (citations omitted). The court also reviewed the submitted expenses of plaintiffs' counsel and detailed which expenses would be permitted and which ones would not and why. We also do not find that the court erred in determining that a reasonable hourly fee is $250 rather than the requested $590. In making this determination, the court properly considered the years of experience of plaintiffs' counsel, but ‘admittedly extremely limited experience in medical malpractice litigation,’ as well as the fact that plaintiffs' counsel failed to demonstrate that a paying client would pay such a rate rather than hire counsel whose rates were more consistent with those charged locally (citations omitted). Thus, because ‘[t]he
determination of reasonable counsel fees is a matter within the sound discretion of the trial court and, absent abuse, that court's determination should be upheld' (citations omitted), we do not find that Supreme Court erred in its discretionary determination of reasonable counsel fees.”).

**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 than 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*, 162 A.D.3d 1548, 79 N.Y.S.3d 428 (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 sanctions

_Vizcaino v. Western Beef, Inc.,_ 161 A.D.3d 632, 77 N.Y.S.3d 667 (1st Dep’t 2018) (“We see no reason to disturb the motion court’s exercise of discretion in declining to strike defendants’ answer (citation omitted). Defendants ultimately provided current contact information for the cashier who assisted plaintiff after her accident at their store, and explained their delay in providing this information as the result of a series of purported good faith mistakes. However, in view of the length of time it took and multiple discovery motions and court orders for defendants finally to provide complete and accurate information, we find that monetary sanctions are warranted. An award of the costs of this motion and appeal is appropriate to compensate plaintiff for the extraordinary time and effort necessitated by defendants’ lack of diligence.”).

_Maxim, Inc. v. Feifer_, 161 A.D.3d 551, 78 N.Y.S.3d 98 (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) - To succeed on motion to dismiss based upon documentary evidence, the documentary evidence must utterly refute the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law._

_Tyree v. Castrovinci_, 164 A.D.3d 1399, 81 N.Y.S.3d 741 (2d Dep’t 2018) (“We agree with the Supreme Court’s determination to grant that branch of the defendants’ motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint. ‘To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’ (citations omitted). Here, the documentary evidence submitted by the defendants, including, inter alia, the trial transcript from the third-party action, utterly refuted the plaintiff’s factual allegations, and conclusively established a defense to the complaint as a matter of law.”).
Karakash v. Trakas, 163 A.D.3d 788, 82 N.Y.S.3d 435 (2d Dep’t 2018) (“We also agree that the remaining allegations underlying the complaint were flatly contradicted by the documentary evidence submitted in connection with the defendant’s motion. . . . A motion to dismiss a complaint based on documentary evidence ‘may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’ (citations omitted). Here, in support of his motion to dismiss, the defendant submitted a copy of the underlying stipulation of settlement in the divorce action, and a transcript from the divorce proceeding on the day the stipulation was signed by the parties. This evidence flatly refuted the plaintiff’s allegation that the defendant had failed to engage in the necessary due diligence to determine the identity and value of the marital assets involved in the underlying divorce action. Since the remaining allegations in the complaint were flatly refuted by the defendant’s documentary evidence, we agree with the Supreme Court’s determination to grant the defendant’s motion pursuant to CPLR 3211(a) to dismiss the complaint (citations omitted).”).

REEC W. 11th St. LLC v. 246 W. 11th St. Realty Corp., 162 A.D.3d 472, 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) - Defendant did not meet burden to conclusively refute the allegations of the complaint that the parties entered into a new contract.**

Kolchins v. Evolution Mkts., Inc., 31 N.Y.3d 100, 73 N.Y.S.3d 519, 96 N.E.3d 784 (2018) (“The issue on this appeal is whether the documentary evidence proffered by defendant Evolution Markets, Inc. on its motion to dismiss pursuant to CPLR 3211 (a) (1) conclusively refuted plaintiff Andrew Kolchins's breach of contract claims. We hold that defendant has not met its burden and we, therefore, affirm….We reject defendant's argument that plaintiff's contract claim should have been dismissed because the additional correspondence defendant proffered in support of its motion to dismiss reflects a lack of mutual assent to material terms — such as plaintiff's minimum guaranteed compensation and the length of the non-compete term — and that this indefiniteness renders the purported contract invalid as a matter of law. As the Appellate Division concluded, that correspondence does not conclusively refute contract formation (citations omitted). The additional emails reveal gaps in time between the parties' written correspondence, refer to discussions that are not reflected in the record before this Court, and do not include conclusive evidence of material disagreements regarding the terms of the agreement sufficient to negate the initial intent to be bound, as a matter of law. Because it is possible to draw competing inferences based on the totality of the parties' communications as set forth in this record — which does not otherwise reflect that defendant expressly reserved the right not be bound except in a formal written document — defendant has not met its burden to conclusively refute the allegations of the complaint that the parties entered into a new contract.”)
CPLR 3211(a)(1) - What qualifies as documentary evidence?

First Choice Plumbing Corp. v. Miller Law Offs., PLLC, 164 A.D.3d 756, 84 N.Y.S.3d 171 (2d Dep’t 2018) (“‘In order for evidence to qualify as documentary,’ it must be unambiguous, authentic, and undeniable’ (citations omitted). ‘Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case’ (citation omitted). ‘Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence’ (citations omitted). Here, the emails and letters submitted in support of the defendant’s motion were not documentary evidence within the meaning of CPLR 3211(a)(1). To the extent that the other evidence submitted was documentary, that evidence did not conclusively establish the absence of an attorney-client relationship between the plaintiffs and the defendant with respect to the liens and their extensions. Thus, the Supreme Court should not have granted that branch of the defendant’s motion which was to dismiss the complaint on this ground.”).

But see First Department decision in Kolchins v. Evolution Mkts., Inc., 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep’t 2015), aff’d, 31 N.Y.3d 100, 73 N.Y.S.3d 519, 96 N.E.3d 784 (2018) (“Preliminarily, we reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence for purposes of CPLR 3211 (a) (1).… Nevertheless, we agree with Supreme Court that the disputed emails and other correspondence do not utterly refute plaintiff's allegations that the parties reached an agreement on the material terms of the contract renewal.); Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc., 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep’t 2014) (emails can qualify as documentary evidence if they meet the “essentially undeniable test”; majority finds that the mail at issue failed test).

CPLR 3211(a)(1) - Insurance policy conclusively disposes of plaintiffs' claim.

Calhoun v. Midrox Ins. Co., 165 A.D.3d 1450 (3d Dep’t 2018) (“Upon our examination of the insurance policy, we find that the terms of the policy conclusively refute plaintiffs' claim that defendant is obligated to cover the structural damage caused to their barn by Calhoun's operation of their tractor and hay baler. By its unambiguous terms, the policy insured plaintiffs only against direct physical loss caused to the barn by 11 specifically delineated perils. Accepting the allegations in plaintiffs' complaint as true and affording them the benefit of every possible favorable inference (citations omitted), the alleged cause of the structural damage here — the tractor and hay baler 'breaking through the barn floor' — does not fall under one of the covered perils. The section of the policy cited by plaintiffs as providing coverage is inapplicable, as that section applies solely to liability insurance coverage arising out of third-party claims made against plaintiffs. Accordingly, as the insurance policy conclusively disposes of plaintiffs' claim, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) should have been granted and the complaint dismissed (citations omitted).”).
CPLR 3211 - When a motion to dismiss invokes an erroneous ground, but other grounds do apply, the court can treat the motion as having specified the correct grounds and grant relief, where no prejudice has been demonstrated.

Miller v. Brunner, 164 A.D.3d 1228, 84 N.Y.S.3d 264 (3d Dep’t 2018) (“As a threshold matter, and contrary to the plaintiffs’ contention, the defendants’ failure to move specifically pursuant to CPLR 3211(a)(5) on the basis of the release does not warrant the denial of that branch of their motion on procedural grounds. The release constitutes documentary evidence upon which dismissal pursuant to CPLR 3211(a)(1) may be granted (citation omitted). Furthermore, although CPLR 3211(a)(5)—which covers, inter alia, the defense of release—was not specifically asserted, the defendants clearly moved to dismiss the first cause of action based upon the defense of release. ‘[W]here the wrong ground is designated but other CPLR 3211(a) grounds do apply, the court may treat the motion as having specified the right ground and grant relief, absent prejudice, which has not been demonstrated’ (citations omitted).”).

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

Cooper v. Thao, 162 A.D.3d 980, 80 N.Y.S.3d 376 (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 an unasserted compulsory counterclaim in an earlier federal action between the same parties was barred by the doctrine of res judicata.


Court of Appeals Deals with Intersection of Federal Court’s Compulsory Counterclaim Rule and Res Judicata Principles

Majority of Court Holds Claim Not Asserted in Prior Federal Court Action as Counterclaim Is Barred in Subsequent State Court Action

The issue in Paramount Pictures Corp. v. Allianz Risk Transfer AG, 31 N.Y.3d 64 (2018), arose out of a prior federal court action in which the district court entered judgment in favor of Paramount Pictures Corporation (Paramount), the defendant there (and the plaintiff here), which judgment was affirmed on appeal. After Paramount commenced this state court action (during the
pendency of the appeal of the federal court action), defendants sought its dismissal, arguing that Paramount’s claim was barred by res judicata because it was not asserted as a counterclaim in the federal court action.

In the prior federal action, investors in an unsuccessful investment venture asserted claims for securities fraud (a federal question), common law fraud, and unjust enrichment (state-law causes of action). Paramount’s claim here in the state court action was that the investors had breached a covenant not to sue contained in the Subscription Agreement, by filing the federal action. Federal Rules of Civil Procedure 13(a) provides for a compulsory counterclaim where it "arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim." The trial court here in the state court action denied the investors’ motion to dismiss, refusing to apply FRCP 13(a)’s compulsory counterclaim rule, because New York state law has a permissive counterclaim rule.

The Appellate Division unanimously reversed, finding that Paramount’s claim was compulsory under FRCP 13(a). Thus, its later assertion in this state court action between the same parties was barred by the doctrine of res judicata.

A majority of the Court of Appeals affirmed. Judge Garcia, writing for the plurality, noted that the preclusive effect of the federal court judgment was to be determined by federal common law. In federal question cases, the uniform federal rules of res judicata apply. Conversely, in diversity cases, federal law incorporates the state court rules of preclusion (of the state in which the federal court sits). The United States Supreme Court, however, has not addressed a case like this, where the judgment encompasses both federal and state law claims. The plurality concluded that federal preclusion law should govern. The Supreme Court has held that, even where state preclusion laws apply (to federal diversity judgments), they may not be "incompatible with federal interests." *Semtek International Inc v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001). Judge Garcia reasoned that "[t]hose federal interests are heightened where, as here, the federal judgment encapsulates matters of federal substantive law." *Paramount*, 31 N.Y.3d 64, 70.

The Court pointed out that res judicata bars not only "'every matter which was offered and received to sustain or defeat the claim or demand,’ but also ‘any other admissible matter which might have been offered for that purpose.’" *Id.* at 72 (citations omitted). Thus, the issue to be determined here was whether the claim to be litigated was "the same" as the claims previously litigated by the parties. The Court held that Paramount’s claim based on the covenant not to sue was sufficiently related to the investors’ claim in the federal action so as to preclude its assertion in this 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 the plaintiffs in no event to bring any claim" — i.e., a covenant not to sue — and held that those 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).

_Id._ at 79.

While concurring, Judge Rivera felt that the majority unnecessarily opined "on an open question of federal law — namely, what rule of res judicata applies to claims asserted in state court where there has been a prior federal judgment predicated on ‘mixed’ subject matter jurisdiction and not solely on the existence of a federal question." _Id._ at 81. Instead, Judge Rivera saw the resolution of the issue as simpler, that is, under either federal or New York State res judicata rules, Paramount’s claim was barred, because it arose out of the same transaction as the defendants’ federal claim, which was litigated to its conclusion. Moreover, the fact that New York is a permissive counterclaim jurisdiction is not controlling because, in a circumstance like this, the court is required to look at the law of the forum that issued the prior judgment, to determine its scope here in the New York State action.

Here, the final judgment in the prior action was entered by a federal court, under a system which has adopted a compulsory counterclaim pleading requirement (see Federal Rules of Civil Procedure 13[a]). We give res judicata effect to the prior federal judgment as it stands under that pleading regime, with its attendant consequences for future litigation. Here, because the federal court would bar Paramount from filing a second action to pursue its breach of contract claim, that same claim is barred under res judicata in our New York courts.

_Id._ at 84.

In dissent, Judge Wilson offered that under both federal and state claim preclusion law, Paramount’s claim was not barred. The dissent maintained that neither would preclude a defendant’s claim arising out of the same transaction or occurrence as the plaintiff’s claim, "unless doing so would nullify the judgment or impair the rights established in the first action." The dissent concluded that that was not the case here:

Although Paramount’s claim for breach of the covenant not to sue arises from the contract, it does not in any way attack the judgment or impair Allianz’s rights from the first action. How could it when Paramount was victorious in the first action? Issue preclusion would prevent Allianz from relitigating issues it lost, but neither federal nor New York rules of claim preclusion restrict Paramount from bringing its claim for breach of the covenant not to sue in a separate state court action.

_Id._ at 98.
CPLR 3211(a)(5) - Res judicata

*Corle v. Allstate Ins. Co.*, 162 A.D.3d 1489, 79 N.Y.S.3d 414 (4th Dep’t 2018) (“Nevertheless, we conclude that defendant was not entitled to dismissal of the complaint under CPLR 3211 (a) (5) based on res judicata. Contrary to defendant's contention, we conclude that the failure of James to litigate the bad faith claim in the earlier Insurance Law § 3420 (a) (2) action does not bar litigation of that claim in the instant action. ‘Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation . . . Additionally, under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy’ (citations omitted). . . . We recognize that the First Department held otherwise on similar facts in *Cirone v Tower Ins. Co. of N.Y.* (citations omitted). To the extent that the First Department in *Cirone* concluded that an injured person/judgment creditor who commenced an action against the insurer pursuant to Insurance Law § 3420 (a) (2) had standing to assert a bad faith settlement practices claim in that action in the absence of an assignment from the insured, we disagree with that conclusion and decline to follow *Cirone*.”)

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 applies to a subsequent action commenced in the individual's personal capacity.

*Seidenfeld v. Zaltz*, 162 A.D.3d 929, 80 N.Y.S.3d 311 (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).”).
Siemsen v. Mevorach, 160 A.D.3d 1004, 72 N.Y.S.3d 478 (2d Dep’t 2018) (“Moreover, we agree with the Supreme Court that the cause of action alleging breach of fiduciary duty was barred by the doctrine of collateral estoppel (citation omitted). The defendant established that the decisive issues in this action regarding her failure to exercise the right of election were necessarily decided in the prior guardianship proceeding, and the plaintiff failed to demonstrate that she did not have a full and fair opportunity to contest the prior determination (citations 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)**


**Complaint Dismissed for Failure to Allege Damages for Out-of-Pocket Expenses**

**Plaintiff’s Claim of Lost Opportunity and Potential Litigation Expenses in Fraudulent Inducement Claim Deemed Speculative**

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 were 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(a)(7)/ 5304[a][1] - Czech legal system provides procedures compatible with due process.**

*Harvardsky Prumyslovy Holding, A.S. - V Likvidaci v. Kozeny*, 166 A.D.3d 494 (1st Dep’t 2018) (“The court properly denied the branch of Kozeny's motion that was based on CPLR 3211(a)(7). Kozeny contends that the Czech judgment ‘was rendered under a system which does not provide . . . procedures compatible with . . . due process’ (citation omitted) because the Czech court never had custody of him and he was tried in absentia. However, because the statute refers to a system which does not provide procedures compatible with due process, ‘it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds’ (citations omitted). The Czech legal system provides procedures compatible with due process (citation omitted).”).

**CPLR 3211(e) – 60-day provision does not apply to statute of limitations defense.**

*Baity v. City of Buffalo*, 159 A.D.3d 1380, 72 N.Y.S.3d 296 (4th Dep’t 2018) (“We reject plaintiff’s contention that defendants waived their statute of limitations defense because their motion was made more than 60 days after interposing their answer. The 60-day waiver rule does not apply to motions to dismiss based on the statute of limitations (citations omitted).”).

**CPLR 3211(e) - Purported rejection of answer does not extend the 60-day time limit.**

*Deutsche Bank Natl. Trust Co. v. Acevedo*, 157 A.D.3d 859, 69 N.Y.S.3d 693 (2d Dep’t 2018) (“Here, the defendant failed to move for judgment on the ground of lack of personal jurisdiction based on improper service within 60 days after his answer was served. Additionally, he failed to
made an adequate showing of undue hardship that prevented the making of the motion within the requisite statutory period. Although the plaintiff, appearing by its former attorneys, wrote to the defendant’s attorney, stating that the verified answer with affirmative defenses and counterclaims was rejected, this Court has indicated that a ‘purported rejection of the defendants’ answer did not extend the 60-day time limit’ (citation omitted). Further, less than one month after the defendant’s verified answer with affirmative defenses and counterclaims was served, the plaintiff’s responsive pleading was served. Under these circumstances, the defendant waived his objection to personal jurisdiction based on improper service (citations omitted).”)

**CPLR 3211(e) - Waiver of service defense in failing to move within 60 days of serving answer; Jurisdiction defense also waived by asserting unrelated counterclaim; Defendant cannot challenge court granting of extension to plaintiff to serve beyond 120 day period.**

*JP Morgan Chase Bank, Natl. Assn. v. Venture*, 148 A.D.3d 1269, 48 N.Y.S.3d 824 (3d Dep’t 2017) (“Supreme Court also properly denied defendant’s cross motion insofar as it sought dismissal of the complaint. Defendant waived his affirmative defense of lack of personal jurisdiction on the basis of improper service of process, as he failed to move to dismiss the complaint on that ground within 60 days after serving his answer (citations omitted). This defense was likewise waived by defendant’s assertion of a counterclaim unrelated to this action (citations omitted). In light of the foregoing, defendant also cannot challenge Supreme Court’s grant of plaintiff’s motion for an extension of time to serve defendant with process beyond the 120-day period provided for in CPLR 306-b, nunc pro tunc (citation omitted).”).

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

*Woloszuk v. Logan-Young*, 162 A.D.3d 1548, 79 N.Y.S.3d 428 (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*, A.D.3d 811, 76 N.Y.S.3d 560 (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 3211(e)/3025 - Trial court properly denied motion to amend because plaintiff was prejudiced by delay.

*Federal Ins. Co. v. Lakeville Pace Mech. Inc.*, 159 A.D.3d 469, 70 N.Y.S.3d 39 (1st Dep’t 2018) (“Defendant waited more than two years to move to amend its answer to include the statute of limitations defense, arguing that plaintiff’s construction negligence claim, with a three-year statute of limitations (citation omitted), was untimely. Moreover, defendant made its motion almost immediately after the expiration of the six-year limitations period (by defendant’s calculation) in which plaintiff could have brought the same action as a breach of contract, even though all of the facts relied upon by defendant were known to it at the time it filed its original answer. Plaintiff, relying on defendant’s waiver of any statute of limitations defense (citation omitted), was prejudiced by the loss of the opportunity to interpose a timely breach of contract claim, which it could have done ‘had the original pleading contained what the [proposed] amended one wants to add’ (citation omitted). The motion court properly concluded that these circumstances warranted denial of defendant’s motion (citation omitted.”).

CPLR 3212 - Summary judgment motion

CPLR 3212


Just When You Thought It Was Safe to Go Out at Night It’s Brill Time … Again!

It’s Brill Time … Again!

You know I have a problem. *Brill v. City of New York*, 2 N.Y.3d 648 (2004) was a well-intended decision. The Court of Appeals wanted to stress that deadlines must be adhered to and, if a litigant fails to move for summary judgment motion within the 30-, 60-, 90-, or 120-day deadline, it will be denied, unless good cause is shown for the delay. A meritorious motion is not good cause; neither is a lack of prejudice.

But, as I have mentioned in the past, what can a practitioner do in counties where notes of issue are, as a matter of course, filed prematurely and motions to vacate notes of issue are generally not granted? Or in a county where the parties are required to file the note of issue before discovery is complete?

Recently, in *Khan v. Macchia*, 2018 N.Y. Slip Op. 06519 (2d Dep’t October 3, 2018), ultimately the Appellate Division held that the trial court should have granted the defendant’s unopposed motion to extend the time to move for summary judgment. However, at what cost and aggravation? The rub here, again, lies in the facts:
In March 2016, the plaintiff filed a note of issue, accompanied by an affirmation of her counsel which stated, inter alia, that while discovery was not complete and the deposition of all parties were outstanding, the note of issues and certificate of readiness were being filed in order to comply with the part rules of the assigned Justice (emphasis added).

*Id.* at *1.*

Here, the Appellate Division found good cause, because a Court Attorney Referee had so ordered a stipulation directing that further discovery take place after the deadline for filing a summary judgment motion. The Appellate Division reasoned that the Court Attorney Referee had implicitly consented to the basis for the extension of the summary judgment motion deadline. Nevertheless, the court felt compelled to add that we "remind counsel and the courts supervising discovery that provisions for the timely completion of discovery and the filing of motions for summary judgment are not mere suggestions, and noncompliance with those provisions should not readily be excused." *Id.* at *2.*

But why do we continue to have circumstances that permit or require a premature filing of the note of issue? Are the pressures of standards and goals behind these decisions? Apart from the inefficiency of such a process, it complicates the issues relating to the summary judgment motion deadline, and is a burden on diligent attorneys and the court system.

**CPLR 3212**


**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.” *Lewis v. Rutkovsky*, 153 A.D.3d 450, 452–53 (1st Dep’t 2017). 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.

**CPLR 3212**


**Court Holds Defendant Failed to Meet its Burden on Summary Judgment Motion on Proximate Cause Issue**

**Rejects Defendant’s Contention That Its Negligence Merely Furnished the Occasion but Did Not Cause the Incident**

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.
**CPLR 3212 - Brill and deadline for summary judgment motion**

*Mitchell v. City of Geneva, 158 A.D.3d 1169, 70 N.Y.S.3d 290 (4th Dep’t 2018)* (‘‘Defendants’ summary judgment motion was made 618 days after the deadline set forth in the court’s scheduling order and 204 days after the filing of the note of issue. Defendants did not make the motion in time to be heard on the court’s November 21, 2016 motion calendar. Nonetheless, defendants’ moving papers failed to address the issue of ‘good cause’ required to make a summary judgment motion more than 120 days after the filing of the note of issue or after the date established by the court in a scheduling order (citations omitted). Plaintiffs opposed the motion on the ground that it was untimely. It was only in reply papers that defendants addressed the issue of ‘good cause.’ The court considered the merits of the motion, granted summary judgment to defendants and dismissed the complaint. That was error. It is well settled that it is improper for a court to consider the ‘good cause’ proffered by a movant if it is presented for the first time in reply papers (citations omitted). Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely (see CPLR 3212 [a]), and the court should have declined to reach the merits. We therefore reverse the final order and judgment, deny defendants’ motion and reinstate the complaint.”).

**CPLR 3212 - You cannot file a summary judgment motion before issue is joined.**

*Gerster’s Triple E. Towing & Repair, Inc. v. Pishon Trucking, LLC, 2018 NY Slip Op 08979 (3d Dep’t 2018)* (‘‘Although no answer had been filed, plaintiff moved for summary judgment in August 2016 and, in November 2016, defendants cross-moved for a continuance and for permission to file a late motion to dismiss the complaint. Supreme Court partially granted plaintiff's motion by awarding it summary judgment on liability on the second and third causes of action. The court denied defendants' cross motion. Defendants now appeal. Supreme Court erred in granting plaintiff summary judgment because defendants never filed an answer and, thus, issue was not joined, a prerequisite that is ‘strictly adhered to’ (citations omitted). Further, summary judgment was not granted here pursuant to CPLR 3211 (c). Even if defendants are deemed to have appeared by filing a notice of removal of the action to federal court or by other conduct (citation omitted), they did not file a responsive pleading (citation omitted) and, consequently, plaintiff was barred from seeking summary judgment (citations omitted).”).

**CPLR 3212[a] - Plaintiff's in limine motion was functional equivalent of an untimely motion for summary judgment on the issue of liability.**

*Farias-Alvarez v. Interim Healthcare of Greater N.Y., 166 A.D.3d 945 (2d Dep’t 2018)* (‘‘We agree with the defendants' contention that the plaintiff's pretrial application, characterized as one for in limine relief, was the functional equivalent of an untimely motion for summary judgment on the issue of liability (citations omitted). ‘[A] motion in limine is an inappropriate substitute for a motion for summary judgment’ (citation omitted). Further, ‘in the absence of any showing of good cause' for the late filing of such a motion (citation omitted) the Supreme Court should have denied
the motion’ (citations omitted). We note that, in light of the verdict in favor of the defendants, we do not otherwise review the propriety of the court's ruling on the plaintiff's in limine application.”).

**CPLR 3212 - Motion for summary judgment should have been denied as untimely.**

*Cullity v. Posner*, 143 A.D.3d 513, 38 N.Y.S.3d 796 (1st Dep’t 2016) (“The motion should have been denied as untimely. The motion court’s rules required dispositive motions to be filed within 60 days of the filing of a note of issue. Defendant filed the motion *papers nine days after the time* to do so had expired, rendering the motion untimely (citations omitted). Defendants’ failure to address the missed filing deadline or offer, let alone show, good cause for the delay in filing, is fatal to their motion (citation omitted).”).

**CPLR 3212 - Trial court should have denied summary judgment motion on timeliness grounds.**

*Nationstar Mtge., LLC v. Weisblum*, 143 A.D.3d 866, 39 N.Y.S.3d 491 (2d Dep’t 2016) (“Here, the plaintiff’s motion was made 128 days after filing of the note of issue, or *8 days after the 120-day deadline* imposed by the Supreme Court in a notice to resume prosecution dated December 17, 2013. The plaintiff failed to demonstrate, in its moving papers, good cause for not filing the motion in a timely manner, as directed by the court citation omitted). The court improvidently exercised its discretion in considering that branch of the plaintiff’s motion which was for summary judgment on the complaint and in considering the good cause arguments raised for the first time in the plaintiff’s reply papers (citations omitted). Accordingly, the Supreme Court should have denied that branch of the plaintiff’s motion which was for summary judgment on the complaint.”).

**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.**


**CPLR 3212 - Failure to include copies of pleadings merits denial of motion.**

*Burnside v. State of New York*, 157 A.D.3d 1071, 66 N.Y.S.3d 649 (3d Dep’t 2018) (“We affirm. Inasmuch as the record reflects that claimant’s original moving papers did not include either a copy of his claim or defendant’s answer, his motion for summary judgment was properly denied for failing to include the pleadings as required by statute (citations omitted). Accordingly, we decline to disturb the denial of claimant’s motion for summary judgment. Footnote 1: Although claimant attempted to cure the defect by attaching a copy of his claim to his affirmation in reply to defendant’s opposition to his motion, he still failed to attach a copy of the answer.”).
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.”

Jbbyn, LLC v. Begum, 156 A.D.3d 769, 67 N.Y.S.3d 284 (2d Dep’t 2017) (“Contrary to the plaintiff’s contention, the Supreme Court properly denied those branches of its motion which were for summary judgment on the complaint and for an order of reference. ‘A motion for summary judgment may not be made before issue is joined (citation omitted and the requirement is strictly adhered to’ (citations omitted). Where, as here, a defendant has served a notice of appearance, but has not served ‘a responsive pleading,’ in this case, an answer (citation omitted), issue has not been joined, and the plaintiff is barred from seeking summary judgment (citations omitted). Accordingly, the court was powerless to grant summary judgment (citation omitted).”).

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

Matter of Bordell, 162 A.D.3d 1262, 79 N.Y.S.3d 706 (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)


New York Court of Appeals Cannot Search Record

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 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 3213 - Where Israeli judgments were included among plaintiff’s claims, judgments and debts in a settlement agreement between the parties, and an issue of fact existed as to plaintiff’s right under the agreement to enforce his claims, the trial court properly denied the motion addressed to the judgments.

Yerushalmy v. Resles, 159 A.D.3d 552, 70 N.Y.S.3d 377 (1st Dep’t 2018) (“The motion decided by the order on appeal seeks summary judgment converting Israeli judgments in plaintiff’s favor against defendant into New York judgments (see CPLR 3213; 5303). The Israeli judgments are included among plaintiff’s ‘claims, judgments and debts’ against defendant that were settled in an agreement between the parties. The settlement agreement provided, among other things, an option for plaintiff to market and sell a penthouse in which defendant had an interest. Plaintiff moved separately for summary judgment in lieu of complaint on the settlement agreement. The motion court denied both motions on the ground that defendant raised an issue of fact as to whether plaintiff properly exercised the option and therefore as to the rights he retained to enforce his claims (citation omitted). We find that since the Israeli judgments are included in the settlement agreement, and an issue of fact exists as to plaintiff’s right under the agreement to enforce his claims, the motion court correctly denied the motion addressed to the judgments.”).
CPLR 3213 - Proof outside of the agreements requires denial of motion.

*Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036, 50 N.Y.S.3d 108 (2d Dep’t 2017) (“Although an unconditional guarantee may qualify as an instrument for the payment of money only (citations omitted), here, neither the guaranty nor the underlying agreement relied upon by the plaintiff in support of its motion contains an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite future time (citation omitted). Since proof outside of the guaranty and underlying agreement is required to establish the amount of Platinum’s obligation to the plaintiff pursuant to the agreement, the plaintiff’s motion for summary judgment in lieu of complaint should have been denied, with the motion and answering papers deemed to be the complaint and answer, respectively (citations omitted).”).

CPLR 3213 - Used to enforce a default judgment

*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 - Verification by counsel was insufficient as proof of facts constituting claim.

*First Franklin Fin. Corp. v. Alfau*, 157 A.D.3d 863, 70 N.Y.S.3d 518 (2d Dep’t 2018) (“Nevertheless, the plaintiff failed to submit the requisite proof of the facts constituting the claim (citation omitted). ‘While a verified complaint may be used as the affidavit of the facts constituting the claim, it must contain evidentiary facts from one with personal knowledge’ (citations omitted).
‘[A] pleading verified by an attorney pursuant to CPLR 3020 (d) (3), and not by someone with personal knowledge of the facts[,] is insufficient to establish its merits’ (citations omitted). On its motion, the plaintiff submitted the complaint, verified only by counsel, and an affirmation of counsel, with counsel having no personal knowledge of the facts. The plaintiff also submitted an affidavit of a representative of the loan servicer attesting to a default, but failing to address the relevant questions relating to the fact that the mortgagor did not own the subject property, whether the relevant documents should be reformed, or whether an equitable lien or mortgage should be imposed.”

**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) - Failure to take proceedings for entry of judgment within one year of default.**

*Quadrozzi Concrete Corp. Individual Account Plan & Trust v. Javash Realty, LLC, 164 A.D.3d 1491, 85 N.Y.S.3d 217 (2d Dep’t 2018)* (“Here, it is undisputed that the plaintiff failed to move for leave to enter judgment within one year of Javash’s default. Contrary to the plaintiff’s contention, the plaintiff failed to offer a reasonable excuse for its delay in so moving (citation omitted). Neither the 2007 letter from Javash’s attorney nor any communications between the parties in 2010 constituted a reasonable excuse for the multi-year delay that preceded those communications (citations omitted). Nor did that same evidence constitute a reasonable excuse for the multi-year delay subsequent to those communications (citations omitted). Additionally, the payments of various sums under the note is not a basis to excuse the plaintiff’s neglect of this action (citation omitted).”).

*OneWest Bank F.S.B. v. Woodford, 163 A.D.3d 432, 76 N.Y.S.3d 406 (1st Dep’t 2018)* (“Supreme Court properly denied plaintiff’s motion for entry of default judgment and referral in its action seeking to foreclose on a residential mortgage and dismissed the action pursuant to CPLR 3215(c). Supreme Court’s February 10, 2015 mortgage foreclosure part conference order required plaintiff to file a motion on notice for appointment of a referee within 90 days, and warned that the failure to make a timely motion could subject it to dismissal. Plaintiff then waited seven months before seeking a default judgment and an order of reference. Furthermore, as noted by Supreme Court,
this residential foreclosure action remained pending for more than six years, and the record reveals that during this time, plaintiff did little to evidence an intention to prosecute. Accordingly, dismissal was appropriate under CPLR 3215(c).”).

CPLR 3215(c) - Failure to take proceedings for entry of judgment within one year of default.

Wells Fargo Bank, N.A. v. Pietro A. Cafasso, 158 A.D.3d 848, 72 N.Y.S.3d 526 (2d Dep’t 2018) (“Cafasso correctly contends that the Supreme Court improperly granted those branches of the plaintiff’s motion which were for leave to enter a default judgment against him and to appoint a referee to compute the amount due to the plaintiff, and that the complaint should be dismissed. CPLR 3215(c) generally provides that where a plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall dismiss the complaint as abandoned. ‘The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if sufficient cause is shown why the complaint should not be dismissed’ (citation omitted). ‘This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious’ (citations omitted). ‘The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court’ (citations omitted). Under the circumstances at bar, the Supreme Court improvidently exercised its discretion in finding that the plaintiff proffered a reasonable excuse for the delay, since the plaintiff’s conclusory and unsubstantiated assertions that unspecified periods of delay were attributable to the effects of Hurricane Sandy, compliance with a then newly enacted administrative order, and changes in loan servicers and counsel were insufficient for this purpose (citations omitted).”).

Deutsche Bank Trust Co. Ams. v. Deutsch, 157 A.D.3d 767, 69 N.Y.S.3d 354 (2d Dep’t 2018) (“CPLR 3215(c) provides that ‘[i]f the plaintiff fails to take proceedings for the entry of a [default] judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed.’ Here, the defendant defaulted in December 2009, but the plaintiff did not initiate proceedings for the entry of a default judgment until February 2014. Although any motions in the action were held in abeyance while settlement conferences were pending (citation omitted), the plaintiff was authorized to proceed with the action at the conclusion of mandatory settlement conferences on October 4, 2011. However, the plaintiff took no steps to initiate proceedings for entry of a default judgment until more than two years later, and it failed to demonstrate a reasonable excuse for its delay (citations omitted). Accordingly, the Supreme Court should have denied the plaintiff’s motion for an order of reference and granted the defendant’s cross motion pursuant to CPLR 3215(c), in effect, to dismiss the complaint insofar as asserted against him as abandoned.”).

CPLR 3215(c) - Plaintiff’s preliminary step of moving for order of reference evidenced intent to continue prosecution of action.

Bank of Am., N.A. v. Lucido, 163 A.D.3d 614, 81 N.Y.S.3d 161 (2d Dep’t 2018) (“Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (citation omitted) within one year of the defendants’ default
There was no evidence that the plaintiff intended to abandon the action. Accordingly, the Supreme Court improvidently exercised its discretion in sua sponte directing dismissal of the complaint pursuant to CPLR 3215(c) and cancellation of the notice of pendency (citations omitted)."

**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, 77 N.Y.S.3d 439 (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(f) - Failure to comply does not render judgment a nullity.**

**NYCTL 1998-2 Trust v. Ocean Gate Estate Homeowners Assn., Inc.**, 143 A.D.3d 683, 38 N.Y.S.3d 599 (2d Dep’t 2016) (“Contrary to the defendant’s contention, the plaintiff’s alleged failure to comply with CPLR 3215(f) does not render the judgment a nullity (citations omitted). Moreover, the plaintiff was not required to serve an additional copy of the summons and complaint pursuant
to CPLR 3215(g)(4) before obtaining a default judgment against the defendant, since this is an action affecting title to real property (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*, 162 A.D.3d 847, 80 N.Y.S.3d 281 (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 - Court order was not proper 90 day demand. Trial court should have granted plaintiff's motion to restore case to calendar. Second Department parts with prior precedent.**

*Element E, LLC v. Allyson Enters., Inc.*, 2018 NY Slip Op 08915 (2d Dep't 2018) (“Here, the court order 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’ (citations omitted). Moreover, the record contains no evidence that the court ever made a motion to dismiss, or that there was an ‘order’ of the court dismissing the case (citations omitted). As in Cadichon v Facelle (citation omitted), ‘[i]t is evident from this record that the case was ministerially dismissed,’ without the court having made a motion, and ‘without the entry of any formal order by the court dismissing the matter’ (citation omitted). The procedural device of dismissing an action for failure to prosecute is a legislative creation, not a part of a court's inherent power (citation omitted), and, therefore, a court desiring to dismiss an action based upon the plaintiff's failure to prosecute must follow the statutory preconditions under CPLR 3216. Since the action was not properly dismissed pursuant to CPLR 3216, the Supreme Court should have granted that branch of the plaintiff's motion which was to restore the action to the active calendar. To the extent that prior cases from this Court are inconsistent with the holding herein (citations omitted), henceforth they should no longer be followed.”).

**CPLR 3216 - Conditional order failed to comply with requirements to be valid 90 day notice.**

*Deutsche Bank Natl. Trust Co. v. Bastelli*, 164 A.D.3d 748, 83 N.Y.S.3d 155 (2d Dep’t 2018) (‘‘While a conditional order of dismissal may have ‘the same effect as a valid 90-day notice pursuant to CPLR 3216’ (citations omitted), the conditional order here ‘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’ (citation omitted). Moreover, the conditional order failed to satisfy the notice requirement on the additional ground that there was ‘no indication that the plaintiff’s counsel was present at the status conference at which the court issued the conditional order of dismissal,’ nor was there ‘evidence that the order was ever properly served upon the plaintiff’ (citation omitted). In the absence of proper notice, ‘the court was without power to dismiss the action for the plaintiff’s failure to comply with the conditional order of dismissal’ (citation omitted). Lastly, the Supreme Court erred in administratively dismissing the
action without further notice to the parties and without benefit of further judicial review (citations omitted). Accordingly, the Supreme Court should have granted the plaintiff’s motion to vacate the order dated October 3, 2013, and to restore the action to the active calendar.”).

**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.*, 162 A.D.3d 859, 80 N.Y.S.3d 83 (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 was 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).”)

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 3217(b) - No evidence that the defendant would be prejudiced by a discontinuance without prejudice.

*Kondaur Capital Corp. v. Reilly*, 162 A.D.3d 998, 79 N.Y.S.3d 632 (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.”).

CPLR 3218 – Judgment by confession

CPLR 3218 - Issues of fact existed which had to be resolved by a plenary action, not a motion.

*Midtown Acquisitions L.P. v. Essar Global Fund Ltd.*, 162 A.D.3d 583, 75 N.Y.S.3d 900 (1st Dep’t 2018) (“Defendant’s motion to vacate the judgment by confession pursuant to CPLR 5015(a)(3) based on fraud was properly denied because issues of fact exist that must be resolved by trial in a plenary action rather than by motion (citations omitted). Even assuming that the filing of the confession of judgment was conditioned on defendant’s default, the parties dispute whether such a default occurred, i.e., whether defendant had repaid $40 million or $50 million under the governing term sheet by the time of the filing of the confession of judgment. This issue cannot be resolved on the motion papers. Although defendant’s CPLR 3218 motion was not duplicative of the CPLR 5015 motion, it was properly dismissed on the same ground, namely, that a plenary action is required.”).

ARTICLE 34 - CALENDAR PRACTICE

CPLR 3402 - Note of issue

CPLR 3402 - Post note of issue discovery

*Kanaly v. DeMartino*, 162 A.D.3d 142, 145, 77 N.Y.S.3d 234, 237 (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

CPLR 3404 - Dismissal of abandoned case

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

Further Appellate Division Conflicts, and One Resolved

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
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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author
for electronic or hard copy distribution.
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 3404 - Failure to demonstrate reasonable excuse for 12-year delay in moving to restore case to calendar.**

_Hagler v. Southampton Hosp._, 164 A.D.3d 479, 82 N.Y.S.3d 498 (2d Dep’t 2018) (“Here, the plaintiffs failed to demonstrate a reasonable excuse for their more than 12-year delay in moving to restore the action to the trial calendar. The plaintiffs failed to adequately explain why it took more than 12 years from the time the action was marked off the trial calendar to ascertain the effects of the injuries that the injured plaintiff allegedly sustained at birth (citation omitted). Furthermore, in light of the plaintiffs’ inactivity regarding the action during the more than 12-year period prior to moving to restore the action to the trial calendar, the plaintiffs failed to rebut the presumption of abandonment that attaches when a matter has been automatically dismissed (citations omitted). Moreover, the plaintiffs failed to demonstrate that the defendants would not be prejudiced if the case were to be restored to the trial calendar, given the 20-year and 7-month delay between the date this action accrued and the date of the plaintiffs’ motion to restore (citations omitted).”).

**ARTICLE 45 - EVIDENCE**

**CPLR 4503 - Attorney**

_CPLR 4503_

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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Divided Court of Appeals Imposes Litigation Requirement on Common-Interest Privilege

Holds Communications Prior to Closing of Merger Not Protected

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 2016 completion’ 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.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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 4503 - Privilege log and in camera review of documents**

*Rickard v. New York Cent. Mut. Fire Ins. Co.*, 164 A.D.3d 1590, 84 N.Y.S.3d 619 (4th Dep’t 2018) (“Here, we conclude that defendant failed to meet its burden inasmuch as it relied solely upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contain protected material. We nonetheless further conclude that, under the circumstances of this case, the court abused its discretion by ordering the production of allegedly protected documents and instead should have granted the alternative relief requested by defendant, i.e., allowing it to create a privilege log pursuant to CPLR 3122 (b) followed by an in camera...
review of the subject documents by the court (citations omitted). We therefore reverse the order insofar as appealed from, vacate the first and second ordering paragraphs, grant the motion for a protective order insofar as it seeks an in camera review, and remit the matter to Supreme Court to determine the motion and the cross motion following an in camera review of the allegedly protected documents.”).

**CPLR 4503**


**Court Splits on Whether Absolute Privilege Applies to Defamatory Statements Made in an Administrative Proceeding**

**Does the Privilege Depend on The Status of the Defamed Person or the Speaker or Whether the Defamed Person Can Challenge the Statement?**

The primary issue in *Stega v. New York Downtown Hosp.*, 2018 N.Y. Slip Op. 04687 (June 27, 2018), was whether alleged defamatory statements made in an administrative proceeding were protected by an absolute privilege. A majority of the Court of Appeals found they were not.

The plaintiff was a medical scientist employed by the defendant hospital and Vice President of Research and Chairperson of the hospital’s Institutional Review Board (IRB). She had been, among other things, developing preparatory materials for a clinical trial of a compound developed to treat patients with metastatic cancer. She was terminated by the hospital (together with the IRB’s Vice Chairperson) for allegedly violating the hospital’s conflict of interest policy and improperly taking money from the developer of the compound "on the side." The plaintiff and the Vice Chairperson submitted a complaint to the FDA, expressing concerns about their termination and whether patients in the research trials would be properly supervised by the IRB. During the FDA’s subsequent investigation, the hospital’s acting chief medical officer made certain negative statements about plaintiff’s actions. The FDA then issued an Establishment Inspection Report (EIR) to the hospital, discussing examples of the IRB’s noncompliance with FDA regulations, unrelated to plaintiff’s actions. However, it noted that the "[i]nspection found certain improprieties documented by the hospital’s management resulting in" the plaintiff’s removal. In addition, the EIR referred to certain of the negative statements made by the hospital’s acting chief medical officer about the plaintiff.

The plaintiff brought this defamation action, alleging that the false and defamatory published statements damaged her professional reputation. The defendants moved to dismiss, arguing that the statements were protected by an absolute privilege, or alternatively, that the statements were true or expressions of pure opinion. The trial court permitted the plaintiff’s defamation claim to proceed. The Appellate Division reversed and dismissed the action. We are limiting our analysis here to the absolute privilege issue.

A majority of the Court of Appeals reversed. It explained that an absolute privilege,
which entirely immunizes an individual from liability in a defamation action, regardless of the declarant’s motives, is generally reserved for communications made by "individuals participating in a public function, such as judicial, legislative, or executive proceedings. The absolute protection afforded such individuals is designed to ensure that their own personal interests — especially fear of a civil action, whether successful or otherwise — do not have an adverse impact upon the discharge of their public function" (citations omitted).

*Id*. at *3*

Application of an absolute privilege in administrative type proceedings depends on whether the proceeding had attributes similar to a court, such as a hearing where both parties can participate and the administrative body can take remedial action. The majority stressed that for absolute immunity to apply in a quasi-judicial context, there must be a mechanism for the allegedly defamed person to challenge the statements.

Here, the plaintiff did not receive notice of the FDA investigation, nor did the FDA regulations provide for notice of an FDA report relating to IRB noncompliance; she was not able to participate in the FDA’s review of the IRB; she lacked standing to seek review of the EIR; and she could not contest her alleged reputational harm before the FDA. The majority concluded that the absolute privilege did not apply, emphasizing "the policy rationale for insisting on an adversarial procedure, namely to prevent the absolute privilege from shielding statements published in a setting in which the defamed party may never know of the statements and, even if he or she did, would have no way to rebut them (citation omitted)." *Id*. at *5.

The dissent opined that the majority wrongly concluded that whether the absolute privilege applies in a quasi-judicial proceeding depends on the status of the defamed person or whether he or she is also the subject of an administrative proceeding or investigation. Rather, it is based on the speaker’s status and "whether the communication was made during the course of the speaker’s participation in a public function. Here, it is undisputed that the speaker was participating in a Food and Drug Administration investigation—the preliminary stage of a potential quasi-judicial proceeding." *Id*. at *6.

The dissent insisted that the Court has never required a defamed person to be a participant in the proceeding or that he or she could challenge the defamatory statement in that very proceeding. The dissent concluded that the communications made to the IRB about the plaintiff were absolutely privileged.
CPLR 4506

Audiotapes properly suppressed.

*Matter of Dennis v. Davis-Schloemer*, 2018 NY Slip Op 08480 (2d Dep’t 2018) (“Contrary to the maternal grandmother's contention, the Family Court properly granted the paternal grandmother's motion to suppress audiotapes of conversations between the paternal grandmother and the child pursuant to CPLR 4506, which provides for the suppression of evidence obtained by illegal wiretapping. The maternal grandmother and her son (the child's uncle) were not parties to the conversation, were not present during the conversation, and the maternal grandmother does not assert that, under the circumstances, any vicarious consent was given (citations omitted). Moreover, there is no merit to the maternal grandmother's contention that the motion was untimely because it was not made before the hearing, since the paternal grandmother only learned of the existence of the tapes during the hearing (citation omitted). The maternal grandmother's remaining arguments in this regard are improperly raised for the first time on appeal and, therefore, are not properly before this Court (citation omitted).”).

CPLR 4506 - “Here, the plaintiff’s actions in recording a telephone call, which apparently took place between the defendant and the children after the defendant requested that the children place the call on speaker so that the plaintiff could hear what he had to say, did not constitute the crime of eavesdropping.”

*Perlman v. Perlman*, 163 A.D.3d 730, 81 N.Y.S.3d 407 (2d Dep’t 2018) (“We agree with the Supreme Court’s determination denying that branch of the defendant’s motion which was to preclude the plaintiff from offering a tape recording of a telephone call into evidence at trial. Generally, ‘[t]he contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury’ (citation omitted). ‘A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication’ (citation omitted). Here, the plaintiff’s actions in recording a telephone call, which apparently took place between the defendant and the children after the defendant requested that the children place the call on speaker so that the plaintiff could hear what he had to say, did not constitute the crime of eavesdropping. The plaintiff’s actions did not amount to ‘mechanical overhearing of a conversation[,]’ as she was present at, and a party to, the conversation at issue (citations omitted). Thus, we agree with the court’s determination that the recordings of that conversation were admissible pursuant to CPLR 4506(1) (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 4513

CPLR 4513 - “[W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court.”

Ubiles v. Halliwell-Kemp, 2018 NY Slip Op 08801 (4th Dep’t 2018) (“We reject defendant's contention that Supreme Court abused its discretion in precluding her from impeaching plaintiff at trial with evidence of a criminal conviction from 2002. ‘[W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court’ (citations omitted), and we conclude that the court did not abuse its discretion in precluding defendant from impeaching plaintiff with evidence of a drug conviction from 15 years earlier (citations omitted).”)

CPLR 4513 - Cross examination about prior conviction for reckless driving

Castillo v. MTA Bus Co., 163 A.D.3d 620, 80 N.Y.S.3d 426 (2d Dep’t 2018) (“Contrary to the defendant’s contention, during the liability trial, it was appropriate for the Supreme Court to allow the plaintiff’s counsel to cross-examine the bus driver about her prior conviction for reckless driving (citations omitted).”).

CPLR 4515 - Form of expert opinion

CPLR 4515


Majority of Court of Appeals Rules That Evidence Was Insufficient as Matter of Law to Establish Proximate Cause

Affirms Lower Courts’ Granting of Ford’s Motion to Set Aside Verdict Under CPLR 4404(a)

In the April 2017 edition of the Digest, we reported on Matter of New York City Asbestos Litig. (Juni), 148 A.D.3d 233 (1st Dep’t 2017), an asbestos case primarily dealing with issues relating to expert testimony. In Juni, the plaintiffs claimed that the decedent contracted mesothelioma from his exposure to various asbestos-containing products when he was employed as a mechanic. The specific claims here arose out of decedent’s alleged exposure to asbestos dust from Ford Motor Company vehicle brakes, clutches, and manifold gaskets. The jury found for the plaintiffs, but the trial court granted Ford’s motion to set aside the verdict under CPLR 4404(a). A
majority of the First Department affirmed, rejecting plaintiffs’ argument that the criteria set forth in the seminal decisions detailing the general requirements for admission of an expert’s scientific opinions in toxic torts cases—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)—would be an insurmountable standard in the context of asbestos claims. The court found that the plaintiffs’ experts did not "quantify the decedent’s exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford’s products." Juni, 148 A.D.3d at 237. It rejected, as the trial court did, the plaintiffs’ single exposure or cumulative exposure theories.

A majority of the Court of Appeals has now affirmed, 2018 N.Y. Slip Op. 08059 (November 27, 2018). In a very brief memorandum opinion, the Court simply stated that "[v]iewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company’s conduct was a proximate cause of the decedent’s injuries pursuant to the standards set forth" in Parker and Cornell. Id. at *1.

In a similarly brief concurring opinion, Judge Fahey concluded that plaintiffs’ proof did not establish, "by legally sufficient evidence," a link between the decedent’s asbestos exposure and Ford’s products. He would not address "any other issues of general or specific causation reached by the Appellate Division." Id.

Judge Wilson’s concurrence had a bit more meat. Initially, he stated his belief that the deficiency in proof here related to general causation, as discussed by the trial court, and not specific causation, highlighted by the Appellate Division. He acknowledged that the decedent worked on Ford brakes and clutches containing chrysotile asbestos; that raw chrysotile asbestos greater than 5 micros in length is toxic and exposure to it increases the risk of contracting mesothelioma; and that the decedent became ill and died from his exposure to asbestos. However, Judge Wilson stressed the plaintiffs’ experts’ failure to rebut Ford’s argument that the physical properties of asbestos in its products had been so radically altered by the extreme temperatures involved in the manufacturing process of those friction products and their subsequent use (transforming the asbestos into Forsterite) that it rendered conventional asbestos toxicology irrelevant. Instead, one of plaintiffs’ causation experts testified extensively that chrysotile asbestos in its raw state caused mesothelioma. But when asked about chrysotile asbestos subjected to the extreme temperatures involved in the manufacture and use of friction products, he testified that he had not studied the release of chrysotile asbestos from friction products because he was "not an engineer or industrial hygienist." He further admitted that the only study of which he was aware on the subject of "the biological activity of this [heat- ]altered state of chrysotile" concluded that "chrysotile biological activity is thereby greatly reduced, and can become virtually nil hundreds of degrees below" the relevant temperatures. … Plaintiffs’ other causation expert, when asked specifically about the high temperature transformation of asbestos to Forsterite, testified that "no one knows" whether the friction product dust to which Mr. Juni was exposed when replacing the used products was toxic.

Id.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Thus, Judge Wilson concluded that "a necessary link in the proof of causation was missing" and that there was a "gap in proof" as to the products’ toxicity.

Judge Rivera dissented. She pointed out that, under CPLR 4404(a), the defendant had to establish that the jury’s verdict was "utterly irrational" and that there was "no valid line of reasoning and permissible inferences that could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial." *Id.* at *1–2* (citation omitted). She asserted that the defendant had not met that burden, and the evidence was sufficient to support the jury’s verdict on causation grounds, relying on Justice Feinman’s dissent below. (Since that decision he had joined the Court and took no part in this decision.) She concluded that the verdict was not "utterly irrational"; that there was compelling evidence of the decedent’s exposure to asbestos in his work on Ford vehicles; and that the jury was not persuaded by Ford’s experts.

**CPLR 4515**


**Plaintiff’s Experts Fail to Establish That Decedent Was Exposed to Sufficient Levels of Toxins**

**Majority of First Department Refuses to Carve Out Different Standard of Proof in Asbestos Cases**

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).
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_, 162 A.D.3d 1503, 78 N.Y.S.3d 542 (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 inadmissible 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).”

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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.”


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 (3d 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 4536

CPLR 4536 - A court sitting as the trier of fact can make its own comparisons of handwriting samples in the absence of expert testimony.

*Matter of Trevisani v. Karp*, 164 A.D.3d 1586, 83 N.Y.S.3d 777 (4th Dep’t 2018) (“Petitioner contends that the court erred in determining that certain signatures on the nominating petition had been forged inasmuch as respondents failed to present testimony from a handwriting expert or from witnesses with knowledge of the identity of the person who provided the signatures, i.e., from a person who signed the nominating petition and/or the voter registration card. That contention is not preserved for our review (citation omitted) and, in any event, we conclude that it is without merit. A court sitting as the trier of fact ‘may make [its] own comparisons of handwriting samples in the absence of expert testimony on the subject’ (citations omitted). Thus, the court was authorized to make findings with respect to the validity of the signatures on the nominating petition by making its own comparison of those signatures to the signatures on the voter registration rolls (citations omitted). Contrary to petitioner’s further contention, the court did not err in comparing the signatures contained on petitioner’s nominating petition to the signatures contained on the voter registration rolls, rather than merely comparing the names and addresses on the nominating petition with the names and addresses on the voter registration rolls (citations omitted).”).

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 4540-a - 2018 Amendment


CPLR Amendments

CPLR 4540-a - Presumption of Authenticity of Material Authored or Created by a Party

One of the preliminary hurdles to the admissibility of documents at trial is to establish their authenticity. An amendment adding CPLR 4540-a attempts to tackle the issue of the authenticity of material authored or otherwise created by a party. L. 2018, ch. 219, eff. January 1, 2019. It provides that material produced by a party in response to a CPLR Article 31 demand seeking "material authored or otherwise created by such party" is presumed authentic when an adverse party offers it into evidence. However, this presumption can be rebutted by the producing party by a preponderance of evidence (of forgery, fraud or other authenticity defect) proving that the material is not authentic. Moreover, any other objection to admissibility, such as the lack of relevance or violation of the best evidence rule, for example, is preserved.

The Sponsor’s memorandum emphasized the benefits of the legislation at trial, primarily in avoiding an unnecessary burden placed on the proponent of the evidence and a waste of the court’s resources:

[E]vidence of such authenticity should not be required if the party who purportedly authored or otherwise created the documents at issue has already admitted their authenticity. And if a party has responded to a pretrial litigation demand for its documents by producing those documents, the party has indeed implicitly acknowledged their authenticity. Thus, in such cases, the presentation of evidence of authenticity is a waste of the court’s time and an unnecessary burden on the proponent of the evidence. The producing party’s simple objection to admissibility for "lack of authentication" in such cases should be summarily overruled. But often it is not, thus warranting remedial legislation. This measure, then, would codify and expand upon case law that has been overlooked by many New York courts, practitioners, and commentators.

CPLR 4545 - Admissibility of collateral source of payment

CPLR 4545


Court Of Appeals Splits on Application of CPLR 4545

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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." \textit{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." \textit{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, 162 A.D.3d 579 (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

CPLR 5003-b - Nondisclosure Agreements

As part of comprehensive sexual harassment law legislation, CPLR 5003-b was enacted, effective July 11, 2018.2

CPLR 5003-b provides that an employer (or its employee or officer) cannot include in a settlement agreement (including an agreed judgment, stipulation, decree, agreement to settle, assurance or discontinuance “or otherwise”) 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.

---

1 L. 2018, Chapter 57 (Part KK, Subpart D), eff. July 11, 2018.
2 See below, new section CPLR 7515, which was also added, barring mandatory arbitration provisions in connection with sexual harassment claims, except where inconsistent with federal law. As part of the legislation, the following Laws were also amended:
   - Public Officers Law was amended by adding new sections 17-a and 18-a.
   - General Obligations law was amended by adding a new section 5-336.
   - Labor Law was amended by adding a new section 201-g.
   - Executive Law was amended by adding a new section 296-d.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
CPLR 5303/5304 - Issue as to whether plaintiff who seeks to recognize and enforce foreign country money judgment in New York has to establish a “separate” jurisdictional predicate over the debtor in New York.

In *Abu Dhabi Commercial Bank PJS v. Saad Trading*, 117 A.D.3d 609, 986 N.Y.S.2d 454 (1st Dep’t 2014), the First Department held that a plaintiff who seeks to recognize and enforce a foreign country money judgment in New York does not have to establish a “separate” jurisdictional predicate over the debtor in New York. Subsequently, in *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93, 73 N.Y.S.3d 1 (1st Dep’t 2018), the court clarified its earlier decision, stating that the *Abu Dhabi* holding applies only where the defendant opposing recognition of the foreign judgment does not assert any of the statutory defenses to the recognition. Where the defendant does raise “colorable statutory grounds for denying the foreign judgment recognition... there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York... This appeal arises from a proceeding to recognize and enforce a foreign country judgment under CPLR article 53. Defendants have raised colorable statutory grounds for denying the foreign judgment recognition. Under these circumstances, we hold that there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York. Because plaintiff does not claim that such jurisdiction is demonstrated on the existing record, and, on appeal, does not seek an opportunity to gather evidence to demonstrate that such jurisdiction exists, we conclude that New York lacks jurisdiction to entertain this proceeding. Accordingly, we reverse the order appealed from and grant defendants’ motion to dismiss the proceeding pursuant to CPLR 3211(a)(8).”

*Huynh, So Muon v. Thach, Ly Sun*, 159 A.D.3d 447, 69 N.Y.S.3d 489 (1st Dep’t 2018) (“Plaintiff’s papers in support of her motion for summary judgment in lieu of complaint, on their face, established, prima facie, that she had a meritorious claim for domestication of the Australian judgment under CPLR article 53. Since defendant did not appear to contest New York’s jurisdiction over this matter or to raise any statutory defenses to recognition or enforcement of the Australian judgment (see CPLR 5304), plaintiff’s motion should have been granted (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) - Awards for pain and suffering deviated materially from what would be reasonable compensation: award reduced.

_Jones v. New York Presbyt. Hosp._, 158 A.D.3d 474, 67 N.Y.S.3d 835 (1st Dep’t 2018) (Lower court order “which granted defendant’s motion to reduce the jury’s damages awards, and ordered a new trial on damages unless plaintiff stipulated to reduce the award for past pain and suffering from $600,000 to $150,000 and the award for future pain and suffering over a five-year period from $400,000 to $150,000, unanimously modified, on the facts, to order a new trial on damages for past pain and suffering unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award for such damages to $400,000, and otherwise affirmed, without costs. As a result of defendant’s negligence, plaintiff suffered a comminuted proximal humerus fracture, which healed in a misaligned manner. The injury resulted in chronic pain and a permanent reduction in plaintiff’s range of motion and has had a significant impact on plaintiff’s quality of life, as she remains unable to care for herself. Under these circumstances, an award for past pain and suffering in excess of $400,000 deviates materially from what would be reasonable compensation (see CPLR 5501[c]), and we modify Supreme Court’s order accordingly. In light of plaintiff’s age (84 when injured and 89 at the time of trial), Supreme Court correctly determined that an award for future pain and suffering in excess of $150,000 deviates materially from what would be reasonable compensation (citations omitted).”).

CPLR 5501(c) - The amounts awarded for plaintiff’s injuries deviate materially from what is reasonable compensation: award increased.

_Nawrocki v. Huron St. Dev. LLC_, 161 A.D.3d 697, 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 / 5701(a)(2) – Once, Twice, Three Times You’re Out. Appeal dismissed for multiple reasons: appeal is from unappealable “Stipulation and Order” entered on consent; did not decide a motion; substantive arguments on this appeal could have been made on earlier appeal dismissed for lack of prosecution. Court cautions parties about lack of disclosure as to prior dismissed appeal.

Dumond v. New York Cent. Mut. Fire Ins. Co., 166 A.D.3d 1554 (4th Dep’t 2018) (“We now dismiss the instant appeal for the following three reasons. First, defendant is not aggrieved by the ‘Stipulation and Order’ on appeal because, as its title reflects, it constitutes an order entered on consent. As such, defendant ‘may not appeal from it’ (citations omitted). The fact that defendant is aggrieved by the prior summary judgment order is of no moment because the ‘Stipulation and Order’ is not a final order or judgment, and it thus does not bring up for review that prior order (citation omitted). Second, the appeal must be dismissed because the paper from which defendant purports to appeal is not an appealable order under CPLR 5701(a)(2), which authorizes an appeal as of right from certain specified orders ‘where the motion it decided was made upon notice.’ That provision is inapplicable here because the ‘Stipulation and Order’ on appeal did not decide a motion, much less a motion made on notice (citations omitted). Third, it is well established that ‘[a]n appeal that has been dismissed for failure to prosecute bars, on the merits, a subsequent appeal as to all questions that could have been raised on the earlier appeal had it been perfected’ (citations omitted). Defendant's substantive contentions on the instant appeal could have been raised on the prior appeal, had it been perfected. Thus, dismissal of the instant appeal is also warranted on that ground (citations omitted). In sum, defendant is attempting to use a non-appealable paper, i.e., the ‘Stipulation and Order,’ as a vehicle to revive its previously dismissed appeal from the summary judgment order. This is improper, because litigants have no authority to ‘stipulate to enlarge our appellate jurisdiction’ (citations omitted). Finally, given the parties' failure to inform us of the prior dismissed appeal in their appellate briefs, we must remind counsel that ‘attorneys for litigants in [an appellate] court have an obligation to keep the court informed of all . . . matters pertinent to the disposition of a pending appeal and cannot, by agreement between them, . . . predetermine the scope of [its] review’ (citations omitted).”).

CPLR 5511 - Party not aggrieved

Matter of Olney v. Town of Barrington, 162 A.D.3d 1610, 80 N.Y.S.3d 563 (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.,_ 162 A.D.3d 751, 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).”).

_Carney v. Carney_, 160 A.D.3d 218, 73 N.Y.S.3d 694 (4th Dep’t 2018) (“As a further preliminary matter, we conclude that the appeals insofar as taken by Donaher must be dismissed inasmuch as he is not an ‘aggrieved party’ and thus is not a proper appellant (CPLR 5511). A party is aggrieved when he or she ‘has a direct interest in the controversy which is affected by the result’ and [when] the adjudication has a binding force against the rights, person or property of the party’ (citation omitted). ‘The fact that the adjudication may remotely or contingently affect interests which [the party] represents does not give [it] a right to appeal’ (citation omitted). Here, Donaher has no direct interest in the controversy between plaintiff and defendant, and the fact that the court’s determinations may contingently affect interests that Donaher and his office represent does not give him a right to appeal. ‘The fact that the [decisions] contain[] language or reasoning that [Donaher] deems adverse to his interests does not provide him with a basis for standing to take an appeal’ (citations omitted).”).

_CPLR 5511 - Since plaintiff did not appeal, the Court could not reinstate the complaint._

_Hain v. Jamison_, 28 N.Y.3d 524, footnote 3, 46 N.Y.S.3d 502, 68 N.E.3d 1233 (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 decr etal 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 5511 - Grandmother was not aggrieved by order granting relief to father against mother.**

*Matter of Kone v. Martin*, 146 A.D.3d 781, 43 N.Y.S.3d 919 (2d Dep’t 2017) (“A person is aggrieved within the meaning of CPLR 5511 when he or she asks for relief but that relief is denied in whole or in part, “or, when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part” (citations omitted). The order appealed from granted relief to the father against the mother. Since the grandmother is not aggrieved by the order appealed from, her appeal must be dismissed (citations omitted).”).

**CPLR 5513 - Time to take appeal**

**CPLR 5513 / 5515 - Failure to file and serve a notice of appeal in a timely fashion is a nonwaivable defect.**

*Avgush v. Jerry Fontan, Inc.*, 2018 NY Slip Op 08553 (1st Dep’t 2018) (“A notice of appeal must be filed and served within 30 days after service by a party of the order and written notice of entry (see CPLR 5513[a], 5515[1]). Here, defendants properly electronically served the order on appeal with notice of entry on August 30, 2016, via the New York State Courts Electronic Filing (NYSCEF) system (citation omitted). At that time, plaintiff was represented by counsel who had not withdrawn or moved to be relieved in the manner prescribed by CPLR 321(b). In a letter dated August 29, 2016, plaintiff's counsel informed him that the law firm would not represent him on any appeal. In a letter dated August 31, 2016, the same counsel informed plaintiff that he was required to file a notice of appeal by September 29, 2016, or his right to appeal would be lost. Since plaintiff neither served nor filed a notice of appeal by that deadline, his appeal is untimely. As ‘[t]he time period for filing a notice of appeal is nonwaivable and jurisdictional’ (citation omitted), it does not matter that plaintiff served and filed his notice of appeal just one day late. Plaintiff's claim that the clerk's office refused to accept his notice of appeal when he brought it to court on the deadline day, September 29, 2016, is unsupported by any evidence, including his notice of appeal, preargument statement, and affidavit of service, which are all dated September 30, 2016. In any event, an appeal is taken once the notice of appeal is both filed and served (citation omitted). There was no impediment to plaintiff's timely serving the notice of appeal notwithstanding the clerk's ostensible refusal to accept the paper for filing, or electronically filing the notice of appeal. A litigant's ‘pro se status does not relieve him of the obligation to comply with the time requirements for taking an appeal’ (citation omitted).”.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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.*, 162 A.D.3d 1265, 79 N.Y.S.3d 702 (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 - Court lacks subject matter jurisdiction to entertain the appeal because petitioner failed to properly file or serve a notice of appeal. Here, the “court of original instance” was administrative body.

*Matter of Community Hous. Improvement Program v. Commissioner of Labor*, 166 A.D.3d 1135 (3d Dep’t 2018) (“As a threshold matter, we must consider respondent's argument that this Court lacks subject matter jurisdiction to entertain the appeal because petitioner failed to properly file or serve a notice of appeal. ‘An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered’ (citation omitted). To properly bring an appeal, petitioner was required to complete both steps by timely filing a notice of appeal in the proper court and by serving it on respondent. Where only one of these steps is properly completed, the court has the discretion to ‘grant an extension of time for curing the omission’ (citation omitted). Notably, however, ‘[a] complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal’ (citations omitted). Petitioner completely failed to comply with CPLR 5515. The notice of appeal that was filed with this Court was ineffective because CPLR 5515 (1) requires that a notice of appeal be filed in ‘the court of original instance.’ When exercising its appellate jurisdiction, this Court is not the court of original jurisdiction. Where there is an appeal from an administrative determination, rather than a court order or judgment, the administrative body responsible for making the final determination is the court of original jurisdiction (citations omitted). We note that this principle is further illustrated by the requirement that notices of appeal from decisions of the Workers' Compensation Board and the Unemployment Insurance Appeal Board must be filed with the appropriate board that made the decision being appealed, not with this Court. Thus, we conclude that for appeals that are to be made directly to this Court pursuant to Labor Law § 657, the IBA is
the court of original instance where the notice of appeal must be filed. Petitioner likewise failed to timely serve a notice of appeal on respondent. Interlocutory papers may be served on an attorney by mailing them to him or her ‘at the address designated by that attorney for that purpose’ (citation omitted). Here, it is undisputed that the notice of appeal was mailed to respondent’s general counsel at an incorrect address. The record contains two addresses for respondent’s general counsel—one in the City of Albany and the second at 75 Varick Street in the City of New York—but the notice of appeal was sent to 120 Broadway in the City of New York, where an office of the Attorney General is located. Service is not completed within the meaning of CPLR 2103 (b) (2) when, as here, papers are mailed to the wrong address (citations omitted). We further note that the failure to comply with all of the relevant provisions of CPLR 2103 prevents service from being made pursuant thereto (citations omitted). Thus, we lack jurisdiction to entertain the appeal.”).

CPLR 5515 - Complete failure to comply with CPLR 5515 deprives court of jurisdiction to entertain the appeal.

Matter of Henry, 159 A.D.3d 1393, 73 N.Y.S.3d 316 (4th Dep’t 2018) (“Pursuant to CPLR 5513 (a), a notice of appeal must be served within 30 days of service of the order from which the appeal is taken, with notice of entry thereof. An additional five days is added where, as here, the order and notice of entry are served by mail (see CPLR 5513 [d]; see also CPLR 2103 [b] [2]). Furthermore, the CPLR provides that ‘[a]n appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered’ (CPLR 5515 [1]) and, in this instance, the order was filed in Surrogate’s Court. Thus, to bring a timely appeal, objectant was required to serve the notice of appeal on the opposing party and to file the notice of appeal in Surrogate’s Court by September 29, 2016 (see CPLR 5515 [1]). ‘A complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal’ (citations omitted). Here, there was such a complete failure. Although objectant’s attorney sent the notice of appeal to the attorneys for the opposing parties, he did so by email, and objectant concedes that neither coexecutor agreed to accept service in that manner. In addition, although objectant’s attorney attempted to file the notice of appeal, he did not do so in the correct venue (citations omitted). ‘A timely notice of appeal is a jurisdictional prerequisite, and the time to take an appeal cannot be extended [where, as here,] the notice of appeal was neither timely filed nor served’ (citations omitted).”).

CPLR 5522 - Disposition of appeal

CPLR 5522 - Moot appeal; and defendant not aggrieved

North Geddes St. Props., LLC v. Iglesia Misionera Monte Desion, 2 A.D.3d 1512, 79 N.Y.S.3d 778(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*, 162 A.D.3d 1650, 75 N.Y.S.3d 445 (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*, 162 A.D.3d 1602, 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).”).
JR Factors, Inc. v. Astoria Equities, Inc., 159 A.D.3d 801, 69 N.Y.S.3d 823 (2d Dep’t 2018) (“It is the obligation of the appellant to assemble a proper record on appeal (citations omitted). Here, the record filed by the appellant does not contain the summons and complaint in this action. The record also does not contain the entire transcript of the trial. In particular, the record is missing a portion of the transcript of the testimony of one of the plaintiff’s witnesses and the entire transcript of the testimony of a witness called by the defense. As the record is inadequate to enable this Court to render an informed decision on the merits of the appeals, the appeals must be dismissed (citations omitted).”).

CPLR 5530 - Beware of dangers of dismissal of prior appeal for lack of prosecution, even though the court has discretion to bail you out.

Budoff v. City of New York, 164 A.D.3d 737, 83 N.Y.S.3d 163 (2d Dep’t 2018) (“As a general rule, we do not consider any issue raised on a subsequent appeal that could have been raised in an earlier appeal which was dismissed for lack of prosecution, although this Court has the inherent jurisdiction to do so (citations omitted). Here, the plaintiff appealed from the order dated September 24, 2014, which granted the defendants’ motions for summary judgment and directed dismissal of the complaint. In March 2016, this Court dismissed the plaintiff’s appeal from that order for failure to perfect in accordance with the rules of this Court (citation omitted). In the order appealed from, the Supreme Court, in effect, granted the plaintiff’s motion to reargue his opposition to the defendants’ motions for summary judgment and, upon reargument, adhered to its original determination in the order appealed from dated August 20, 2015. While the better practice would have been for the plaintiff to withdraw the prior appeal, rather than abandon it, we nevertheless exercise our discretion to review the issues raised on the appeal from the order made upon reargument (citations omitted).”).

ARTICLE 75 – ARBITRATION

CPLR 7501 - Effect of arbitration agreement

CPLR 7501


What Is Plain and Unambiguous Is in the Eyes of the Beholder

Court of Appeals Splits as to Whether There Was Intent to Limit the Right to Demand Arbitration to the Petitioner’s Union

A simple one-paragraph majority opinion in Matter of Widrick, 2018 N.Y. Slip Op. 04780 (June 28, 2018), masks a deeply divided Court on the interpretation of a collective bargaining

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
agreement (CBA). The decision also illustrates how two reasonable people can find the same agreement to be clear and yet come to diametrically opposed conclusions as to its meaning.

Because of the majority’s brevity, the facts need to be gleaned from the dissent. The petitioner worked as a dispatcher for the Lewis County Sheriff’s Office. One day, the Sheriff observed that a deputy and the petitioner had exchanged in the parking lot signed petitions nominating the Sheriff’s challenger in an upcoming election. When confronted, both the petitioner and the deputy insisted the papers related to personal work and would not show them to the Sheriff. This prompted the Sheriff to notify the petitioner that she was under investigation. Eventually, the petitioner admitted in a sworn affidavit that the papers were indeed what the Sheriff had suspected.

The Sheriff then sent a letter to the petitioner advising that she was terminated for cause, because of "serious acts of misconduct," including "dishonesty" and "participating in political campaign activity while on duty." The notice expressly stated, in accordance with the CBA, that the petitioner had five work days to "either exercise [her] rights under the grievance and arbitration process or rights provided under Section 75" of the Civil Service Law. The petitioner sent an email to the Lewis County Attorney advising that she was exercising her right to grieve the termination, and her lawyer requested, in a letter to the County Attorney, that she contact the American Arbitration Association to initiate the arbitration process. The letters were ignored, prompting the petitioner’s attorney to send another letter threatening suit to compel arbitration. The following day, the County sent a letter to the petitioner stating that "'[p]ursuant to the terms of the [CBA], there is no recognized grievance filed and the County considers the matter closed.'" Id. at *3.

The petitioner commenced this Article 75 proceeding to compel arbitration. The trial court granted the petition to compel arbitration (and denied respondents’ dismissal motion), but the Appellate Division reversed, holding that based on express language in the CBA only the union had the right to demand arbitration, the union did not make such a demand, and the petitioner’s demand had no effect.

A majority of the Court of Appeals affirmed, simply and concisely stating that their reading of the CBA as a whole established the parties’ "plain and unambiguous intent to limit the right to demand" arbitration to the union.

The dissent looked at the same CBA and saw something quite different. First, they pointed to Article IV of the CBA, which sets forth a general grievance procedure available to "all employees." It provides that within 10 days of the employee’s submission of a written grievance to the department head, a decision is to be made and communicated to the employee. Article IV then states that "[s]hould the … decision not be acceptable to [the union], [the union] shall have the right … to proceed to binding arbitration as conducted by PERB, the Public Employment Relations Board." The dissent maintained that the purpose of this section was to permit the union to arbitrate if it was dissatisfied with the results of the grievance procedure, even in a circumstance where the employee was satisfied, but the union was concerned about the ramifications for other union members. The provision was not intended to bar the employee from seeking arbitration.
The dissent also referred to provisions in the CBA that "clearly" grant an employee the right to elect arbitration. Moreover, even if the agreement was ambiguous, the dissent noted, it should be construed in favor of an employee’s right to demand arbitration, in view of New York’s policy in favor of arbitration.

Finally, the dissent insisted that the majority’s citation to the Court’s decision in County of Westchester v. Mahoney, 56 N.Y.2d 756 (1982), for the proposition that the union had the exclusive right to demand arbitration, was misplaced. To the contrary, the dissent maintained that the County of Westchester case supported the petitioner’s position. In that case, an amendment to the CBA expressly removed an existing right of an employee to initiate a grievance. Here, by contrast, "there is no evidence of a bargained-for amendment to the CBA whose purpose was to remove an employee’s right to demand arbitration." Widrick, 2018 N.Y. Slip Op. 04780, at *5.

**CPLR 7515 - 2018 Amendment**

As part of a comprehensive sexual harassment law legislation, CPLR 7515\(^3\) was enacted, effective July 11, 2018.\(^4\)

CPLR 7515 bars mandatory arbitration clauses in connection with sexual harassment claims, except where inconsistent with federal law. Specifically, it prohibits “any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment.”

The mandatory arbitration clause concerns a provision in a written contract (1) requiring the submission of a matter to arbitration (as defined in CPLR Article 75) prior to bringing any legal action, and (2) providing that an arbitrator’s determination with respect to an alleged “unlawful discriminatory practice based on sexual harassment [is] final and not subject to independent court review.” If such provisions are included, they will be deemed null and void. However, it will not impair the enforceability of other provisions in the agreement.

The amendment does not prohibit employers from including a non-prohibited clause or other mandatory arbitration provisions, agreed upon by the parties. Where there is a conflict between provisions of this section and a collective bargaining agreement, the latter controls.

---

\(^3\) L. 2018, Chapter 57 (Part KK, Subpart D), eff. July 11, 2018.
\(^4\) See above, new section CPLR § 5003-a, which was also added, dealing with the settlement of sexual harassment claims and prohibiting certain nondisclosure provisions. As part of the legislation, the following Laws were also amended:
- Public Officers Law was amended by adding new sections 17-a and 18-a.
- General Obligations law was amended by adding a new section 5-336.
- Labor Law was amended by adding a new section 201-g.
- Executive Law was amended by adding a new section 296-d.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
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


Once, Twice, Three Times a Maybe

Court of Appeals Affirmance Leaves Open Question as to Whether Petitioner Has Right to Pursue Claim

The issue in Matter of East Ramapo Cent. Sch. Dist. v. King, 29 N.Y.3d 938, 51 N.Y.S.3d 2, 73 N.E.3d 342 (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/ 7803 - Arbitrary and capricious standard.**

*Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y.*, 164 A.D.3d 1324, 85 N.Y.S.3d 157 (2d Dep’t 2018) *(Compare Majority):* “Contrary to the petitioner’s contention and the conclusion of our dissenting colleagues, we find that Purchase did not abuse its discretion or act arbitrarily or capriciously in denying the petitioner’s request to adjourn the hearing (citation omitted). While our dissenting colleagues rely on a provision of Purchase’s Sexual and Interpersonal Violence Policy that gives an accused student the right to request a ‘one-time extension’ of a disciplinary hearing, this provision is neither cited by the parties nor contained in the record. In any event, this provision merely states that an accused student has the right to ‘request’ an extension of up to five business days, and further provides that the Director of the Office of Community Standards ‘will review the request and make a determination’ before notifying the requesting party as to ‘the acceptance or denial of the request’ (citation omitted). Here, although the petitioner was informed on September 30, 2014, that the hearing would likely be scheduled for October 6 or 7, and although he was informed on October 2, 2014, of the exact time of the hearing, he alleges that he did not request an adjournment until ‘on or about’ October 5, 2014, which was two days before the date of the hearing. Any delay in the petitioner’s attorney discussing the scheduling of the hearing with the Purchase administration was attributable to the petitioner’s delay in executing a FERPA release form as instructed. The hearing involved the participation of three faculty or staff members serving as the administrative board, eight testifying witnesses including the petitioner and the complainant, and a support person for the complainant. Jones had previously mentioned in an email to the petitioner the difficulty that she was having finding a time when all of these people could participate. Given the difficulty in scheduling and the timing of the request for an adjournment, the denial of the request was not arbitrary, capricious, or an abuse of discretion (citations omitted). Nor did the denial of the request for an adjournment amount to a denial of due process. In disciplinary proceedings at public colleges, ‘[d]ue process requires that the [accused students] be given the names of the witnesses against them, the opportunity to present a defense, and the results and finding of the hearing’ (citations omitted). Due process does not require colleges to provide accused students with legal representation at disciplinary hearings (citations omitted). Purchase’s rules, the legality of which the petitioner does not challenge, allow for an attorney to be present and advise an accused student at a disciplinary hearing, but not to represent the student or interact with anyone at the hearing other than the accused student. Here, the petitioner had hired an attorney as of September 30, 2014. As noted above, the petitioner was notified on September 30, 2014, that the hearing would likely be scheduled for October 6 or 7, and was informed of the exact time of the hearing on October 2, 2014. He alleges that he did not request an adjournment until ‘on or about’ October 5, 2014, which was two days before the date of the hearing. Under these circumstances, contrary to the suggestion of our dissenting colleagues, the petitioner was not
denied the opportunity to have an attorney present at the hearing (citations omitted)."); and Dissent: “In sum, the requested three-hour delay in this case was exceedingly minimal and the record does not support Purchase’s contention, raised in its brief, that it was ‘unable to grant the postponement.’ Given the gravity of the administrative charges facing the petitioner, and the threat of additional criminal charges stemming from an active police investigation, Purchase abused its discretion and violated the petitioner’s right to due process when it denied his timely request for a three-hour adjournment of the administrative hearing so that his attorney could attend (citations omitted).”).

CPLR 7803 - Questions raised

CPLR 7803 - Determination was not arbitrary and capricious.

Matter of Krug v. City of Buffalo, 162 A.D.3d 1463 (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(3)


Court of Appeals Rules That Board Rationally Interpreted General Municipal Law § 50-l

Board Properly Revoked Defense and Indemnification Upon Finding That Plaintiff Did Not Properly Discharge His Duties as a Police Officer

Matter of Lemma v. Nassau County Police Officer Indemn. Bd., 2018 N.Y. Slip Op. 04382 (June 14, 2018), involved the interpretation of General Municipal Law (GML) § 50-l, which requires that Nassau County police officers be indemnified for civil "damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of his duties and within the scope of his employment." The crux of the dispute surrounded the phrase "proper discharge of his duties."

In Lemma, the petitioner, a Nassau County police officer, investigated a March 26, 2005, knifepoint robbery. Two months after the incident, Raheem Crews was arrested. A few days later, while questioning another suspect who acknowledged his involvement in the robbery, the petitioner learned that Crews had been incarcerated at the time of the robbery. The petitioner then confirmed Crews’s incarceration via a police database search. However, petitioner told no one,
resulting in Crews remaining in pretrial detention for four months. (For those asking how Crews or his lawyer did not contest his incarceration, apparently because of a typographical error in the felony complaint, the date of the robbery was incorrectly stated and, on that date, Crews was not in jail.)

Crews brought a 42 U.S.C. § 1983 action in federal court against the petitioner, among others. Nassau County initially agreed to defend and indemnify the petitioner, as it did not know of his malfeasance. Years later, the Nassau County Police Officer Indemnification Board ("Board") revoked its defense and indemnification after the petitioner was deposed in the Crews case and admitted for the first time that he knew a few days after the arrest that Crews had been incarcerated on the date that the robbery actually occurred. He claimed that he did not intentionally conceal the information; rather, it "simply slipped his mind."

The petitioner brought this Article 78 proceeding to annul the Board’s determination. He argued that the phrases "proper discharge" of duties and "scope of employment" in the indemnification provision were synonymous. Thus, the former phrase did not mean that the officer’s act had to be proper; it meant that the action occurred while the officer was engaged in police work. Moreover, the petitioner asserted that because the indemnification extended to punitive damages, it contemplated coverage even for intentional misconduct. The trial court denied the petition and dismissed the proceeding. The Appellate Division affirmed, holding that the Board rationally interpreted GML § 50-l to limit defense and indemnification, and concluding that the word "proper" was "added … to exclude indemnification for intentional misconduct."

The Court of Appeals affirmed. It reasoned that the petitioner’s argument equating the phrases "proper discharge" of duties and "scope of employment" in essence read the word "proper" out of the statute. Instead, the Court insisted that the statute’s use of the modifying word, "proper," reflected an intent to hold officers to a higher standard than the mere performance of duty. Thus, the Board was permitted to evaluate the propriety of the officer’s actions when considering whether defense and indemnification were appropriate. The Court found support for its interpretation in the legislative history, which reflected an intent that all conduct was not to be immunized and indemnification was to be conditioned on the propriety of the police’s conduct. In addition, the Court pointed to similar provisions covering Westchester County and New York City.

The Court did not believe that the punitive damages provision automatically protected willful misconduct:

[A] punitive damages finding and a defense and indemnification determination are made at different times by different factfinders. The decision whether to defend and indemnify a police officer is typically made by the Board at the beginning of litigation or upon discovery of facts previously unknown — long before the facts are litigated and a judgment of punitive damages is ever rendered. The Board may take a different view of the facts than is ultimately adopted by a jury in the underlying civil action against the officer.

_Id. at *3._

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Moreover, the legislative history reflected that the drafters acknowledged that punitive damages could be awarded by juries in situations where the Board regarded the officer’s actions as "proper" under the statute. And it is the Board’s responsibility to determine what "proper" conduct is based on the particular circumstances. In concluding that the Board’s determination was not arbitrary and capricious, the Court stated that

[t]here was evidence supporting the Board’s finding that, despite knowledge that Crews could not have committed the robbery for which he had been arrested and charged (and for which he remained in pretrial detention for four months), petitioner, by his own admission, remained silent — conduct antithetical to proper police work that resulted in a man’s loss of liberty. Because that determination is rational, it is entitled to deference and must be sustained.

_Id._ at *4.

**CPLR 7803(4)**


**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_, 31 N.Y.3d 1045, 76 N.Y.S.3d 510, 100 N.E.3d 849 (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 7803


Majority of Court of Appeals Upholds Labor Department’s Interpretation of Labor Law as Rational

Apprentice Doing Work Outside Classification of Work Is Entitled to Higher Wages

International Union of Painters & Allied Trades, Dist. Council No. 4 v. New York State Dept. of Labor, 2018 N.Y. Slip Op. 06963 (October 18, 2018), deals with New York’s prevailing wage requirement, which requires workers on public works projects not to "be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state" where the public work is located. Thus, Article I, section 17 of the New York Constitution and Labor Law § 220 require that laborers, workers and mechanics who are employed on public works projects be paid a statutorily determined prevailing wage rate. The purpose of the law is to constrain employers from reducing construction work standards by hiring large numbers of unskilled workers and to assure that learning-level workers receive approved, supervised training.

The New York State Department of Labor (DOL) is responsible for enforcing the prevailing wage law, classifies work performed as a "task" with respect to a specific trade, regulates apprenticeship programs, and determines prevailing rates for journey-workers and apprentices, two categories of workers for each trade.
Specifically, this case concerned Labor Law § 220(3-e), which permits contractors on public works projects to pay lower wages to apprentices. However, the statute limits its applicability by providing that

[a]pprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the [DOL]. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the [DOL] for the classification of work [the employee] actually performed (emphasis added).

Id. at *2.

Pursuant to the statute, the plaintiffs registered a glazier apprenticeship program with the DOL. That program included training in the installation of storefronts and entrances, curtain walls and pre-glazed windows, which tasks are deemed "meaningful employment and relevant training" for glazier apprentices. However, the DOL has classified some of these tasks as ironwork, rather than glazier work.

The DOL's policy is that an apprentice who is "performing work outside of the classification of work for which the apprentice is indentured" must be paid the higher journey-worker's wage rate for that work. The plaintiffs sought a judgment declaring that glazing contractors can compensate apprentices registered in the program at the apprentice rate, rather than journey-level wages; and that the DOL's interpretation of Labor Law § 220 (3-e) was in violation of its plain meaning, which the plaintiffs assert permits the payment of apprentice rates, so long as the apprentice is in a DOH certified program, regardless of the work actually performed.

A majority of the Court of Appeals found that the statute was ambiguous. It stressed that courts are to defer to an administrative agency's statutory interpretation, where such an interpretation "involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences." Id. at *4. In addition, the DOL's interpretation of the statute was entitled to deference unless it is inconsistent with unambiguous language in the statute or irrational. Here, there is no unambiguous text with which the DOL's interpretation clearly conflicts. The DOL is simply interpreting the statute's ambiguous reference to an apprentice's working "as such" (Labor Law § 220 [3-e]), to mean working as an apprentice in the apprentice's chosen trade. It follows that an apprentice may "work as such," i.e., work as an apprentice in a particular trade and receive apprentice wages for tasks classified by the DOL as belonging to that trade, only when registered under an approved apprenticeship program for that trade. Certainly, the dissent's effort to read "as such" as referring to tasks claimed to be included in the apprenticeship program curriculum is no more compatible with the language of the statute.
The Court held that the DOL’s interpretation was rational:

Labor Law § 220 (3-e), as analyzed by the DOL, ensures that apprentices are learning tasks within their trades and that they are not used as cheap labor. The interpretation advanced by the Glazing Contractors would give contractors a financial incentive, particularly if ironworker apprentices were scarce, to divert glazier apprentices from their limited opportunities to learn glazier skills and require them to perform ironworker tasks. There is a substantial risk that employers would seek to use cheaper labor whenever consistent with the construction market. Glazier apprentices would lose significant training hours in their chosen trade if diverted to working in another trade, and they would receive supervision only from journey-workers who are, at best, expert in a trade different from their own.

Judge Garcia, in his dissent, found that the statute was not ambiguous. He asserted that deference to an agency is not required where the question is of a pure legal interpretation of statutory terms, as it was here; that this is not a situation where statutory interpretation required specialized knowledge or expertise, and regardless the DOL’s interpretation contravened the statute’s plain meaning (that registered glazier apprentices may be paid apprentice wages, regardless of the work performed); and that an agency cannot create an ambiguity by adding words to a statute and issuing it as a "policy."

Significantly, the dissent pointed out that the language that the DOL sought to insert into the statute (limiting its applicability) could be found in other provisions of Labor Law § 220, seeking to narrow their application to a particular trade or classification. Thus, the absence of such language in the relevant provision indicated that there was no legislative intent to limit the statute as the DOL suggested.

CPLR 7803


Criticizes Appellate Division for Substituting Its Own Factual Findings

In Matter of Haug v. State Univ. of N.Y. at Potsdam, 2018 N.Y. Slip Op. 06964 (October 18, 2018), the Court of Appeals spends very little time addressing the facts. Thus, reference to the Appellate Division decision is necessary. However, the Court’s review of the standard to apply under CPLR 7803(4), in connection with the judicial review of an administrative decision-maker, is worth noting.

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
Briefly, this is an Article 78 proceeding in connection with a State University of New York at Potsdam (SUNY) Hearing Board determination that found the petitioner, a student, guilty of sexual misconduct in violation of the university’s code of conduct. The Board suspended the petitioner, and, on his appeal, SUNY’s Appellate Board increased the penalty to expulsion. The Appellate Division concluded that the Board’s determination was not supported by substantial evidence, but a majority of the Court of Appeals reversed.

CPLR 7803(4) provides that one of the questions that can be raised in an Article 78 proceeding is "whether 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." The Court here stressed that the Appellate Division is to accord deference to an administrative decision-maker’s findings. In addition, "the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." *Id.* at *1. The substantial evidence standard is a "minimal standard," less than a preponderance of the evidence and only requires "that a given inference is reasonable and plausible, not necessarily the most probable." Thus, "[r]ationality is what is reviewed under the substantial evidence rule," and if there is substantial evidence, a court cannot substitute its own judgment, even if the court believes it would have decided the issue differently. *Id.* at *2. Moreover, courts recognize that there can be substantial evidence on both sides of an issue, or to support varying conclusions.

The Court also pointed out that in an administrative hearing, hearsay is admissible as competent evidence and "if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds." *Id.*

In the case at hand, the Court held that, although the petitioner’s accuser did not attend the hearing, the hearsay evidence submitted at the hearing, together with petitioner’s testimony, provided substantial evidence to support the Board’s finding. The Board is empowered to make credibility determinations and to resolve any conflicting evidence. The Court found that the Appellate Division had "improperly engaged in a re-weighing of the evidence when it substituted its own factual findings for those of respondents." *Id.*

**CPLR Article 78**


**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*, 30 N.Y.3d 674, 70 N.Y.S.3d 881, 94 N.E.3d 444 (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 85

CPLR 8501


Court of Appeals Holds That Requiring Nonresidents to Post Security for Costs Does Not Violate the Privileges and Immunities Clause

Court Stresses That There Can be Valid Reasons for Disparate Treatment Between Residents and Nonresidents

Under New York Law, residents and nonresidents are treated differently with respect to security for costs in an action, that is, only nonresidents must post security. See CPLR 8501(a), 8503. The issue in Clement v. Durban, 2018 N.Y. Slip Op. 07693 (November 14, 2018), was whether that different treatment violated the Privileges and Immunities Clause of the United States Constitution (article IV, section 2).

In Clement, the plaintiff was a New York resident when she commenced this personal injury action. However, after she pulled up stakes and went to Georgia, defendants moved for an order pursuant to CPLR 8501(a) and 8503 to compel the plaintiff to post security for costs of at least $500 in the event she lost the case. Plaintiff argued that those provisions were unconstitutional because they violated the Privileges and Immunities Clause "by impairing nonresident plaintiffs’ fundamental right of access to the courts." The trial court granted the defendants’ motion and the Appellate Division affirmed.

Under the Privileges and Immunities Clause, states are required to treat all citizens, residents and nonresidents, equally. However, the Court of Appeals here noted that the United States Supreme Court has been clear that the clause is not absolute. The restriction is not to place "unreasonable" burdens on nonresidents. With respect to access to the courts, states do not have to eliminate all differences between citizens and noncitizens that could conceivably give citizens "some detectable litigation advantage."

Thus, the Court of Appeals stressed that there can be valid reasons for disparate treatment and states are to be given considerable latitude in "analyzing local evils and prescribing appropriate cures." States can differentiate between residents and nonresidents to level the playing field by withdrawing an "unfair advantage" that a non-resident may have. Significantly, the Court has acknowledged, in dicta, that provisions requiring nonresident parties to post security for costs are a prime example of disparate treatment that does not violate the Privileges and Immunities Clause. See Salla v. Monroe County, 48 N.Y.2d 514, 521 (1979).

The Court pointed to the two-step inquiry applicable to Privileges and Immunities Clause challenges to statutes providing for disparate treatment based on residency. The first inquiry asks...
if the statute burdens one of the privileges and immunities protected by the clause. If it implicates access to the courts, the issue is whether nonresidents are given access on "reasonable and adequate … terms … for the enforcing of any rights [they] may have." *Clement*, 2018 N.Y. Slip Op. 07693 at *2 (citation omitted). Note that those terms do not have to be identical to those afforded residents. If a court finds that the plaintiff's fundamental rights have been impinged, the burden shifts to the defendant to prove that the challenged restrictions should nevertheless be upheld, by establishing that there is a "substantial reason" for the disparate treatment and that the discrimination "bears a substantial relationship to the State’s objective."

In analyzing the case at hand, the Court pointed to the facts that security for costs provisions are fixtures in states throughout the Unites States; CPLR 8501(a) expressly identifies circumstances where nonresidents do not have to post security (for example, where the plaintiff qualifies for poor persons relief); and that the legislative history for CPLR article 85 indicates that mandatory security for costs was intended "to obviate the danger of the property being placed beyond reach of a court’s process by a plaintiff, who has been ordered to pay the costs of litigation." *Id.* at *4 (citing to the 1959 Third Preliminary Rep of the Advisory Comm. on Prac. and Pro., at 443, 446).

In this case, the Court found that the plaintiff had not met her burden by merely identifying a facially discriminatory restriction that related to a protectable fundamental right because disparate terms of access to the courts for nonresidents, like those applicable to posting security costs, can be in compliance with the Privileges and Immunities Clause. The Court held that security for costs provisions do not violate the Privileges and Immunities Clause because nonresidents are given reasonable and adequate access to the courts. It maintained that its decision was consistent with United States Supreme Court decisions that have cited security for costs provisions as examples of statutes that do not violate the clause and the nearly unanimous state court decisions across the country. The Court concluded that sections 8501(a) and 8503 affect only a limited class of nonresident plaintiffs who are ineligible for any statutory exemptions and impose a "relatively minor hardship" that does not constitute an "impermissible burden" that would impair "reasonable and adequate access to the courts." *Id.* In fact, nonresident plaintiffs who do not prevail pay the same costs as non-prevailing resident plaintiffs. They are merely required to post security for those costs in advance. Moreover, where nonresident plaintiffs prevail, the security they posted is refunded, with interest.

Because the plaintiff failed to make the initial showing, the Court did not address the defendants’ bases for the provisions.
RECENT COMMERCIAL DIVISION RULES


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

Copyright © 2019 David L. Ferstendig, All Rights Reserved, Permission Required from Author for electronic or hard copy distribution.
• 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 commenced 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.
STATE OF NEW YORK

7588--A

IN SENATE

January 26, 2018

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and
when printed to be committed to the Committee on Rules -- committee
discharged, bill amended, ordered reprinted as amended and recommitted
to said committee

AN ACT to amend the civil practice law and rules, in relation to certain
negligent actions or claims; to amend a chapter of the laws of 2017,
amending the civil practice law and rules relating to accrual of caus-
es of action for medical, dental and podiatric malpractice, as
proposed in legislative bills numbers S. 6800 and A. 8516, in relation
to the effectiveness thereof; to repeal certain provisions of a chap-
ter of the laws of 2017, amending the civil practice law and rules
relating to accrual of causes of action for medical, dental and podia-
tric malpractice, as proposed in legislative bills numbers S. 6800 and
A. 8516, relating to certain negligent acts or omissions; and to
repeal certain provisions of the civil practice law and rules relating
thereto

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

Section 1. Paragraph 2 of subdivision (g) of section 203 of the civil
practice law and rules, as added by a chapter of the laws of 2017,
amending the civil practice law and rules relating to accrual of causes
of action for medical, dental and podiatric malpractice, as proposed in
legislative bills numbers S.6800 and A.8516, is REPEALED and a new para-
graph 2 is added to read as follows:

2. Notwithstanding paragraph one of this subdivision, in an action or
claim for medical, dental or podiatric malpractice, where the action or
claim is based upon the alleged negligent failure to diagnose cancer or
a malignant tumor, whether by act or omission, for the purposes of
sections fifty-e and fifty-i of the general municipal law, section ten
of the court of claims act, and the provisions of any other law pertain-
ing to the commencement of an action or special proceeding, or to the
serving of a notice of claim as a condition precedent to commencement of
an action or special proceeding within a specified time period, the time
in which to commence an action or special proceeding or to serve a

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD14476-05-8
notice of claim shall not begin to run until the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.

§ 2. Section 214-a of the civil practice law and rules, as amended by a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S.6800 and A.8516, is amended to read as follows:

§ 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions. An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the accrual of any such action. The accrual of an action occurs at the later of either (a) when one knows or reasonably should have known of the alleged negligent failure to diagnose a malignant tumor or cancer, whether by act or omission and knows or reasonably should have known that such negligent act or omission has caused the injury, or (b) the date of the last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the accrual of an action. However, such action shall commence no later than seven years from the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that: (a) where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and (b) where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition. For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

§ 3. Section 3 of a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S.6800 and A.8516, is REPEALED.

§ 4. Notwithstanding sections 50-e and 50-i of the general municipal law, section 10 of the court of claims act, and the provisions of any other law pertaining to the commencement of an action or special proceeding, or to the serving of a notice of claim as a condition precedent to commencement of an action or special proceeding within a specified time period, with regard to any action or claim arising from
alleged medical malpractice based upon an alleged negligent failure to
diagnose cancer or a malignant tumor, whether by act or omission, which,
within ten months prior to the effective date of the act that created
this section, became time-barred under any applicable limitations period
then in effect, such action or claim may be commenced within six months
of the effective date of the act that created this section, and not
beyond. The provisions added by section one and amended by section two
of the act that created this section shall not apply to such actions.
§ 5. Section 4 of a chapter of the laws of 2017, amending the civil
practice law and rules relating to accrual of causes of action for
medical, dental and podiatric malpractice, as proposed in legislative
bills numbers S.6800 and A.8516, is amended to read as follows:
§ 4. This act shall take effect immediately and shall apply to acts,
omissions, or failures occurring on or after such effective date.
§ 6. This act shall take effect immediately; provided, however, that
sections one, two and three of this act shall take effect on the same
date and in the same manner as a chapter of the laws of 2017, amending
the civil practice law and rules relating to accrual of causes of action
for medical, dental and podiatric malpractice, as proposed in legisla-
tive bills numbers S.6800 and A.8516, takes effect provided, further,
that the provisions added by section one of this act shall also apply to
acts, omissions, or failures occurring within 1 year and 90 days prior
to the effective date of this act, and not before, and further provided,
however, that for actions or claims governed by section 10 of the court
of claims act such section one shall also apply to acts, omissions, or
failures occurring within 2 years prior to the effective date of this
act, and not before; provided, further, that the provisions amended by
section two of this act shall also apply to acts, omissions, or failures
occurring within 2 years and 6 months prior to the effective date of
this act, and not before.
NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S7588A
SPONSOR: DEFRANCISCO

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to certain negligent actions or claims; to amend a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, in relation to the effectiveness thereof; to repeal certain provisions of a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, relating to certain negligent acts or omissions; and to repeal certain provisions of the civil practice law and rules relating thereto

PURPOSE OF BILL:
To amend the statute of limitations for medical, dental or podiatric malpractice for actions involving a failure to diagnose cancer or a malignant tumor to include a discovery of injury rule, allowing the current two and half year statute of limitations to run from the date an injured patient discovers, or should have discovered, that their injury was caused by malpractice.

SUMMARY OF PROVISIONS OF BILL:
Amends Sections 203 and 214-a of the Civil Practice Law and Rules to accomplish the above purpose.

JUSTIFICATION:
New York's current statute of limitations as to medical malpractice is two and one half years from the date of the act, omission or failure complained of or last treatment where there is continuous treatment. It is not only the shortest negligence statute in the State of New York, except for claims against municipalities, but works undue hardship in its application and interpretation.

The courts in this State have consistently interpreted the accrual of a cause of action for negligence as occurring at the time the act complained of occurred. In medical malpractice cases, arising out of a misdiagnosis or the failure to diagnose, the injury suffered by the victim of such a tort is often discovered until the well after the statute of limitation has expired.

This injustice is sometimes seen when a patient discovers the growth of a cancerous tumor. For example, a patient is seen by a physician for rather general complaints and a series of tests are ordered, including an x-ray. The patient is diagnosed as having no illness. Several years later the patient is diagnosed as having a spot on the lung by a different physician. Review of the original x-ray films show the presence of a
spot on the earlier film. Time is of the essence in the treatment of cancer if one is to get a favorable chance at long term survival. If more than two and one half years have passed from the date of the original x-ray (assuming no continuous course of treatment), the patient's claim is time barred, despite the fact that the patient could not have reasonably known of the existence of the medical misconduct.

The patient may in fact be totally asymptomatic for years after the two and one half year statute of limitations has expired. However, if symptoms (and hence discovery of the medical misconduct) become apparent only after the expiration of the statute, the patient nevertheless has no legal recourse.

The current statute of limitations is based upon an archaic rule that a cause of action sounding in negligence accrues at the time of the negligent act. The better rule and the one most widely adopted in other jurisdictions, such as New Jersey, North Carolina, and claims against the United States of America arising under the Federal Tort Claims Act, is one which recognizes that some injuries do not manifest themselves at the time of the negligent act, and which permits a victim of medical malpractice to discover his or her injury before their statutory period to begin suit runs. New York has dealt with this problem in the field of Toxic Torts. In 1986 the Legislature enacted CPLR Section 214-c. That section set forth a discovery rule for injuries suffered as a result of exposure and implantation (1992 amendment) of foreign substances. The justification for the passage of 214-c was that individuals who were exposed to toxic substances did not show any adverse health effects until after the three (3) year general negligence statute of limitations had run. The issue was revisited in 1992 when that act was amended to include implantation within "exposure" to remedy an injustice to victims of breast implants.

This bill would remove this gaping loophole in the law, as applicable to the victims of medical negligence referable to failure to diagnose cancer or a malignant tumor, which allows a patient's rights to expire prior to the patient even knowing that she had any rights in the first place. The bill would certainly not mandate that any claim be deemed meritorious - instead, the bill would merely prevent the statute of limitations from being used as an unfair and inequitable shield front professionally negligent medical misconduct.

LEGISLATIVE HISTORY:

New bill, but clarifying the provisions of A.8516 of 2017.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

Undetermined.

EFFECTIVE DATE:

Immediately and provides that any action or claim for medical malpractice based on a failure to diagnose cancer or a malignant tumor that expired within the last 10 months is revived, and may be filed within 6 months of the effective date. Further, the bill would apply the new date of discovery provisions to any action or claim that was still timely on the effective date.
STATE OF NEW YORK

IN ASSEMBLY

April 19, 2018

Introduced by M. of A. FAHY, MCDONALD -- read once and referred to the Committee on Codes

AN ACT to amend the civil practice law and rules and the state finance law, in relation to the disposal of property upon a judgment or order of forfeiture

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

1 Section 1. Subparagraph (i) of paragraph (h) of subdivision 2 of section 1349 of the civil practice law and rules, as added by chapter 655 of the laws of 1990, is amended to read as follows:
2 (i) seventy-five percent of such moneys shall be deposited to a law enforcement purposes subaccount of the general fund of the state where the claiming agent is an agency of the state or the political subdivision or public authority of which the claiming agent is a part, to be used for law enforcement use in the investigation of penal law offenses or law enforcement assisted diversion;

§ 2. Subdivision 3 of section 97-w of the state finance law, as amended by chapter 398 of the laws of 2004, is amended to read as follows:

3 Moneys of the fund, when allocated, shall be available to the commissioner of the office of alcoholism and substance abuse services and shall be used to provide support for (a) funded agencies approved by the New York state office of alcoholism and substance abuse services, [and (b) local school-based and community programs which provide chemical dependence prevention and education services, and (c) law enforcement assisted diversion of individuals with substance use disorders.

Consideration shall be given to innovative approaches to providing chemical dependence services.

§ 3. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD14938-03-8
NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A10403

SPONSOR: Fahy

TITLE OF BILL: An act to amend the civil practice law and rules and the state finance law, in relation to the disposal of property upon a judgment or order of forfeiture

PURPOSE OR GENERAL IDEA OF BILL:

This bill amends the civil practice law and rules and the state finance law to provide law enforcement the flexibility to expend funds received through forfeiture on activities related to law enforcement assisted diversion (LEAD).

SUMMARY OF PROVISIONS:

Section one of the bill amends subparagraph (i) of paragraph (h) of subdivision 2 of section 1349 of the civil practice law and rules to authorize law enforcement to utilize certain forfeited funds for law enforcement assisted diversion (LEAD) activities in addition to their existing authority to utilize such funds for the investigation of penal law offenses.

Section two of the bill amends subdivision 3 of section 97-w of the state finance law, known as the "chemical dependence service fund," to provide the commissioner of the Office of Alcoholism and Substance Abuse Services (OASAS) the ability to make funding available to LEAD programs in the state to assist individuals with substance use disorders.

Section three of the bill is the effective date.

JUSTIFICATION:

Law enforcement assisted diversion, or "LEAD," was first launched in Seattle, Washington in 2011 as a new harm-reduction, prevention and jail diversion approach in combating drug addiction and low-level drug possession and sales crimes. Instead of police officers immediately arresting and taking into custody alleged offenders, LEAD authorizes officers to divert people into substance use treatment, health or mental health services, housing assistance, or other services as may be needed. Law enforcement collaborates with prosecutors, defense attorneys, drug and substance abuse counselors, political leaders, housing providers, and other community leaders to end the seemingly endless cycle of arrest, prosecution, and incarceration. A 2017 study demonstrated that participants in Seattle’s LEAD program were 58% less likely to recidivate compared to those not in the program. Further, this study showed that Seattle LEAD participants were also less likely to be charged with a felony crime compared to individuals in the typical criminal justice system.

Upon seeing the successes of Seattle, New York's capital city of Albany
sought to replicate LEAD and moved to officially adopt it as city policy in 2016. Various community stakeholders signed a memorandum of understanding ensuring there would be collaboration and understanding between the police department, the district attorney, and other community advocates and stakeholders. Albany’s LEAD program is similar to Seattle’s: divert individuals who would be better served receiving help through services rather than being in the cycle of the criminal justice system. Although only in operation for a few years, the Albany LEAD program sees 3 to 4 diversions per week, with an average of 112 diversions per year. A case manager is assigned to each diverted individual that helps guide them through the services they may need in order to stay out of trouble. In order to be eligible for Albany’s LEAD program, alleged offenders must be at least 18 years old and accused of non-violent, non-exploitative offenses with no previous murder in the first or second degree, arson in the first or second degree, robbery in the first degree, or assault in the first degree convictions.

Besides Albany, other New York municipalities will be launching, developing, or exploring the possibility of LEAD, including Ithaca, Brooklyn, Buffalo, Schenectady, Rensselaer, and Essex and Orange counties.

Albany's LEAD program and other LEAD programs seeking to start up in New York have struggled to secure stable ongoing funding. Although grants have been made available for programs, a steady and reliable funding stream is needed to ensure that LEAD can continue to operate. Under the current restrictions in the Civil Practice Law and Rules, the forfeited funds provided to law enforcement can only be utilized for the investigation of Penal Law offenses, which may include the purchase of additional equipment, but not for programs like LEAD. This bill would give law enforcement the flexibility to also utilize some of this funding for LEAD so that they can effectively assist citizens in their community with overcoming addiction, homelessness, or other struggles that have placed them in conflict with the law. Additionally, this bill would make funds available from the state Chemical Dependence Service Fund to the OASAS commissioner so that they can provide funding to LEAD programs to specifically help individuals struggling with substance use disorders.

PRIOR LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None. This legislation would authorize the use of funds by law enforcement seized through forfeiture.

EFFECTIVE DATE:
Immediate.
STATE OF NEW YORK

6047
2017-2018 Regular Sessions

IN ASSEMBLY

February 22, 2017

Introduced by M. of A. TITONE, WEINSTEIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to a subpoena of records for trial

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

1 Section 1. Section 2305 of the civil practice law and rules is amended by adding a new subdivision (d) to read as follows:
2 (d) Subpoena duces tecum for a trial; service of subpoena and delivery for records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.

§ 2. This act shall take effect immediately and apply to all actions pending on or after such effective date.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD06661-01-7
NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A6047

SPONSOR: Titone

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to a subpoena of records for trial

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of her Advisory Committee on Civil Practice.

Our Advisory Committee has studied the procedures by which records intended for use at trial are produced pursuant to a subpoena duces tecum; and is of the view that counsel should have the option of having trial material delivered to the attorney or self-represented party at the return address set forth in the subpoena, rather than to the clerk of the court. This is especially true where the materials are in digital format and can be delivered on a disk or through other electronic means.

In this measure, CPLR 2305 would be amended to add a new subdivision (d) providing that where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.

This measure, which would have no fiscal impact, would be effective immediately and apply to all actions pending on or after such effective date.

2015-2016 LEGISLATIVE HISTORY:

Senate 5621 (Sen. Bonacic) (committed to Rules)
Assembly 7057 (M. of A. Titone) (PASSED)
STATE OF NEW YORK

9061

IN SENATE

June 15, 2018

Introduced by Sen. GIANARIS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the civil practice law and rules, in relation to judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service

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

Section 1. Rule 4511 of the civil practice law and rules, as renumbered by chapter 315 of the laws of 1962, is amended to read as follows:

1. Rule 4511. Judicial notice of law. (a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) When judicial notice may be taken without request; when it shall be taken on request. Every court may take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

(c) When judicial notice shall be taken based on a rebuttable presumption. Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD16284-02-8
presumption that such image, map, location, distance, calculation, or
other information fairly and accurately depicts the evidence presented.
The presumption established by this subdivision shall be rebutted by
credible and reliable evidence that the image, map, location, distance,
calculation, or other information taken from a web mapping service, a
global satellite imaging site, or an internet mapping tool does not
fairly and accurately portray that which it is being offered to prove. A
party intending to offer such image or information at a trial or hearing
shall, at least thirty days before the trial or hearing, give notice of
such intent, providing a copy or specifying the internet address at
which such image or information may be inspected. No later than ten days
before the trial or hearing, a party upon whom such notice is served may
object to the request for judicial notice of such image or information,
stating the grounds for the objection. Unless objection is made pursuant
to this subdivision, or is made at trial based upon evidence which could
not have been discovered by the exercise of due diligence prior to the
time for objection otherwise required by this subdivision, the court
shall take judicial notice of such image or information.

(d) Determination by court; review as matter of law. Whether a matter
is judicially noticed or proof is taken, every matter specified in this
section shall be determined by the judge or referee, and included in his
or her findings or charged to the jury. Such findings or charge shall be
subject to review on appeal as a finding or charge on a matter of law.

[(d) (e)] (f) Evidence to be received on matter to be judicially noticed.
In considering whether a matter of law should be judicially noticed and
in determining the matter of law to be judicially noticed, the court may
consider any testimony, document, information or argument on the
subject, whether offered by a party or discovered through its own
research. Whether or not judicial notice is taken, a printed copy of a
statute or other written law or a proclamation, edict, decree or ordi-
nance by an executive contained in a book or publication, purporting to
have been published by a government or commonly admitted as evidence of
the existing law in the judicial tribunals of the jurisdiction where it
is in force, is prima facie evidence of such law and the unwritten or
common law of a jurisdiction may be proved by witnesses or printed
reports of cases of the courts of the jurisdiction.

§ 2. This act shall take effect immediately.
NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S9061

SPONSOR: GIANARIS

TITLE OF BILL:
An act to amend the civil practice law and rules, in relation to judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service

PURPOSE:
To allow judicial notice of google maps and other web mapping or global imaging websites.

SUMMARY OF PROVISIONS:
Section 1 amends Rule 4511 of the civil practice law and rules to provide a rebuttable presumption of judicial notice of web mapping or global imaging websites.

JUSTIFICATION:
Google Maps is a tool that can be used by the courts to fairly resolve cases in a timely manner. Allowing a judge to take judicial notice of a satellite image, location, distance, or other information using Google Maps would relieve the parties from having to otherwise prove the information evidenced in the image or map. Such rebuttable presumption of judicial notice will save time in proving points of fact, while preserving the ability of an opposing party to offer credible and reliable evidence otherwise.

Judicial notice is taken of Google Maps in federal court, as a source that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" pursuant to Rule 201 of the Federal Rules of Evidence. Federal courts have taken judicial notice of images, as well as general locations and distances, provided by Google Maps and Google Earth. There is extensive use of Google Maps to determine distances between two locations, as well as an estimate of walking or driving time between such points provided by Google Maps. In 2015, the 9th Circuit sought to specifically determine if a Google Earth satellite image constituted hearsay. The Court held in US v. Lizarra-Tirado (789 F.3d 1107 (2015)) that a Google Maps satellite image is not hearsay under Rule 801a because maps make "no assertion" and are not the statement of a person. Google Maps was held to be a source beyond reasonable question and as such, was subject to judicial notice pursuant to Rule 201.

The 9th Circuit first took judicial notice of Google Maps six years ago in 2012 in the U.S v. Perea-Rey case (680 F.3d 1179 (2012)). The decision in this case described the direction of Hernandez Street in Calexico, California, and in a footnote stated:
"We take judicial notice of a Google map and satellite image as a "source whose accuracy cannot reasonably be questioned," at least for the purpose of determining the general location of the home. Fed. R. Evid. 201(b). See also Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1219 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculations); cf. Boyce Motor Lines v.

United States, 342 U.S. 337, 344 (1952) ("We may, of course, take judicial notice of geography.") (Jackson, J., dissenting).


In a 2014 Northwestern University Law Review article titled "Trial by Google: Judicial Notice in the Information Age," the author noted: "In the opinions to date, there seems to be little controversy as to the propriety of using Google Maps to judicially notice facts that would otherwise be proved by parties. Courts see the practice as self-evidently proper, often citing Justice Jackson's assertion in a 1952 case: 'We may of course, take judicial notice of geography.'" Jeffrey Bellin & Andrew Guthrie Ferguson, Trial by Google: Judicial Notice in the Information Age, Nw. U. L. Rev. 108:1137 (2014). The article discussed Google Maps in particular as a source most often relied upon by courts. The authors found: "Judicial uses of Google Maps are varied, and the case law reflects reliance on not just the basic map feature, but also Google's satellite imagery to discern the physical contours of an area and nearby landmarks."

This change to the CPLR will further the interests of justice by allowing litigation to proceed in a timelier manner and will help both plaintiff and defendant resolve litigation as soon as possible.

LEGISLATIVE HISTORY:

New Bill.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

Immediately
STATE OF NEW YORK

6048

2017-2018 Regular Sessions

IN ASSEMBLY

February 22, 2017

Introduced by M. of A. ZEBROWSKI, WEINSTEIN, WEPRIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to the authenticating effect of a party's production of material authored or otherwise created by the party

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

Section 1. The civil practice law and rules is amended by adding a new rule 4540-a to read as follows:

Rule 4540-a. Presumption of authenticity based on a party's production of material authored or otherwise created by the party. Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD06638-01-7
NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A6048

SPONSOR: Zebrowski

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to the authenticating effect of a party's production of material authored or otherwise created by the party

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice.

This measure would add a new CPLR 4540-a to eliminate the needless authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.

It is fundamental, of course, that the genuineness of a document or other physical object must be established as a prerequisite to its admissibility when the relevance of the item depends upon its source or origin. See Barker & Alexander, Evidence in New York State and Federal Courts § 9:1 (2d ed. 2011). But evidence of such authenticity should not be required if the party who purportedly authored or otherwise created the documents at issue has already admitted their authenticity. And if a party has responded to a pretrial litigation demand for its documents by producing those documents, the party has indeed implicitly acknowledged their authenticity. Thus, in such cases, the presentation of evidence of authenticity is a waste of the court's time and an unnecessary burden on the proponent of the evidence. The producing party's simple objection to admissibility for "lack of authentication" in such cases should be summarily overruled. But often it is not, thus warranting remedial legislation. This measure, then, would codify and expand upon caselaw that has been overlooked by many New York courts, practitioners, and commentators.

The idea that a party's production of his or her own papers serves to authenticate them is a specific application of the general rule that the authenticity of a document may be established by circumstantial evidence. See People v. Myers, 87 A.D.3d 826, 828 (4th Dep't 2011), leave to appeal denied, 17 N.Y.3d 954 (2011). The New York Court of Appeals recognized the probative value of a party's production of its own documents in Driscoll v. Troy Housing Auth., 6 N.Y.2d 513 (1959), where the issue was the authenticity of an unsigned, undated "roster card" describing the status of a civil service employee. The card was produced by the civil service commission from its files, where it had been kept for eight years. The Court held that "its authenticity must be presumed, or we have presumed wrongdoing rather than honesty on the part of the public official." Id. at 519. The Court's ruling was bolstered by the presumption of regularity that attaches to the acts and records of public agencies, but the authentication-by-production doctrine was also recognized with respect to private documents in Ruegg v. Fairfield Securities Corp., 308 N.Y. 313, 320 (1955). There, the Court observed that the authenticity of a copy of a letter "produced from defendant's own files" was "unquestioned."
Several recent federal cases have likewise held that a party can satisfy the requirement of authentication based on the opposing party’s production of its own papers during discovery proceedings. For example, the court in Bieda v. JCPenney Communications, Inc., 1995 WL 437689 n.2 (S.D.N.Y. 1995), held that "the mere fact that Defendants here produced most of the documents in question is at least circumstantial, if not conclusive, evidence of authenticity." See also Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1423 (10th Cir. 1991); Snyder v. Whitaker Corp., 839 F.2d 1085, 1089 (5th Cir. 1988); FTC v. Hughes, 710 F.Supp. 1520, 1522-23 (N.D.Tex. 1989).

The act-of-production doctrine in Fifth Amendment jurisprudence provides further support for the principle that a party who produces papers in response to a litigation demand for papers written by him or her implicitly authenticates those papers. For example, the Court of Appeals noted in People v. Defore that "a criminal defendant is protected by the Fifth Amendment from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness." 242 N.Y. 13, 27 (1926), cert. denied, 270 U.S. 657 (1926) (internal quotation marks and citation omitted) (italics added). See also U.S. v. Hubbell, 530 U.S. 27, 36 (2000) ("By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.") (internal quotation marks omitted); Fisher v. United States, 425 U.S. 391, ' 412 n.12 (1976) (collecting cases).

In furtherance of the foregoing principles, the proposed new CPLR 4540-a creates a rebuttable presumption that accomplishes two goals. First, when the item at issue is one that has already been produced by a party in the course of pretrial disclosure, and such item purportedly was authored or created by that party, the opposing party is thereby relieved of the need, ab initio, to come forward with evidence of its authenticity. Second, the rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked "objection" based on lack of authenticity, however, will not suffice. Shifting the burden of proof to the producing party makes sense because that party is most likely to have better access to the relevant evidence on the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule.

We note that adoption of the proposed new CPLR 4540-a would not preclude establishing authenticity by any other statutory or common law means. See CPLR 4543 ("Nothing in this article prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.").

This measure, which would have no fiscal impact on the State, would take effect on the first of January next succeeding the date on which it shall have become law.

2016 LEGISLATIVE HISTORY:

Senate 7256 (Sen. Bonacic) (committed to Rules)
Assembly 9541 (M. of A. Zebrowski) (PASSED)
New Uniform AD Practice Rules
Practice Rules of the Appellate Division

Approved by Joint Order of the Departments of the New York State
Supreme Court, Appellate Division
December 12, 2017
(Revised June 29, 2018)

Part 1250

1250.1 General Provisions and Definitions

(a) Unless the context requires otherwise, as used in this Part:

(1) The word “cause” or “matter” includes an appeal, a special proceeding transferred to
the Appellate Division pursuant to CPLR 7804 (g), a special proceeding initiated in the
Appellate Division, and an action submitted to the Appellate Division pursuant to CPLR 3222 on
a case containing an agreed statement of facts upon which the controversy depends.

(2) Any reference to the “court” or the “Appellate Division” means the Appellate
Division of the Supreme Court of the State of New York for the Judicial Department having
jurisdiction over the cause or matter; any reference to a “justice” means a justice of that court;
any reference to the “clerk” means the clerk of that court or a designee, unless the context of
usage indicates the clerk of another court.

(3) Wherever reference is made to a “judgment,” “order” or “determination,” it shall also
be deemed to include a sentence.

(4) The word “consolidation” refers to the combining of two or more causes arising out
of the same action or proceeding in one record or appendix and one brief.

(5) The phrase “cross appeal” refers to an appeal taken by a party whose interests are
adverse to a party who previously appealed from the same order or judgment as relates to that
appeal and cross appeal.

(6) The word “concurrent,” when used to describe appeals, shall refer to those appeals
which have been taken separately from the same order or judgment by parties whose interests are
not adverse to one another as relates to those appeals.

(7) The word “appellant” shall refer to the party required to file the initial brief to the
court in a cause or matter, including an appellant, a petitioner, an appellant-respondent and
similar parties.

(8) The term “NYSCEF” shall mean the New York State Courts Electronic Filing System
and the “NYSCEF site” shall mean the New York State Courts Electronic Filing System website
located at www.nycourts.gov/efile.
(9) The phrase “filed electronically,” when used to describe submissions to a court, shall refer to documents that have been filed by electronic means through the NYSCEF site.

(10) The phrase “electronic means” shall mean any method of transmission of information between computers or other machines, other than facsimile machines.

(11) The phrase “hard copy” shall mean a document in paper format.

(12) The phrase “digital copy” shall mean a document in text-searchable portable document format and otherwise compliant with the technical requirements established by the court.

(b) Number of Justices. When a cause is argued or submitted to the court with four justices present, it shall, whenever necessary, be deemed submitted also to any other duly qualified justice of the court, unless objection is noted at the time of argument or submission.

(c) Filing and Service; Weekends and Holidays.

(1) Filing

   (i) Electronic filing. For the purpose of meeting deadlines imposed by court rule, order, or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of the submissions are transmitted to the NYSCEF site. The filing of additional hard copies of such electronic filings pursuant to court rules shall not affect the timeliness of the filing.

   (ii) Hard copy filing. For the purpose of meeting deadlines imposed by court rule, order or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions not filed electronically will be deemed filed as of the time hard copies of the submissions are received and stamped by the office of the clerk.

   (iii) A document deemed filed for purposes of timeliness under this rule may thereafter be reviewed and rejected by the clerk for failure to comply with any applicable statute, rule or order.

(2) Proof of Service. All hard copy filings shall be accompanied by proof of service upon all necessary parties pursuant to CPLR 2103.

(3) Service by Mail and Overnight Mail. If a period of time prescribed by this Part is measured from the service of a record, brief or other submission and service is by mail, five days shall be added to the prescribed period. If service is by overnight delivery, one day shall be added to the prescribed period.

(4) Service by Electronic Mail Upon Consent. Unless otherwise directed by the court, parties in matters not subject to e-filing may agree, in writing, to service of submissions by
electronic mail. A copy of any such agreement shall be filed with the court with the affidavit of service.

(5) Weekends and Holidays. If a period of time prescribed by this Part for the performance of an act ends on a Saturday, Sunday or court holiday, the act will be deemed timely if performed before the close of business on the next business day.

(d) Signing of documents. The original of every hard copy document submitted for filing in the office of the clerk of the court shall be signed in ink in accordance with the provisions of section 130-1.1-a (a) of this Title. Copies of the signed original shall be served upon all parties to the matter and shall be filed in the office of the clerk whenever multiple copies of a submission are required to be served and filed in accordance with the provisions of this Part. Documents filed electronically shall be signed in accordance with the provisions of the Appellate Division Rules for Electronic Filing.

(e) Confidentiality and Sealing.

(1) Records, briefs and other submissions filed in matters deemed confidential by law shall not be available to the public except as provided by statute or rule.

(2) Appeals and proceedings that are confidential by law include, but are not limited to:

(i) Matters arising pursuant to the Family Court Act (Family Court Act § 166).

(ii) Matrimonial actions and proceedings (Domestic Relations Law § 235; CPLR 105 [p]).

(iii) Adoption proceedings (Domestic Relations Law § 114).

(iv) Youthful offender adjudications (CPL 720.35 [2]; 725.15).

(v) Proceedings pursuant to article 6 of the Social Services Law (Social Services Law § 422 [4] [a]).

(vi) In criminal matters not otherwise confidential, records of grand jury proceedings (CPL 190.25 [4]), grand jury reports (CPL 190.85) and presentence reports and memoranda (CPL 390.50).

(vii) Proceedings pursuant to Civil Rights Law § 50-b.

(viii) Proceedings pursuant to Judiciary Law § 90 (10).

(3) Applications for sealing and unsealing court records shall be made by motion, upon good cause shown.
(4) In a civil cause, documents that are subject to an existing sealing order from another court shall remain subject to such order, except as otherwise ordered by the Appellate Division.

(f) Appellate Division Numbers. All documents filed with the court shall prominently display the name of the court of original instance, the index number or indictment number of the case in such court, if any, and any number assigned by the Appellate Division.

(g) Rejection for Noncompliance. The clerk may reject any submission that does not comply with this Part, is incomplete, is untimely, is not legible, or fails to comply with any applicable statute, rule or order. The court may waive compliance by any party with any provision of this Part.

(h) Sanctions. An attorney or party who fails to comply with a rule or order of the court or who engages in frivolous conduct shall be subject to such sanction as the court may impose. The imposition of sanctions and costs may be made upon motion or upon the court's own initiative, after a reasonable opportunity to be heard. The court may impose sanctions and/or costs upon a written decision setting forth the conduct on which the imposition is made.

(i) Electronic Filing Rules. The rules of this Part shall be read in conjunction with the Electronic Filing Rules of the Appellate Division (22 NYCRR Part 1245). Where there is a conflict between this Part and Part 1245 in an appellate e-filed matter, Part 1245 shall control.
1250.2 Settlement or Withdrawal of Motion, Appeal or Proceeding; Notice of Change in Circumstances

(a) Withdrawal of Motion. A moving party may file a written request to withdraw a motion at any time prior to its determination.

(b) Withdrawal or Discontinuance of Appeal or Proceeding.

(1) Unperfected appeals, or proceedings where issue has not been joined, may be withdrawn and discontinued by letter application to the court, with service on all parties.

(2) An appeal that has been perfected or a proceeding where issue has been joined may be withdrawn and discontinued by leave of the court upon the filing with the court of a written stipulation of discontinuance signed by the parties or their attorneys and, in criminal appeals, by the appellant personally. Absent such a stipulation, an appellant may move for permission to withdraw such an appeal or proceeding. An appeal that has been perfected in the Second Judicial Department and in which no respondent’s brief has been filed may be withdrawn by letter application to the court, with service on all parties.

(c) Notice of Change of Circumstances. The parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue therein or when a matter or any issue therein has been rendered moot. The parties or their attorneys shall likewise immediately notify the court if the cause should not be calendared because of the death of a party, bankruptcy or other appropriate event. Any such notification shall be followed by an application for appropriate relief. Any party or attorney who, without good cause shown, fails to comply with the requirements of this subdivision may be subject to the imposition of sanctions.

1250.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Initial Filings. Unless the court shall direct otherwise, in all civil matters counsel for the appellant or the petitioner shall file with the clerk of the court of original instance and serve on all parties, together with the notice of appeal or transfer order and the order or judgment appealed from, an initial informational statement on a form approved by the court and in such number as the court may direct. The clerk of the court from which the appeal is taken shall promptly transmit to the Appellate Division the informational statement and a copy of the notice of appeal or order granting leave or transferal and the order or judgment appealed from.

(b) Active Management. The court may direct that any matter be actively managed and may set forth a scheduling order specifying the time and manner of expedited briefing.

(c) Settlement or Mediation Program.

(1) The court may issue a notice in any settlement or mediation program directing the attorneys for the parties, the parties themselves (unless the court excuses a party’s personal presence), and such additional parties in interest as the court may direct to attend a conference before such person as it may designate to consider settlement, the limitation of issues and any
other matter that such person determines may aid in the disposition of the appeal or resolution of
the action or proceeding. Attorneys and representatives who appear must be fully familiar with
the action or proceeding, and must be authorized to make binding stipulations or commitments
on behalf of the party represented.

(2) Counsel to any party may apply to the court by letter at any time requesting such a
conference. The application shall include a brief statement indicating why a conference would
be appropriate.

(3) Upon the failure of any party, representative or counsel to appear for or participate in
a settlement or mediation conference, or to comply with the terms of a stipulation or order
entered following such a conference, the party or counsel may be subject to sanctions.
1250.4 Motions

(a) General.

(1) Day and time returnable. Unless otherwise required by statute, rule or order of the court or any justice thereof, every motion and every proceeding initiated in the court shall be made returnable at 10:00 a.m. on any Monday (or, if Monday is a legal holiday, the first business day of the week), and on such other days as the court may direct.

(2) Commencement; filing. All motions initiated by notice of motion shall be filed with the clerk at least one week before the return date. The originals of all such submissions shall be filed, together with proof of service upon all parties entitled to notice. Motions by any other method shall be as directed by the court or a justice thereof.

(3) The submissions in support of every motion made before the appeal is determined shall include a copy of the order, judgment or determination sought to be reviewed, the decision, if any, and the notice of appeal or other document which first invoked the jurisdiction of the court, with proof of filing.

(4) Notice and service of documents. Unless otherwise directed by the court, a motion shall be served with sufficient notice to all parties as set forth in CPLR 2103. In computing the notice period, the date upon which service is made shall not be included.

(5) Answering and reply documents, if any, shall be served within the time prescribed by CPLR 2214 (b) or directed by a justice of the court. The originals thereof with proof of service shall be filed by 4:00 p.m. of the business day preceding the day on which the motion is returnable, unless, for good cause shown, they are permitted to be filed at a later time.

(6) Cross motions. Cross motions shall be made returnable on the same date as the original motion. A cross motion shall be served, either personally, by overnight delivery service or by electronic means, and filed at least three business days before the return date.

(7) Motions shall be deemed submitted on the return date, and no further documents shall be accepted for filing without leave of the court upon written application.

(8) Oral argument. Oral argument of motions is not permitted.

(9) One adjournment, for a period of 7 or 14 days, shall be permitted upon written consent of the parties to the appeal, filed no later than 10:00 a.m. on the return date.

(b) Motions or Applications Which Include Requests for Interim Relief.

(1) An application or order to show cause presented for signature that includes a request for a temporary stay or other interim relief pending determination of a motion, or an application pursuant to CPLR 5704, shall be presented in person unless the court excuses such appearance, and shall state, among other things:
(i) the nature of the motion or proceeding;

(ii) the specific relief sought; and

(iii) the names, addresses, telephone numbers and (where known) email addresses of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding.

(2) Notice. The party seeking relief as provided in this subdivision shall give reasonable notice to his or her adversary of the day and time when, and the location where, the application or order to show cause will be presented and the relief (including interim relief) being requested. The application or order to show cause shall be accompanied by an affidavit or affirmation stating the time, place and manner of such notification; by whom such notification was given; if applicable, reasons for the non-appearance of any party; and, to the extent known, the position taken by the opposing party.

(3) Response. Unless otherwise ordered by the court, all submissions in opposition to any motion or proceeding initiated by an application or order to show cause shall be filed with the clerk at or before 10:00 a.m. on the return date, and shall be served by a method calculated to place the movant and other parties to the motion in receipt thereof on or before that time. The originals of all such submissions shall be filed with the court. On the return date the motion or proceeding will be deemed submitted to the court without oral argument.

(4) Reply. Reply submissions shall be permitted only by leave of the court.

(c) Permission to Appeal to the Appellate Division in a Civil Matter.

(1) When Addressed to a Justice.

(i) An application to a justice of the court for permission to appeal pursuant to CPLR 5701 (c) shall be made within the time prescribed by CPLR 5513.

(ii) The submissions upon which such an application is made shall state whether any previous application has been made and, if so, to whom and the reason given, if any, for any denial of leave or refusal to entertain the application.

(2) When Addressed to the Court.

(i) Where leave of the court is required for an appeal to be taken to it, the application for such leave shall be made in the manner and within the time prescribed by CPLR 5513 and 5516.

(ii) The submissions upon which an application for leave to appeal is made shall include a copy of the order or judgment and decision, if any, of the court below, a concise statement of the grounds of alleged error and a copy of the order of the lower court denying leave to appeal, if any.
(3) Motions for leave to appeal from an order of the Appellate Term.

(i) Where applicable, motions pursuant to CPLR 5703 for leave to appeal from an order of the Appellate Term shall be made only after a denial of a motion for leave to appeal made at the Appellate Term.

(ii) Such motions shall include a copy of the decisions, judgments, and orders of the lower courts, including: a copy of the Appellate Term order denying leave to appeal; a copy of the record in the Appellate Term if such record shall have been printed or otherwise reproduced; and a concise statement of the grounds of alleged error. If the application is to review an Appellate Term order which either granted a new trial or affirmed the trial court's order granting a new trial, the application shall also include the applicant's stipulation consenting to the entry of judgment absolute against him or her in the event that the Appellate Division should affirm the order appealed from.

(d) Poor Person Relief.

(1) All matters. An affidavit in support of a motion for permission to proceed as a poor person, with or without a request for assignment of counsel, shall set forth the amount and sources of the movant's income; that the movant is unable to pay the costs, fees and expenses necessary to prosecute or respond in the matter; whether trial counsel was assigned or retained; whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses; and such other information as the court may require.

(2) Civil Matters.

(i) In a civil appeal or special proceeding, an affidavit in support of a motion for permission to proceed as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1) of this Part, set forth sufficient facts so that the merit of the contentions can be ascertained (CPLR 1101 [a]). This subdivision has no application to appeals described in Family Court Act §1120(a), SCPA 407(1) and Judiciary Law §35(1).

(ii) Applicants for poor person relief in civil matters shall comply with the service requirements of CPLR 1101(c).

(3) Family Court Matters

(i) In appeals pursuant to the Family Court Act, in lieu of a motion, an application for either permission to proceed as a poor person or for permission to proceed as a poor person and assignment of counsel may be made by trial counsel assigned pursuant to Family Court Act § 262 or the attorney for the child, as appropriate, by filing with the clerk a certification of continued indigency and continued eligibility for assignment of counsel pursuant to Family Court Act § 1118.
(ii) Counsel shall attach to the certification a copy of the order from which the appeal is taken, together with the decision, if any, and a copy of the notice of appeal with proof of service and filing.

(4) Criminal Matters. In a criminal appeal not otherwise addressed in section 1250.11(a) of this Part, an affidavit in support of a motion for permission to proceed on appeal as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1), set forth the following: the date and county of conviction; whether the defendant is at liberty or in custody; the name and address of trial counsel; whether trial counsel was appointed or retained and, if retained, the source of the funds for such retention and an explanation as to why similar funds are not available to retain appellate counsel; whether the defendant posted bail during the trial proceedings; and, if bail was posted and the defendant is currently in custody, an explanation as to why the funds used to post such bail are not available to retain appellate counsel.

(e) Admission Pro Hac Vice. An attorney and counselor-at-law or the equivalent may apply for permission to appear pro hac vice with respect to a particular matter pending before the court pursuant to 22 NYCRR 520.11 by providing an affidavit stating that the applicant is a member in good standing in all the jurisdictions in which the applicant is admitted to practice and that the applicant is associated with a member in good standing of the New York bar, which member shall be the attorney of record in the matter. The applicant shall attach to the affidavit an original certificate of good standing from the court or other body responsible for regulating admission to the practice of law in the state in which the applicant maintains his or her principal office for the practice of law. The New York attorney of record in the matter shall provide an affirmation in support of the application.

(f) Leave to File Amicus Curiae Brief. A person or entity who is not a party to an appeal or proceeding may make a motion to serve and file an amicus curiae brief. An affidavit or affirmation in support of the motion shall briefly set forth the issues to be briefed and the movant's interest in the issues, and shall include six such number of copies of the proposed brief as the court requires. The proposed brief may not duplicate arguments made by a party to the appeal or proceeding. Unless permitted by the court, a person or entity granted permission to file an amicus curiae brief shall not be entitled to oral argument.
1250.5 Methods of Perfecting Causes

(a) Unless the court directs that a cause be perfected in a particular manner, an appellant may elect to perfect a cause by the reproduced full record method (CPLR 5528[a][5]); by the appendix method (CPLR 5528[a][5]); by the agreed statement in lieu of record method (CPLR 5527); or, where authorized by statute or this Part or order of the court, by the original record method.

(b) Reproduced Full Record Method. If the appellant elects to proceed on a reproduced full record on appeal, the record shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(c) Appendix Method. If the appellant elects to proceed by the appendix method, the appendix shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(d) Agreed Statement in Lieu of Record Method. If the appellant elects to proceed by the agreed statement method in lieu of record method, the statement shall be reproduced as a joint appendix as provided in sections 1250.6 and 1250.7 of this Part. The statement required by CPLR 5531 shall be appended.

(e) Original Record Method. In the First, Second and Fourth Judicial Departments, the following causes may be perfected upon the original record, including a properly settled transcript of the trial or hearing, if any:

(1) appeals from the Family Court;
(2) appeals under the Election Law;
(3) appeals under the Human Rights Law (Executive Law § 298);
(4) proceedings transferred to the court pursuant to CPLR 7804 (g)
(5) appeals where the sole issue is compensation of a judicial appointee;
(6) appeals under Correction Law §§ 168-d (3) and 168-n (3);
(7) appeals of criminal causes;
(8) appeals from the Appellate Term, where the matter was perfected on an original record at the Appellate Term;
(9) other causes where an original record is authorized by statute; and
(10) causes where permission to proceed upon the original record has been authorized by the court.
1250.6 Reproduction of Records, Appendices and Briefs

(a) Compliance with the CPLR. Briefs, appendices and reproduced full records shall comply with the requirements of CPLR 5528 and 5529, and reproduced full records shall, in addition, comply with the requirements of CPLR 5526.

(b) Method of Reproduction. Briefs, records and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper or its digital equivalent. Use of recycled paper and reproduction on both sides of the paper is encouraged for hard copy filings and submissions.

(c) Paper Quality, Size and Binding. Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color and measure 11 inches along the bound edge by 8½ inches. Records, appendices and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness.

(d) Designation of Parties. The parties to all appeals shall be designated in the record and briefs by adding the word "Appellant," "Respondent," etc., as the case may be, following the party's name, e.g., "Plaintiff-Respondent," "Defendant-Appellant," "Petitioner-Appellant," "Respondent-Respondent," etc. Parties who have not appealed and against whom the appeal has not been taken shall be listed separately and designated as they were in the trial court, e.g., "Plaintiff," "Defendant," "Petitioner," "Respondent." In appeals from the Surrogate's Court or from judgments on trust accountings, the caption shall contain the title used in the trial court including the name of the decedent or grantor, followed by a listing of all parties to the appeal, properly designated. In causes originating in the Appellate Division, the parties shall be designated "Petitioner" and "Respondent" or "Plaintiff" and "Defendant."

(e) Docket Number. The cover of all records, briefs and appendices shall display the appellate division docket number assigned to the cause, or such other identifying number as the court shall direct, in the upper right-hand portion opposite the title.
1250.7 Form and Content of Records and Appendices; Exhibits

(a) Format. Records and appendices shall be consecutively paginated and shall include accurate reproductions of the submissions made to the court of original instance, formatted in accordance with the practice in that court. Reproductions may be slightly reduced in size to fit the page and to accommodate the page headings required by CPLR 5529 (c), provided, however, that such reduction does not significantly impair readability.

(b) Reproduced Full Record. The reproduced full record shall be bound separately from the brief, shall include the items set forth in CPLR 5526, and shall include in the following order so much of the following items as shall be applicable to the particular cause:

(1) A cover which shall contain the title of the cause on the upper portion, and, on the lower portion, the names, addresses, telephone numbers and email addresses of the attorneys, the county clerk's index or file number, the docket or other identifying number or numbers used in the court from which the appeal is taken, and the superior court information or indictment number;

(2) The statement required by CPLR 5531;

(3) A table of contents which shall list and briefly describe each document included in the record. The part of the table relating to the transcript of testimony shall separately list each witness and the page at which direct, cross, redirect and re-cross examinations begin. The part of the table relating to exhibits shall concisely indicate the nature or contents of each exhibit and the page in the record where it is reproduced and where it is admitted into evidence;

(4) The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, exhibits, and any opinion or decision in the cause;

(5) An affirmation, certification, stipulation or order, settling the transcript pursuant to CPLR 5525;

(6) A stipulation or order dispensing with reproducing exhibits, as provided in subdivision (c).

(7) The appropriate certification, stipulation, or settlement order pursuant to subdivision (g).

(c) Exhibits. The parties may stipulate to dispense with reproduction of exhibits in the full reproduced record on grounds that (1) the exhibits are not relevant or necessary to the determination of an appeal, and will not be cited in the parties' submissions; or (2) the exhibits, though relevant and necessary, are of a bulky or dangerous nature, and will be kept in readiness and delivered to the court on telephone notice.
(d) Appendix.

(1) The appendix shall include those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the following:

(i) notice of appeal or order of transfer;
(ii) judgment, decree or order appealed from;
(iii) decision and opinion of the court or agency, and report of a referee, if any;
(iv) pleadings, and in a criminal case, the indictment or superior court information;
(v) material excerpts from transcripts of testimony or from documents in connection with a motion. Such excerpts shall include all the testimony or averments upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such excerpts shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;
(vi) copies of relevant exhibits, including photographs, to the extent practicable;
(vii) if pertinent, a statement identifying bulky, oversized or dangerous exhibits relevant to the appeal, as well as identifying the party in custody and control of each exhibit; and
(viii) the appropriate certification, stipulation or settlement order pursuant to subdivision (g).

(2) The appendix shall have a cover complying with subdivision (b)(1) and shall include the statement required by CPLR 5531 and a table of contents.

(3) The court may require such other contents in an appendix in a criminal cause as it deems appropriate.

(4) If a settled transcript of the stenographic minutes, or an approved statement in lieu of such transcript, is not included in the submissions, the appellant shall cause a digital copy of such transcript or statement to be filed together with the brief.

(e) Condensed Format of Transcripts Prohibited. No record or appendix may include a transcript of testimony given at a trial, hearing or deposition that is reproduced in condensed format such that two or more pages of transcript in standard format appear on one page, unless the transcript was submitted in that format to the court from which the appeal is taken.

(f) Settlement of Transcript or Statement. Regardless of the method used to prosecute any civil cause, if the record includes a transcript of the stenographic minutes of the proceedings or a statement in lieu of such transcript, such transcript or statement shall first be either stipulated as correct by the parties or their attorneys or settled pursuant to CPLR 5525.

(g) Certification of Record or Appendix. A reproduced full record or an appendix shall be certified either by: (1) a certificate of the appellant's attorney pursuant to CPLR 2105; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532 or, if the parties are unable to stipulate, an order settling the record. The reproduced copy
containing the signed certification or stipulation shall be marked "Original." A party may move
to waive certification pursuant to this rule for good cause shown, and shall include with the
motion a copy of the proposed record or appendix.

1250.8 Form and Content of Briefs

(a) Cover. The cover shall set forth the title of the action or proceeding. The upper right-hand
section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to
be argued, the time actually required for the argument; and the name of the attorney who will
argue. The lower right-hand section shall contain the name, address, telephone number and
email address of the attorney filing the brief and shall indicate whom the attorney represents.

(b) Appellant’s Brief. The appellant’s brief shall include, in the following order:

(1) a table of contents, which shall include (i) a list of point headings and (ii) the contents
of the appendix, if it is not bound separately, with references to the initial page of each document
included and of the direct, cross and redirect examination of each witness;

(2) a table of cases (alphabetically arranged), statutes and other authorities, indicating the
pages of the brief where they are cited;

(3) a concise statement, not exceeding two pages, of the questions involved, set forth
separately and followed immediately by the answer, if any, of the court from which the appeal is
taken;

(4) a concise statement of the nature of the case and of the facts which should be known
to determine the questions involved, with appropriate citations to the reproduced record,
appendix, original record or agreed statement in lieu of record;

(5) the argument for the appellant, which shall be divided into points by appropriate
headings distinctively printed;

(6) a statement certifying compliance with printing requirements under this Part, on a
form approved by the court, as set forth in subdivision (f);

(7) in the First and Second Judicial Departments, the appellant’s brief shall include as an
addendum the statement required by CPLR 5531;

(8) in the First and Second Judicial Departments, in any civil cause permitted to be
heard on the original record, the appellant’s brief shall include:

(i) a copy of the order or judgment appealed from and the decision, if any;

(ii) a copy of the opinion and findings, if any, of a hearing officer and the
determination and decision of any administrative department, board or agency; and
(iii) a copy of the notice of appeal or order transferring the proceeding to this court.

(c) Respondent’s Brief. The respondent’s brief shall conform to the requirements of subdivision (b), except that a counterstatement of the questions involved or a counterstatement of the nature and facts of the case shall be included only if the respondent disagrees with the statement of the appellant.

(d) Reply Brief. Any reply brief of the appellant or cross appellant shall conform to the requirements of subdivision (b), without repetition. An appellant’s reply in a cross appeal shall include the points of argument in response to the cross appeal.

(e) Sur-reply Brief. Absent leave of the court, sur-reply briefs shall not be permitted.

(f) Computer-generated briefs.

(1) Briefs prepared on a computer shall be printed in either a serified, proportionally spaced typeface such as Times Roman, or a serified, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters.

   (i) Briefs set in a proportionally spaced typeface. The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points.

   (ii) Briefs set in a monospaced typeface. The body of a brief utilizing a monospaced typeface shall be printed in 12-point type containing no more than 10½ characters per inch, but footnotes may be printed in type of no less than 10 points.

(2) Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).

(g) Typewritten briefs.

(1) Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. The original of the brief shall be signed and filed as one of the number of copies required by section 1250.9 of this Part.

(2) Typewritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).
(h) Margins, line spacing and page numbering of computer-generated and typewritten briefs. Computer-generated and typewritten briefs shall have margins of one inch on all sides of the page. Text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages shall be numbered consecutively.

(i) Handwritten briefs.

   (1) Self-represented litigants and persons filing pro se supplemental briefs may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black or blue ink.

   (2) Handwritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance or any addendum authorized pursuant to subdivision (k). Pages shall be numbered consecutively. The submission of handwritten briefs is not encouraged. If illegible, handwritten briefs may be rejected for filing by the clerk.

(j) Printing Specifications Statement. Every brief, except those that are handwritten, shall have at the end thereof a printing specifications statement, stating that the brief was prepared either on a typewriter, a computer or by some other specified means. If the brief was typewritten, the statement shall further specify the size and pitch of the type and the line spacing used. If the brief was prepared on a computer, the statement shall further specify the name of the typeface, point size, line spacing and word count. A party preparing the statement may rely on the word count of the processing system used to prepare the brief. The signing of the brief in accordance with section 130-1.1-a (a) of this Title shall also be deemed the signer’s representation of the accuracy of the statement.

(k) Briefs may include an addendum that are composed exclusively of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter cited therein that were not published or that are not otherwise readily available.
1250.9  Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Appellant's Filing. Except where the court has directed that an appeal be perfected by a particular time, an appellant shall file with the clerk within six months of the date of the notice of appeal or order granting leave to appeal:

(1) if employing the reproduced full record method, an original and five hard copies of a reproduced full record, an original and five hard copies of appellant's brief, and one digital copy of the record and brief, with proof of service of one hard copy of the record and brief upon each other party to the appeal; or

(2) if employing the appendix method, an original, five hard copies and one digital copy of appellant's brief and appendix, with proof of service of one hard copy of the brief and appendix upon each other party to the appeal, and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or

(ii) in the Third and Fourth Judicial Departments, a digital copy of the complete record.

(3) if employing the agreed statement in lieu of record method, an original and five hard copies of the agreed statement in lieu of record as provided in CPLR 5527, an original and five hard copies of appellant's brief, and one digital copy of the agreed statement and the brief, with proof of service of one hard copy of the agreed statement and brief upon each other party to the appeal; or

(4) if employing perfecting on the original record method, an original and five hard copies and one digital copy of appellant's brief, with proof of service of one hard copy of the brief upon each other party to the appeal and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or

(ii) in the Third and Fourth Judicial Departments, a hard copy of the complete record.

(5) In the First and Second Judicial Departments, where a subpoena is required to be served upon the clerk of the court of original instance pursuant to sections 1250.9(a)(2)(i) and 1250.9(a)(4)(i) of this Part, the clerk from whom the papers are subpoenaed shall compile the original papers constituting the record on appeal and cause them to be transmitted to the clerk of the court, together with a certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted.
(b) Extension of time to perfect appeal. Except where the court has directed that the appeal be perfected by a particular time, the parties may stipulate, or in the alternative an appellant may apply by letter, on notice to all parties, to extend the time to perfect an appeal up to 60 days. Any such stipulation shall be filed with the court. The appellant may thereafter apply by letter, on notice to all parties, to extend the time to perfect by up to an additional 30 days. Any further application for an extension of time to perfect the appeal shall be made by motion.

(c) Respondent’s Filing. The respondent on an appeal shall file with the clerk within 30 days of the date of service of the appellant’s submissions or, in the First Judicial Department, in accordance with the court’s published terms calendar:

(1) under the full record method, the agreed statement in lieu of record method, or when perfecting on the original record method, an original and five hard copies and one digital copy of the respondent’s brief, with proof of service of one hard copy of the brief upon each party to the appeal; or

(2) under the appendix method, an original and five hard copies and one digital copy of the respondent’s brief and appendix, if any, with proof of service of one hard copy of the brief and appendix, if any, upon each party to the appeal.

(d) Appellant’s Reply. The appellant shall file with the clerk an original, five hard copies and one digital copy of the appellant’s reply brief, with proof of service of one hard copy of the brief upon each party to the matter, within 10 days of the date of service of the respondent’s submissions or, in the First Judicial Department, in accordance with the court’s published terms calendar.

(e) Pro se or unrepresented parties shall be exempt from the requirement of the filing of a digital copy of any brief or other document.

(f) Cross Appeals; Concurrent Appeals from Single Order or Judgment; Consolidation of Appeals from Multiple Orders or Judgments.

(1) Cross appeals. In a cross appeal:

(i) The appealing parties shall consult and make best efforts to stipulate to a briefing schedule. In the First Judicial Department, if the parties fail to stipulate to an alternative briefing schedule, the cause shall be perfected in accordance with the court’s published terms calendar, and shall not be governed by the time parameters set forth in subsections (iv) through (vi).

(ii) The appealing parties shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix;

(iii) The party that first perfects the appeal shall be denominated the appellant-respondent;
(iv) A respondent-appellant’s answering brief shall include the points of argument on the cross appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the first appeal brief;

(v) An appellant-respondent’s reply brief shall include the points of argument in response to the cross-appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the answering brief;

(vi) Unless the parties have stipulated otherwise, a respondent-appellant’s reply brief, if any, shall be served within 10 days after service of appellant’s reply brief.

(2) Concurrent appeals from a single order or judgment. In concurrent appeals, the appellants shall perfect the appeals together, without motion, in the period measured from the date of the latest notice of appeal. The appellants shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix.

(3) Appeals from multiple orders or judgments. When an appellant takes appeals from multiple orders and judgments arising out of the same action or proceeding, the appellant may perfect the appeals together, without motion and upon a single record or appendix, provided that each appeal is perfected in a timely manner pursuant to this Part.

(4) Absent an order of the court, appeals from orders or judgments in separate actions or proceedings cannot be consolidated but may, upon written request of a party, be scheduled by the court to be heard together on the same day.

(g) Extensions of Time to File and Serve Responsive Briefs. Except where the court has directed that answering or reply briefs be served and filed by a particular time, an extension of time to serve and file such briefs may be obtained as follows:

(1) By initial stipulation or application. The parties may stipulate or a party may apply by letter on notice to all parties to extend the time to file and serve an answering brief by up to 30 days, and to file a reply brief by up to 10 days. Not more than two such stipulations or applications shall be permitted. A stipulation shall not be effective unless promptly filed with the court. Any further application shall be made by motion. In the First Judicial Department, extensions by stipulation shall be filed by a date set forth in the court’s published terms calendar, and shall put a matter over to any later term other than the June Term.

(2) By motion. A party may move to extend the time to file and serve a brief.

(h) Leave to File Oversized Brief. An application for permission to file an oversized brief shall be made to the clerk by letter stating the number of words or pages by which the brief exceeds the limits set forth in this section and the reasons why submission of an oversized brief is
necessary. The letter shall be accompanied by a copy of the proposed brief and printing specifications statement.

(i) Constitutionality of State Statute. Where the constitutionality of a statute of the State is involved in a matter in which the State is not a party, the party raising the issue shall serve a copy of the brief upon the Attorney General of the State of New York, and file proof of service with the court. The Attorney General may thereupon intervene in the appeal.

1250.10 Dismissal of a Matter

(a) Civil Matters. In the event that an appellant fails to perfect a civil matter within six months of the date of the notice of appeal, the order of transfer, or the order granting leave to appeal, as extended pursuant to section 1250.9(b) of this Part, the matter shall be deemed dismissed without further order.

(b) Criminal Matters. The court upon its own motion or the motion of a respondent may dismiss a criminal appeal pursuant to CPL 470.60.

(c) Motion to Vacate Dismissal. When an appeal or proceeding has been deemed dismissed pursuant to subdivision (a) or by order of the court for failure to perfect, a motion to vacate the dismissal may be made within one year of the date of the dismissal. In support of the motion, the movant shall submit an affidavit setting forth good cause for vacatur of the dismissal, an intent to perfect the appeal or proceeding within a reasonable time, and sufficient facts to demonstrate a meritorious appeal or proceeding.
1250.11 Additional Rules Relating to Criminal Appeals

(a) Poor Person Relief and Assigned Counsel.

(1) Continuation of eligibility for assigned counsel on appeal. Where a sentencing court has granted a defendant’s application for poor person relief on appeal pursuant to CPL 380.55, the Appellate Division may, upon receipt of a properly filed notice of appeal and a copy of the order, assign appellate counsel or provide other relief without the need for further motion or application.

(2) Continuation of assigned counsel in People’s appeal. Unless otherwise ordered by the court, a defendant represented in the superior court by assigned counsel shall continue to be represented by that counsel on an appeal taken by the People.

(b) Application for Certificate Granting Leave to Appeal in a Criminal Matter.

(1) An application for a certificate granting leave to appeal to the Appellate Division shall

   (i) be made, in writing, within 30 days after service of the order upon the applicant;

   (ii) provide 15 days’ notice to the District Attorney;

   (iii) be filed with proof of service; and

   (iv) be submitted without oral argument.

(2) The moving papers for a certificate granting leave to appeal shall be addressed to the court for assignment to a justice, shall state that no prior application for such certificate has been made, and shall set forth:

   (i) the return date;

   (ii) the name and address of the party seeking leave to appeal and the name of the District Attorney;

   (iii) the indictment number; and

   (iv) the questions of law or fact which ought to be reviewed.

(3) The moving papers shall include:

   (i) a copy of the order sought to be reviewed;

   (ii) a copy of the decision of the court below or a statement that there was none; and
(iii) a copy of all submissions filed with the trial court.

(4) Answering submissions or a statement that there is no opposition to the application shall be served and filed not later than one business day before the return date stated in the application.

c) Exhibits. If required by the court in a criminal appeal, in lieu of submitting original physical exhibits (e.g., weapons or contraband) to the court, the appellant may file a stipulation of the parties identifying the particular exhibits, identifying the party in custody and control of each exhibit and providing that each exhibit shall be made available to the court upon the request of the clerk.

d) Briefs.

(1) There shall be included at the beginning of the main brief submitted by an appellant in any criminal case a statement setting forth the order or judgment appealed from; the sentence imposed, if any; whether an application for a stay of execution of judgment pending determination of the appeal was made and, if so, the date of such application; whether an order issued pursuant to CPL 460.50 is outstanding, the date of such order, the name of the judge who issued it and whether the defendant is free on bail or on his or her own recognizance; and whether there were codefendants in the trial court, the disposition with respect to such codefendants, and the status of any appeals taken by such codefendants.

(2) Briefs in criminal appeals shall otherwise conform to the requirements of section 1250.8 of this Part.

(3) Assigned counsel shall file proof of mailing of a copy of briefs filed on behalf of a defendant to the defendant at his or her last known address.

e) Expedited appeal of an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information.

(1) At the request of either party, the court shall give preference to the hearing of an appeal from an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information (CPL 210.20 (6) (c); 450.20 (1-a); 450.55), and shall determine the appeal as expeditiously as possible.

(2) The appellant's brief in such an appeal shall include an appendix containing a copy of the notice of appeal, the indictment, the order appealed from and any underlying decision. The respondent's brief may also include an appendix, if necessary. The appellant shall file, separate from the appendix, one copy of the grand jury minutes under seal.

(f) Application for Withdrawal of Assigned Appellate Counsel Pursuant to *Anders v California* (386 US 738 [1967]). When assigned appellate counsel files a brief pursuant to *Anders v California*, counsel shall additionally either
(1) file proof that the following were mailed to the defendant at his or her last known address: (i) a copy of the brief, and (ii) a copy of a letter to the defendant advising that he or she may file a pro se supplemental brief and, if he or she wishes to file such a brief, that he or she must notify the court no later than 30 days after the date of mailing of counsel’s letter of the intention to do so; or

(2) in the Fourth Judicial Department, move to be relieved as counsel pursuant to People v. Crawford, 71 A.D.2d 38 (4th Dept. 1979).

(g) Pro Se Supplemental Briefs in Criminal Appeals Involving Assigned Counsel. When assigned appellate counsel does not file a brief pursuant to Anders v California, a defendant wishing to file a pro se supplemental brief shall

(1) in the First and Second Judicial Departments, move for permission to do so not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel; the affidavit in support of the motion shall briefly set forth the points that the defendant intends to raise in the supplemental brief; or

(2) in the Third and Fourth Judicial Departments, file the pro se supplemental brief not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel.

(h) Appeal from an Order Concerning a Grand Jury Report.

(1) The mode, time and manner for perfecting an appeal from an order accepting a report of a grand jury pursuant to CPL 190.85 (1) (a), or from an order sealing a report of a grand jury pursuant to CPL 190.85 (5), shall be in accordance with the provisions of this Part governing appeals in criminal cases.

(2) An appeal from such an order shall be a preferred cause.

(3) The record, briefs and other documents on such an appeal shall be sealed and not be available for public inspection except as permitted by CPL 190.85 (3).
1250.12 Transferred Proceedings

(a) Transferred CPLR Article 78 Proceedings. A proceeding commenced pursuant to CPLR article 78 and transferred to the Appellate Division pursuant to CPLR 7804(g) shall be governed in the same manner as an appeal under this Part-by-the original record method, with the time to file the petitioner's brief measured from the date of the order of transfer.

(b) Transferred Human Rights Law Proceedings (Executive Law § 298).

(1) A proceeding under the Human Rights Law which is transferred to the Appellate Division for disposition shall be prosecuted upon the original record, which shall include:

(i) copies of all submissions filed in the Supreme Court;
(ii) the decision of the Supreme Court, or a statement that no decision was rendered;
(iii) the order of transfer; and
(iv) the original record before the State Division of Human Rights, including a copy of the transcript of the public hearing.

(2) In all other respects every proceeding so transferred shall be governed by this Part in the same manner as an appeal, with the time to perfect measured from the date of the order of transfer.

(3) In the event that the original record that was before the State Division of Human Rights was not previously submitted to the Supreme Court, the Division shall file the original record with the Appellate Division within 45 days after entry of, or service upon it of a copy of the order of transfer.

1250.13 Original Special Proceedings

(a) Return date. Unless otherwise required by statute or court directive, original special proceedings commenced in the Appellate Division, including original proceedings pursuant to CPLR article 78, shall be made returnable at 10:00 a.m. on any Monday or on such other days as the court may direct, with a return date not less than 20 days after service of the notice of verified petition and petition on each respondent.

(b) Necessary documents.

(1) A petitioner shall file the original and a digital copy of the notice of petition or order to show cause, the petition and the filing fee as required by CPLR 8022.

(2) Proof of service of a hard copy of the notice of petition (or order to show cause) and the petition on each respondent shall be filed not later than 15 days after the applicable statute of limitations has expired (see CPLR 306-b).
(3) Each respondent shall serve a hard copy, and shall file a hard copy and a digital copy, of an answer or other lawful response, the record before the respondent, the transcript of the hearing, if any, and the determination and findings of the respondent.

(c) Briefing and Original Record in Original Special Proceedings.

(1) In the following original special proceedings commenced in the First and Second Judicial Departments, the petitioner shall file an original, five copies and a digital copy of a brief, with proof of service of one hard copy of the brief upon each other party to the proceeding, within six months of the date of service of the answer:

(i) Eminent Domain Procedure Law § 207;
(ii) Public Service Law §§ 128 or 170;
(iii) Labor Law §§ 220 or 220-b;
(iv) Public Officers Law § 36; and
(v) Real Property Tax Law § 1218.

In all other special proceedings commenced in the First and Second Judicial Departments, further briefing shall not be required, and the court shall determine the matter on the original submissions.

(2) In all original special proceedings filed in the Third and Fourth Judicial Departments, the petitioner shall file an original, five hard copies and one digital copy of the petitioner's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding within six months of the date of service of the answer, or pursuant to such briefing schedule that the court may issue.

(3) In original special proceedings where briefing is required, the respondent to the petition shall file within 30 days of the date of service of the petitioner's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, an original, five hard copies and one digital copy of the respondent's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding. Not more than ten days after service of the respondent's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, the petitioner may file an original, five hard copies and one digital copy of the petitioner's reply brief, if any.

(4) In original special proceedings where briefing is required, the period of time within which to file the petitioner's brief or respondent's brief may be extended in the manner provided for the extension of time to perfect and appeal or to file and serve responsive briefs set forth in sections 1250.9(b) and 1250.9(g) of this Part.

(5) All original special proceedings will be heard upon the original record, which shall include: (A) the notice of petition or order to show cause and petition; (B) the original record before the respondent, including a copy of the transcript of the hearing, if any; and (C) the determination and findings of the respondents.
1250.14 Miscellaneous Appeals and Proceedings

(a) Annexation Proceedings. Annexation proceedings shall be prosecuted as set forth in General Municipal Law article 17.

(b) Election Appeals. Appeals in proceedings brought pursuant to any provision of the Election Law shall be prosecuted upon the original record, pursuant to a scheduling directive of the court or clerk, with the filing and service of briefs in such number and manner as the court shall direct.

(c) Appeals from the Workers’ Compensation Board and Unemployment Insurance Appeal Board. Appeals from decisions of the Workers’ Compensation Board and the Unemployment Insurance Appeal Board shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(d) Original Proceedings under the Education Law, Public Health Law and Tax Law. Proceedings seeking review of determinations pursuant to Education Law § 6510, Public Health Law § 230-c or Tax Law § 2016 shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(e) Appeals of Compensation Awards to Judicial Appointees. If the sole issue sought to be reviewed on appeal is the amount of compensation awarded to a judicial appointee (i.e., referee, arbitrator, guardian, guardian ad litem, conservator, committee of the person or a committee of the property of an incompetent or patient, receiver, person designated to perform services for a receiver, such as but not limited to an agent, accountant, attorney, auctioneer or appraiser, person designated to accept service), the cause may be prosecuted by motion or as an appeal. In such event, the review may be had on the original record, and briefs may be filed at the option of the parties.

(f) Appeals from the Appellate Term. When the court has made an order granting leave to appeal from an order of the Appellate Term, the appellant shall file with the clerk of the Appellate Term a copy of the order. Thereafter the appeal may be brought on for argument by the filing of briefs in the same manner as any other cause.

(g) Submitted facts (CPLR 3222). An original agreed statement of facts in an action submitted to the court pursuant to CPLR 3222 shall be filed in the office of the county clerk, and a copy shall be appended to appellant's brief together with a statement required by CPLR 5531. Briefs shall be served and filed in the manner and in accordance with the time requirements prescribed by section 1250.9 of this Part.
1250.15 Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Calendar Preference.

(1) By letter. A party seeking and entitled by law to a preference in the hearing of an appeal shall provide prompt notice by letter to the court setting forth the basis for such preference.

(2) By motion. A party not entitled to a preference by law may move for a calendar preference for good cause shown.

(b) Calendar Notice. Notification that a cause has been placed on the calendar shall be published on the court’s website. The court may also arrange for publication of such notice in a daily law journal or other newspaper or periodical regularly published within the Judicial Department.

(c) Oral Argument.

(1) Oral Argument Generally. Oral argument shall be permitted unless proscribed by court rule or, in a particular cause, by the court in its discretion. Parties who do not file a brief on appeal shall not be permitted to argue a cause.

(2) Oral Argument by Permission. Where oral argument is proscribed by rule, a party may seek leave of the court therefor by filing of a letter application, on notice to all parties, or by motion where required by the court, within 7 days of the filing of the respondent’s main-brief. The application or motion shall specify the reasons why oral argument is appropriate and the amount of time requested.

(3) Failure to Request Oral Argument. In the event that any party’s main brief shall fail to set forth the appropriate notations indicating that the cause is to be argued and the time required for argument, the cause will be deemed to have been submitted without oral argument by that party.

(4) Failure to Appear for Oral Argument. Where counsel or a self-represented litigant fails to appear timely for oral argument, the matter shall be deemed to have been submitted without oral argument by that party.

(5) Rebuttal. Prior to beginning argument, the appellant may orally request permission to reserve a specific number of minutes for rebuttal in the First and Third Judicial Departments. The time reserved shall be subtracted from the total time assigned to the appellant. The respondent may not request permission to reserve time for sur-rebuttal.

(d) Post-Argument Submissions. Post-argument submissions are discouraged, and may be made only with leave of the court.
1250.16 Decisions, Orders and Judgments; Costs; Remittitur; Motions for Reargument or Leave to Appeal to the Court of Appeals

(a) Decisions, Orders and Judgments. A decision, order or judgment of the court on a cause shall be deemed entered on the date upon which it was issued. The court shall cause to be posted copies of the court's decisions, orders and judgments on the court's website.

(b) Costs. Costs upon an appeal under CPLR 8107 shall be allowed only as directed by the court in each case. In the absence of a contrary direction, the award by the court of costs in any matter shall be deemed to include disbursements in accordance with CPLR 8301(a).

(c) Remittitur. Unless otherwise ordered by the court, an order determining an appeal shall be remitted, together with the record on appeal, to the clerk of the court of original instance in accordance with CPLR 5524(b).

(d) Motion for Reargument or Leave to Appeal to the Court of Appeals.

   (1) Time of motion. A motion for reargument or of leave to appeal to the Court of Appeals from an order of the court shall be made within 30 days after service of the order of the court with notice of entry.

   (2) Reargument. An affidavit or affirmation in support of a motion for reargument shall briefly set forth the points alleged to have been overlooked or misapprehended by the court.

   (3) Leave to appeal to the Court of Appeals.

      (i) An affidavit or affirmation in support of a motion for leave to appeal to the Court of Appeals shall briefly set forth the questions of law sought to be reviewed by the Court of Appeals and the reasons that the questions should be reviewed by the Court of Appeals.

      (ii) In a civil matter, a motion for leave to appeal to the Court of Appeals shall, to the extent practicable, be determined by the panel of justices that determined the appeal.

      (iii) In a criminal matter, a motion for leave to appeal to the Court of Appeals may be submitted to any member of the panel of justices that determined the appeal. The affidavit or affirmation in support of the motion shall state that no other application for leave to appeal to the Court of Appeals has been made. Service of a copy of an order on an appellant as required by CPL 460.10 (5) (a) shall be made pursuant to CPLR 2103.
1250.17 Fees of the Clerk of the Court

(a) Fees. The clerk of the court shall be entitled to the following fees, which shall be payable in advance:

(1) upon the filing of a record on a civil appeal or statement in lieu of record on a civil appeal and upon the filing of a notice of petition or order to show cause commencing a special proceeding, $315.

(2) upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, $45, except that no fee shall be imposed for a motion or cross motion which seeks leave to appeal as a poor person pursuant to CPLR 1101 (a).

(3) such other fees as the court shall direct.

(b) Exemptions. Notwithstanding the foregoing, no party shall be required to pay a filing fee hereunder where such party demonstrates entitlement to an exemption from the payment of such fee under statute or other authority.
New AD Individual Department Rules
Rules of Practice of the Appellate Division, First Judicial Department

Part 600

600.1 General Provisions and Definitions

(a) Practice Rules of the Appellate Division

This Part serves as a supplement to, and should be read in conjunction with, the Practice Rules of the Appellate Division (22 NYCRR) Part 1250 and the Electronic Filing Rules of the Appellate Division (22 NYCRR) Part 1245. Where there is a conflict between this Part and Parts 1250 and 1245, this Part controls when practicing within the First Judicial Department.

(b) Sessions of the Court

The court will convene at 2:00 o’clock in the afternoon during the appointed terms of the court for the hearing of appeals except on Fridays when the court will convene at 10:00 o’clock in the forenoon. Special sessions of the court may be scheduled for such time or such purposes as the court may direct.

600.2 [Reserved]

600.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Pre-argument Conference Program

(1) By order of the court, counsel and the parties, and any additional parties in interest, may be directed to attend a pre-argument conference before a special master or such other person as may be designated by the Appellate Division.

(2) Within 10 days after an order directing a pre-argument conference, counsel for respondent shall file a counterstatement, together with proof of service, setting forth:

(i) the issues proposed to be raised on the appeal, if respondent disagrees with the issues identified by appellant in the informational statement filed pursuant to (22 NYCRR) § 1250.3;

(ii) the extent to which respondent challenges the assertions made in the informational statement; and

(iii) an explanation of the grounds for granting the relief sought by respondent.

(3) Upon the conclusion of the conference, if the parties have entered into a stipulation the court shall file an order of approval.
600.4 Motions

(a) Electronically Filed Motions. One hard copy of electronically filed motion papers shall be filed with the clerk in accordance with section 1245.6(a) of the Electronic Filing Rules of the Appellate Division ([22 NYCRR] Part 1245).

(b) Leave to File Amicus Curiae Brief. A motion to serve and file an amicus curiae brief shall include six copies of the proposed brief.

600.5 [Reserved]
600.6 [Reserved]
600.7 [Reserved]
600.8 [Reserved]

600.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Filing and Service of Digital Copies of Record, Appendices and Briefs

    (1) Digital copies of the records, appendices and briefs filed pursuant to (22 NYCRR) § 1250.9(a), (c) and (d) shall comply with the technical specifications for electronically filed documents set forth in Attachment A to Electronic Rules of the Appellate Division ([22 NYCRR] Part 1245) and shall be filed and served by e-mail. Emails to the court shall be directed as follows:

        (i) In civil matters – AD1copy-civil@nycourts.gov
        (ii) In criminal matters – AD1copy-criminal@nycourts.gov
        (iii) In Family Court matters – AD1copy-family@nycourts.gov

    (2) Records, appendices and briefs filed electronically through NYCSEF shall satisfy the digital copy requirements of (22 NYCRR) § 1250(a), (c) and (d).

600.10 [Reserved]

600.11 Additional Rules Relating to Criminal Appeals

(a) Transcript of Proceedings. Where an appeal in a criminal matter is prosecuted on the original record or by the appendix method, the appellant shall serve a copy of the transcript of the proceedings upon the respondent together with the brief and appendix, and cause a copy to be filed with the court.

600.12 [Reserved]
600.13 [Reserved]
600.14 [Reserved]
600.15 Calendar Preferences; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Calendar Notice

All appeals or causes shall be noticed for a term of the court as enumerated or non-enumerated.

The following appeals are to be noticed as enumerated:

(1) Appeals from final orders and judgments of the Supreme Court, other than those dismissing a cause for failure to prosecute, for failure to serve a complaint or for failure to obey an order of disclosure or to stay or compel arbitration.

(2) Appeals from decrees or orders of the Surrogate’s Court finally determining a special proceeding.

(3) Appeals from orders granting or denying motions for a new trial.

(4) Appeals from orders granting or denying motions for summary judgment.

(5) Appeals from orders granting or denying motions to dismiss a complaint, a cause of action, a counterclaim or an answer in point of law.

(6) Appeals from orders of the Appellate Term.

(7) Appeals from judgments or orders in criminal proceedings.

(8) Special proceedings transferred to this court for disposition.

(9) Controversies on agreed statement of facts.

(10) Appeals from orders of the Family Court finally determining a special proceeding.

(11) Appeals from orders granting or denying custody of minors after a hearing.

(12) Special proceedings challenging determination of the New York City tax appeals tribunal.

(13) Such other appeals as the court or a justice thereof may designate as enumerated.

(b) All other types of appeals not set forth in subdivision (a) of this section shall be noticed as non-enumerated.

(c) How Placed on the Calendar; filing time

(1) Appellant’s Filing. An appeal or cause shall be placed on the calendar, by the appellant or moving party filing with the clerk, at least 57 days before the first day of the term for which the matter shall have been noticed, the record on appeal or appendix and brief, in the manner and number required by (22 NYCRR) § 1250.9(a), and a note of issue, with proof of service, stating the term for which noticed, the date of the notice of appeal, the date the judgment or order was entered, the name of the justice who made the decision, the nature of the appeal or cause, and the index or indictment number and the Appellate Division number.
(2) Respondent’s Filing. At least 27 days before the first day of the term for which the appeal or cause shall have been noticed, the respondent or opposing party shall file the answering brief and appendix, if any, in the manner and number required by (22 NYCRR) § 1250.9(c).

(3) Reply Brief. Within nine days after service of the respondent’s brief, the appellant or moving party may file a reply brief, in the manner and number required by (22 NYCRR) § 1250.9(d).

(d) Cross Appeals

(1) If the parties to the appeal do not stipulate to a briefing schedule pursuant to (22 NYCRR) § 1250.9(f)(1)(i), respondent-appellant shall file his or her answering brief pursuant to the schedule for a respondent for that specific term. Appellant shall have nine days thereafter to file its reply brief, and thereafter, respondent-appellant shall have nine days to file his or her reply brief.

(e) Time Permitted for Argument

(1) On the argument of an enumerated appeal, not more than 15 minutes shall be permitted on either side. Any party may for good cause request additional argument time by written application before the day of argument.

(2) Oral argument shall not be allowed in non-enumerated appeals, except by permission of the Court upon application pursuant to (22 NYCRR) § 1250.15(c)(2).

(3) Only one counsel on each side shall be heard except by permission of the Court.

600.16 [Reserved]

600.17 Fees of the Clerk of the Court

(a) In addition to the fees provided for in (22 NYCRR) § 1250.17, pursuant to Judiciary Law § 265, the clerk of the court is entitled to receive in advance the following fees on behalf of the State of New York:

(1) For an embossed and engraved certificate of admission as an attorney and counselor at law, twenty-five dollars;

(2) For a certificate of good standing, ten dollars;

(3) For furnishing a hard or digital copy, certified or uncertified, of an opinion, decision, order, record, or other paper in his or her custody, one dollar for the first page and 50 cents for each additional page; and

(4) No charge shall be made for furnishing a copy of the order, opinion or decision of the court to any party to an appeal or proceeding pending in the court.
The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, pursuant to the authority vested in it, DOES HEREBY, effective September 17, 2018, rescind Part 670 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and adopt a new Part 670 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York as follows:

Part 670. Rules of Practice

670.1 General Provisions and Definitions

(a) Practice Rules of the Appellate Division

This Part serves as a supplement to, and should be read in conjunction with, the Practice Rules of the Appellate Division (22 NYCRR Part 1250) and the Electronic Filing Rules of the Appellate Division (22 NYCRR Part 1245). Where there is a conflict between this Part and Parts 1250 and 1245, this Part controls when practicing within the Second Judicial Department.

(b) Sessions of the Court

Unless otherwise ordered, the court will convene at 10 o'clock in the forenoon on Monday, Tuesday, Thursday, and Friday. Special sessions of the court may be held at such times and for such purposes as the court from time to time may direct.

670.2 Settlement or Withdrawal of Motion, Appeal or Proceeding; Notice of Change in Circumstances

(a) Withdrawal of an appeal which has been placed on the court's calendar

A stipulation withdrawing an appeal or proceeding which has been placed on the Court's calendar must be filed with the court prior to the calendar date. Absent such a stipulation, an appellant may, prior to the calendar date, move for permission to withdraw such an appeal or proceeding.

670.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Initial Filings

(1) In all civil matters, counsel for the appellant or the petitioner shall file the original plus one copy, and serve one copy, of the papers referred to in section 1250.3(a) of the Practice Rules of the Appellate Division (22 NYCRR §1250.3[a]).

(2) Where an appeal is taken in a criminal matter, the clerk of the court of original instance shall execute an initial information statement on a form approved by the court and shall transmit
it together with a copy of the notice of appeal and the order of sentence and commitment, if any, to the clerk of this court.

(3) An initial informational statement relating to attorney matters shall be filed in connection with attorney disciplinary proceedings instituted in this court and applications made to this court pursuant to sections 690.17 and 690.19 of the rules of this court.

(4) In all other actions or proceedings instituted in this court, and applications pursuant to CPLR 5704, an initial informational statement shall be filed.

(b) Active Management.

(1) All appeals from orders of the Family Court, and any other proceedings in which the welfare, custody or parental access of children is at issue, shall be actively managed.

(2) In all actively managed matters, the clerk shall issue a scheduling order or orders directing the parties to take specified action to expedite the prosecution thereof, including but not limited to the ordering of the transcript of the proceedings and the filing of proof of payment therefor, the making of motions, the perfection of the cause, and the filing of briefs. Notwithstanding any of the time limitations set forth in this part or Part 1250 (22 NYCRR 1250), a scheduling order shall set forth the date or dates on or before which such specified action shall be taken.

(3) If any party shall establish good cause why there cannot be compliance with the provisions of a scheduling order, the clerk may amend the same consistent with the objective of insuring expedited prosecution of the cause. An application to amend a scheduling order shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. The determination of the clerk in amending or declining to amend a scheduling order shall be reviewable by motion to the court on notice pursuant to section 1250.4 of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4).

(4) Upon the default of any party in complying with the provisions of a scheduling order, the clerk shall issue an order to show cause, on notice, why the cause should not be dismissed or such other sanction be imposed as the court may deem appropriate.

670.4 Motions

(a) Motions Which Include Requests for Interim Relief

(1) Notice. To the extent practicable, the notice required by section 1250.4(b)(2) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4[b][2]) shall be accompanied by a copy of the papers the party seeking relief intends to present to the court for filing. The affidavit or affirmation of notice required by section 1250.4(b)(2) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4[b][2]) shall state the manner in which the proposed filing was served. If notice has not been given, and/or a copy of the papers the party seeking relief intends to present to the court for filing has not been served, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and/or make such service and the reasons for the lack of success. If the applicant is unwilling to give notice and/or to make the required service, the affidavit or affirmation shall state the reasons for such unwillingness.
(2) Oral argument. Where the notice required by subdivision (1) has been given, the party seeking relief and/or the party opposing the relief sought may request the opportunity to present argument to the justice to whom the application will be presented, which request shall be determined in the discretion of that justice.

(b) Permission to Appeal to the Appellate Division in a Civil Matter. A motion for permission to appeal to the Appellate Division pursuant to CPLR 5701(c) and Family Court Act § 1112 shall be addressed to the court.

(c) Leave to File Amicus Curiae Brief. A motion for leave to file an amicus brief shall be made in accordance with section 1250.4(f) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4(f)), and shall include one copy of the proposed brief.

Section 670.5 [Reserved]

Section 670.6 [Reserved]

Section 670.7 [Reserved]

Section 670.8 [Reserved]

670.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Digital Copies of Records, Appendices and Briefs. The digital copies of the records, appendices and briefs required to be filed with the Court pursuant to §§ 1250.9[a], [c] and [d] of the Rules of Practice of the Appellate Division (22 NYCRR §§ 1250.9[a], [c], [d]) shall comply with the technical requirements for electronically filed documents (22 NYCRR Part 1245, Appendix A), and shall be filed by e-mailing those documents to ad2-digitalfiling@nycourts.gov

(b) Extensions of time to perfect an appeal or to file and serve a brief. Motions to extend the time to perfect an appeal or to file and serve a brief shall be granted only in limited circumstances and upon a showing of good cause.

Section 670.10 [Reserved]

670.11 Additional Rules Relating to Criminal Appeals

(a) Transcript of Proceedings. Where an appeal in a criminal matter is prosecuted on the original record or by the appendix method, the appellant shall serve a copy of the transcript of the proceedings upon the respondent together with the brief and appendix, and cause a copy to be filed with the court.

(b) Appeal from Sentence. Where the only issue to be raised on appeal concerns the legality, propriety, or excessiveness of sentence, the appeal may be prosecuted by submitting a concise statement setting forth the reasons urged in support of the reversal or modification of sentence. Such statement shall contain the information required by CPLR 5531 and by section 1250.8(b)(3) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.8[b][3]) and shall contain a statement by counsel for the appellant that no other issues are asserted.

(i) Such appeals may be brought on as though they were motions made in accordance with the provisions of section 1250.4 of the Practice Rules of the Appellate Division (22 NYCRR §
1250.4) and shall be placed upon a special calendar for appeals submitted in accordance with this subdivision. The respondent shall serve and file papers in opposition within 14 days after service of the motion papers.

(2) The appellant shall submit the transcript of the sentence proceeding and of the underlying plea or trial. The parties shall file an original and one digital copy of their respective papers, including the necessary transcripts.

Section 670.12 [Reserved]

Section 670.13 [Reserved]

Section 670.14 [Reserved]

670.15 Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Oral Argument. A maximum of 15 minutes shall be allowed for argument to each attorney who has filed a brief, except as set forth in subdivision (b).

(b) Argument Proscribed. Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; determinations made pursuant to the sex offender registration act; grand jury reports; and calendar and practice matters including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court.

(c) Who May Argue. Not more than one attorney shall be heard for each brief filed unless, upon application made in writing at least seven days before the matter appears on the court’s calendar, the court shall have granted permission to allow more than one attorney to argue.

(d) Adjournment of Oral Argument. After filing a brief and until a matter has been placed on the court’s calendar, counsel shall advise the court, in writing and on a continuing basis, of commitments that will interfere with counsel’s ability to appear on a particular date. Requests for leave to adjourn oral argument of an appeal or proceeding which appears on the court’s calendar are strongly disfavored. Such requests may be granted only where unusual circumstances are present, as explained in a writing in which counsel indicates why he or she cannot appear for oral argument, why no other attorney can appear in his or her place, and why oral argument is necessary. Requests for leave to adjourn oral argument of an appeal or proceeding are within the discretion of the court.

(e) Submission. A party who originally elected to argue may notify the clerk of the intention to submit the cause without argument and need not appear at the call of the calendar.

(f) Rebuttal. Rebuttal argument shall not be permitted, except with leave of the court given at the time of argument.

(g) Citations to Recent Authority. After a cause has been placed on the calendar and prior to argument or submission of that cause, any party who previously submitted a brief may inform the court by letter, a copy of which is contemporaneously provided to the other parties to the appeal,
of the citation to any decisions, statutes, ordinances, rules, regulations, or other similar matter not previously cited in that party’s brief which arose subsequent to the filing thereof, without additional argument. Except for good cause shown, the court will not accept precedent at the call of the calendar where a copy thereof has not previously been given to the other parties.

Section 670.16 [Reserved]

670.17 Fees of the Clerk of the Court

(a) Fees. In addition to the fees provided for in section 1250.17 of the Practice Rules of the Appellate Division (22 NYCRR § 1250.17), pursuant to Judiciary Law § 265 the clerk of the court is directed to charge and is entitled to receive in advance the following fees on behalf of the State:

(1) For making a photocopy or providing a digital copy of an order, decision, opinion, or other filed paper or record, $1 for the first page and 50 cents for each additional page.

(2) For comparing the copy of a prepared order, decision, opinion, or other paper or record with the original on file, $1 for the first page and 50 cents for each additional page, with a minimum fee of $2.

(3) For certifying the copy of an order, decision, record, or other paper on file or for affixing the seal of the court, $1; and for authenticating the same, an additional $5.

(4) For certifying in any form that a search of any records in his custody has been made and giving the result of such search, $1.

(5) For an engraved parchment diploma attesting to admission as an attorney and counselor at law, $25.

(6) For a printed certificate attesting to admission or to good standing as an attorney and counselor at law, $10.

DATED: Brooklyn, New York
       June 22, 2018

_________________________
ALAN D. SCHEINKMAN
Presiding Justice
At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held in the City of Albany, State of New York, commencing on the 26th day of June 2018.

PRESENT:

HON. ELIZABETH A. GARRY,  
Presiding Justice
HON. WILLIAM E. McCARTHY
HON. JOHN C. EGAN JR.
HON. MICHAEL C. LYNCH
HON. EUGENE P. DEVINE
HON. CHRISTINE M. CLARK
HON. ROBERT C. MULVEY
HON. SHARON A.M. AARONS
HON. PHILLIP R. RUMSEY
HON. STAN L. PRITZKER,
Associate Justices

In the Matter of the Amendment of the Rules of Practice of the Supreme Court, Appellate Division, Third Judicial Department.  

ORDER

The Appellate Division of the Supreme Court of the State of New York, Third Department, pursuant to the authority vested in it, DOES HEREBY, effective September 17, 2018, rescind Part 800 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and adopt a new Part 850 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York as follows:

Part 850   RULES OF PRACTICE

850.1 General Provisions and Definitions

(a) The Practice Rules of the Appellate Division
The Practice Rules of the Appellate Division are embodied in Part 1250 of the New York Rules of Court (22 NYCRR Part 1250) and the Electronic Filing Rules of the Appellate Division are embodied in Part 1245 (22 NYCRR Part 1245). The Rules of Practice of the Appellate Division, Third Judicial Department are intended to supplement the Practice Rules of the Appellate Division. Where there is a conflict between this Part and Parts 1250 and 1245, this part controls when practicing within the Third Judicial Department.

(b) Definitions

All of the definitions contained in section 1250.1 of the Practice Rules of the Appellate Division are incorporated herein unless otherwise indicated.

(c) Court Sessions

Unless otherwise directed by the court, court sessions shall commence at 1:00 p.m., except on Friday and the last session day of a term, when they shall commence at 9:30 a.m. A term of court shall be deemed to continue until the day on which the next term convenes, and the court may reconvene at any time during recess.

850.2 [Reserved]

850.3 [Reserved]

850.4 Motions

(a) Motions or Applications Which Include Requests for Interim Relief.

(1) Notice. A party seeking relief as provided in section 1250.4 (b) of the Practice Rules of the Appellate Division shall, in addition to the notice required by section 1250.4 (b) (2), provide advance notice to the court of its intention to present the application or order to show cause. To the extent practicable, the notice required by section 1250.4 (b) (2) and by this section shall be accompanied by a copy of the papers the party seeking relief intends to present to the court for filing. The affidavit or affirmation of notice required by section 1250.4 (b) (2) shall state the manner in which the proposed filing was served.

(2) Oral argument. Where the notice required by subdivision (1) has been given, the party seeking relief and/or the party opposing the relief sought may request the opportunity to present argument to the justice to whom the
application or order to show cause will be presented, which request shall be
determined in the discretion of that justice.

(b) Admission Pro Hac Vice. An application for admission pro hac vice, pursuant
to 1250.4 (e) of the Practice Rules of the Appellate Division, shall be made in
the form of a motion.

(c) Leave to File Amicus Curiae Brief. A motion for permission to serve and file
an amicus curiae brief, made pursuant to 1250.4 (f) of the Practice Rules of the
Appellate Division, shall include one original, five hard copies and one digital
copy of the proposed brief with proof of service of one hard copy of the brief upon
each other party to the appeal or proceeding.

850.5 Methods of Perfecting Causes

Where perfection of a cause by the original record has been authorized by statute
or order of the court, the appellant's brief shall contain an appendix which shall be printed
or otherwise reproduced as provided in sections 1250.6 and 1250.7 of the Practice Rules
of the Appellate Division.

850.6 [Reserved]

850.7 Form and Content of Records and Appendices; Exhibits

(a) Exhibits. Exhibits under a respondent's control or under the control of a third
person shall be filed either pursuant to a five-day written demand served by the
appellant upon a respondent or pursuant to a subpoena duces tecum issued in
accordance with CPLR article 23. The appellant shall also file with the brief proof
of service of such a demand or subpoena together with a list of all relevant
exhibits.

(b) Certification of Record or Appendix. The record or appendix shall be certified
as provided in section 1250.7 (g) of the Practice Rules of the Appellate Division.
Any dispute concerning the certification of the record or appendix or the contents
of a record or appendix so certified shall be directed to the court from which the
appeal is taken.

850.8 [Reserved]

850.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Extension of time to perfect appeal. A motion for an extension of time to
perfect an appeal or proceeding, made pursuant to section 1250.9 (b) of the
Practice Rules of the Appellate Division, shall be supported by an affidavit setting forth a reasonable excuse for the delay and an intent to perfect the appeal or proceeding within a reasonable time.

(b) Extensions of time to file and serve responsive briefs. A motion for an extension of time to file and serve a responsive brief, made pursuant to section 1250.9 (g) of the Practice Rules of the Appellate Division, shall be supported by an affidavit setting forth a reasonable excuse for the delay and an intent to file and serve the brief within a reasonable time.

850.10 [Reserved]

850.11 Additional Rules Relating to Criminal Appeals

(a) Transcript of Proceedings. Where poor person status has been granted by this court, the clerk of the court from which the appeal is taken, after service upon the clerk of a copy of the decision of this court, shall furnish without charge to a person granted permission to proceed as a poor person one copy of the transcript of all proceedings in the matter and one copy of any other paper or document on file which is material and relevant to the appeal, and shall forward another copy of the transcript to the clerk of this court, who shall attach it to the single copy of the record upon which the appeal shall be prosecuted.

(b) Where a court has directed that the appeal be perfected by a particular date, the appellant may apply by letter, on notice to all parties, to extend the time to perfect the appeal. Where counsel has been assigned, any request for an extension of time to perfect the appeal made more than one year after the assignment date shall be made by motion. Any application or motion shall state the following: the date of the judgment of conviction; whether the conviction was by trial or plea; whether defendant is free on bail; the date the notice of appeal was filed; the date the transcript and other record documents were ordered; whether the transcript and other record documents have been received; the reason for the request; and the anticipated date that the appeal is expected to be perfected. All extension applications and motions must be accompanied by proof of service upon the District Attorney and the defendant.

(c) Notwithstanding the provisions of sections 1250.9 (a) and 1250.10 (b) of the Practice Rules of the Appellate Division, an appeal authorized by the Criminal Procedure Law shall be deemed to have been abandoned where the appellant shall fail to apply for permission to proceed as a poor person and/or for assignment of counsel or shall fail to perfect the appeal within twenty-four months after the date of the notice of appeal; and the clerk of this court shall not accept for filing any record, brief or appendix beyond the twenty-four-month period unless
directed to do so by order of the court. Such an order shall be granted only pursuant to a motion on notice supported by an affidavit setting forth a reasonable excuse for the delay, in addition to any information required by 850.11 (b).

(d) In addition to the items specified in 1250.7 (d), an appendix in a criminal cause shall contain a copy of the indictment and a complete transcript of the sentencing minutes.

850.12 [Reserved]

850.13 [Reserved]

850.14 Miscellaneous Appeals and Proceedings

(a) Unemployment insurance appeals. An appeal from a decision of the Unemployment Insurance Appeal Board may be prosecuted in accordance with written instructions which are available from the clerk of the court or the Department of Law, Employment Security Bureau. There are no filing fees associated with Unemployment Insurance appeals.

(b) Workers' compensation appeals. An appeal from a decision of the Workers' Compensation Board shall be prosecuted in accordance with sections 1250.6 and 1250.7 of the Practice Rules of the Appellate Division. In addition, the record shall contain a record list and a copy of each item identified in the record list, including those items the appellant reasonably assumes will be relied upon by a respondent.

(1) Record list.

(i) The appellant shall prepare a list of the papers relevant to those issues intended to be presented for review by the court.

(ii) Unless, within 45 days after service of a notice of appeal, the Workers' Compensation Board shall vacate, modify or rescind the decision which is the subject of the appeal, within 30 days after expiration of said 45 days or, in the event the board sooner determines that it will not vacate, modify or rescind the decision, within 30 days after the board serves a notice of such determination on the appellant, the appellant shall serve a copy of the proposed record list upon the Attorney General and each party affected by the board decision, together with a written stipulation reciting that the papers, testimony and exhibits listed therein constitute all of the papers necessary and relevant to the issues. The appellant shall also
serve upon the parties affected a written request to stipulate to the
contents of the record list within 20 days. Within 20 days after such
service, any party so served may make objections or amendments to
the record list and serve them upon the appellant.

(iii) Within 20 days after service of a proposed record list, a party
respondent shall serve upon the appellant any proposed objections or
amendments thereto. The appellant and the objecting party shall have
20 days thereafter in which to agree upon the objections and
amendments to the record list and to stipulate in writing thereto. If
they are unable to agree, within 10 days after expiration of said 20
days, the appellant shall make application to the board for settlement
of the record list. A copy of the board's decision shall be attached to
the record list.

(iv) If a party timely served with a proposed record list shall fail to
serve objections or amendments within 20 days, the record list shall
be deemed correct as to that party, and the appellant shall affix to the
record on appeal an affirmation certifying to the timely service of the
proposed record list and request to stipulate and to the failure of one
or more parties to comply with the request or to make objections or
amendments thereto within the time prescribed.

(v) When filing the record on appeal, the appellant shall file the
record list, together with the stipulation, board decision or
affirmation.

(vi) A decision of the board upon an application to settle a record list
shall be reviewable by motion pursuant to section 1250.4 of the
Practice Rules of the Appellate Division. The moving papers shall
contain a copy of the board decision and the papers submitted to the
board upon the application. Where necessary, the court will obtain
the board's file for use on the motion.

(2) Form and content of record. A record on an appeal pursuant to section
23 of the Workers' Compensation Law shall comply as to form with
sections 1250.6 and 1250.7 of the Practice Rules of the Appellate Division.

(3) Certification of record. The record on appeal shall be certified as true
and correct by the secretary or other designee of the Workers'
Compensation Board, by a certificate of the appellant's attorney pursuant to
CPLR 2105, or by a stipulation in lieu of certification pursuant to CPLR
5532.
(4) Remittitur. Upon entry of an order on the court's decision, the record on appeal shall be remitted to the Attorney General with a copy of the order for filing with the Workers' Compensation Board.

(c) Sex Offender Registration Act (SORA) appeals. An appeal authorized by Correction Law sections 168-d (3) and 168-n (3) shall be prosecuted in accordance with section 1250.11 of the Practice Rules of the Appellate Division and with section 850.11 of this Part.

850.15 Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

Unless otherwise permitted by the court, oral argument shall not be allowed in the following cases:

(a) appeals from the Workers' Compensation Board;

(b) appeals from the Unemployment Insurance Appeal Board;

(c) appeals from judgments of conviction in criminal cases challenging only the legality, propriety or excessiveness of the sentence imposed;

(d) appeals in or transfers of CPLR article 78 proceedings in which the sole issue raised is whether there is substantial evidence to support the challenged determination; and

(e) any other case in which the court, in its discretion, determines that argument is not warranted.

850.16 Decisions, Orders and Judgments; Costs; Remittitur; Motions for Reargument or Leave to Appeal to the Court of Appeals

(a) The orders, judgments, appointments, assignments and directions of the court shall be signed by the presiding justice, the clerk of the court or a deputy clerk of the court.

(b) Costs in workers' compensation, unemployment insurance appeals and proceedings commenced in this court shall be taxed by the clerk in accordance with CPLR 8403.

850.17 Fees of the Clerk of the Court
(a) Fees. In addition to the fees provided for in section 1250.17 of the Practice Rules of the Appellate Division, pursuant to Judiciary Law § 265, the clerk of the court is entitled to receive for and on behalf of the state:

(1) For a large, embossed certificate attesting to admission as an attorney and counselor at law, twenty-five dollars ($25).

(2) For a printed certificate attesting to admission, good standing and registration as an attorney and counselor at law, ten dollars ($10).

DATED AND ENTERED: June 29, 2018

[Signature]
Hon. Elizabeth A. Garry
Presiding Justice
Appellate Division, Fourth Judicial Department
22 NYCRR Part 1000. Rules of Practice
Effective September 17, 2018

1000.1 General Provisions and Definitions

(a) Practice Rules of the Appellate Division

This Part serves as a supplement to, and should be read in conjunction with, the Practice Rules of the Appellate Division (22 NYCRR Part 1250) and the Electronic Filing Rules of the Appellate Division (22 NYCRR Part 1245). Where there is a conflict between this Part and those rules, this Part controls when practicing within the Fourth Judicial Department.

(b) Sessions of the Court

The Presiding Justice shall designate by order the terms of Court and the Clerk shall provide notice of designated terms to the Bar. Unless otherwise ordered by the Presiding Justice, the Court shall convene at 10:00 a.m. each day during a designated term.

1000.2 [Reserved]

1000.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) The Court does not require the filing of an initial informational statement pursuant 22 NYCRR 1250.3 (a).

(b) The Court does not have a settlement or mediation program pursuant to 22 NYCRR 1250.3 (c).

1000.4 Motions

(a) Proof of service required. In addition to proof of filing of the notice of appeal as required pursuant to 22 NYCRR 1250.4 (a) (3), a movant shall submit proof or admission of service of the notice of appeal.

(b) Order to show cause. An application for an order to show cause pursuant to 22 NYCRR 1250.4 (b) shall be directed to a Justice of this Court with chambers in the Judicial District from which the appeal or proceeding arises.
(c) Family Court Act § 1114 and CPLR 5704 (a). Unless otherwise ordered by a Justice of this Court, an application for a stay pursuant to Family Court Act § 1114 or an application pursuant to CPLR 5704 (a) shall be made by order to show cause pursuant to 22 NYCRR 1250.4 (b).

(d) Extension of time to file answering or reply documents. Any request for an extension of time to file answering or reply documents pursuant to 22 NYCRR 1250.4 (a) (5) shall be made by motion, and shall be supported by an affidavit demonstrating with particularity a reasonable excuse for the delay and an intent to file the documents within a reasonable time.

(e) Leave to File Amicus Curiae Brief. A motion for leave to file an amicus curiae brief shall be made in accordance with 22 NYCRR 1250.4 (f), and only one copy of the proposed brief shall be submitted with the motion. When permission to submit an amicus curiae brief is granted, the person or entity to whom it is granted shall file five hard copies and one digital copy of the brief with proof of service of one hard copy on each party. A person or entity granted permission to appear amicus curiae shall not be entitled to oral argument unless the Court directs otherwise.

(f) Poor person relief.

(1) An affidavit in support of a motion for permission to proceed on appeal as a poor person shall, in addition to the matters listed in 22 NYCRR 1250.4 (d), list

(a) the movant’s assets with their value; and

(b) the number of dependants the movant supports in the movant’s present household.

(2) A motion for permission to proceed on appeal as a poor person and for assignment of counsel shall be served upon the County Attorney in the county from which the appeal arises.

1000.5 [Reserved]
1000.6 [Reserved]
1000.7 Form and Content of Records and Appendices; Exhibits
-3-

(a) Proof of filing and service of notice of appeal. All records and appendices shall contain the notice of appeal with proof of service and filing.

(b) Certification of Record or Appendix. Any dispute over a certification of the record or appendix pursuant to 22 NYCRR 1250.7 (g) or the contents of a record or appendix so certified shall be directed to the court from which the appeal is taken.

(c) Failure to list document. In a criminal matter, the failure of the parties to list in the stipulation to the record on appeal any transcript, exhibit or other document that constituted a part of the underlying prosecution shall not preclude the Court from considering such transcript, exhibit, or other document in determining the appeal.

(d) Appendices - criminal appeals. Pursuant to 22 NYCRR 1250.7 (d) (3), in a criminal matter, when permission to proceed as a poor person has been granted, the appendix to be filed and served by the appellant shall contain, in the following order: the description of the action required by CPLR 5531; a copy of the notice of appeal with proof of service and filing; a copy of the certificate of conviction and the judgment from which the appeal is taken; a copy of the indictment, superior court information or other accusatory instrument; all motion papers, affidavits and, to the extent practicable, written and photographic exhibits relevant and necessary to the determination of the appeal; and the stipulation of the parties or their attorneys to the complete record, the order settling the record, or the certification of the record pursuant to 22 NYCRR 1250.7 (g). The appellant shall also file a copy of any prior order entered by this Court or the trial court affecting the appeal including, but not limited to, an order that: expedites the appeal; grants permission to proceed on appeal as a poor person or on less than the required number of records and briefs; assigns counsel; grants an extension of time to perfect the appeal; grants a stay or injunctive relief; grants relief from dismissal of the appeal; or grants permission to exceed page limitations.

1000.8 Form and Content of Briefs

(a) Cover color. Except in those appeals in which permission to proceed as a poor person has been granted, the cover of a hard copy brief of an appellant or petitioner shall be blue; the cover of a hard copy brief of a respondent shall be red; the cover of a hard copy reply brief shall be gray; the cover of a hard copy surreply brief shall be yellow; and the cover of a hard copy brief of an intervenor or amicus curiae shall be green. The cover of a hard copy pro se supplemental
brief in a criminal appeal shall be white, as shall the cover of a hard copy brief submitted by an Attorney for the Child. Covers of electronically-filed briefs shall likewise be colored to the extent practicable.

1000.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Extension of time to perfect. A motion for an extension of time to perfect an appeal pursuant to 22 NYCRR 1250.9 (b) shall be supported by an affidavit demonstrating with particularity a reasonable excuse for the delay and an intent to perfect the appeal within a reasonable time.

(b) Extension of time to file brief. A stipulation to extend the time to file and serve a responsive brief pursuant to 22 NYCRR 1250.9 (g) (1) shall be filed on or before the date by which the brief was originally required to be filed. In no case shall the parties stipulate to, or apply by letter for, an extension of time to file and serve a responsive brief that would permit the filing and service of the brief within 30 days of the date upon which the matter is scheduled to be heard. A motion for an extension of time to file and serve a responsive brief pursuant to 22 NYCRR 1250.9 (g) (2) shall be supported by an affidavit demonstrating with particularity a reasonable excuse for the delay and an intent to file and serve the brief within a reasonable time.

(c) Digital copies. In matters not subject to electronic filing, digital copies of the records, appendices and briefs filed pursuant to 22 NYCRR § 1250.9 (a), (c) and (d) shall comply with the technical specifications for electronically filed documents (Attachment A to 22 NYCRR Part 1245) and shall be filed and served as directed by the Clerk of the court.

1000.10 [Reserved]

1000.11 Additional Rules Relating to Criminal Appeals

(a) Poor Person Relief and Assigned Counsel; Continuation of eligibility for assigned counsel on appeal. Relief pursuant to 22 NYCRR 1250.11 (a) (1) is contingent upon receipt of a properly filed and served notice of appeal and a copy of the order granting a defendant’s application pursuant to CPL 380.55.

(b) Application for Withdrawal of Assigned Appellate Counsel. When counsel who has been assigned to perfect an appeal on behalf of an indigent defendant
determines, after conferring with the defendant and trial counsel, that the appeal is frivolous, counsel may move to be relieved of the assignment pursuant to 22 NYCRR 1250.11 (f) (2) (see People v Crawford, 71 AD2d 38). The motion must be accompanied by a brief in which counsel states all points that may arguably provide a basis for appeal, with references to the record and citation of legal authorities. A copy of the brief, together with the motion, must be served upon the defendant at least 45 days before the return date of the motion. Together with the original motion papers and brief, counsel shall submit the papers that would constitute the record on appeal. Counsel shall also submit a copy of a letter to the defendant advising that he or she may elect to file a pro se response to the motion and/or a pro se supplemental brief.

A defendant wishing to file a pro se response to such a motion and/or a pro se supplemental brief shall file the original response and/or brief, together with proof of service of one copy on assigned counsel and one copy on the People, by 4:00 p.m. on the business day preceding the day on which the motion is returnable, unless, for good cause shown, they are permitted to be filed at a later time. Any request for an extension to file such a response and/or pro se supplemental brief must be made by motion and supported by an affidavit demonstrating with particularity a reasonable excuse for the delay and an intent to file and serve the response and/or brief within a reasonable time (see 22 NYCRR 1250.4 [a] [5]).

(c) Pro se supplemental briefs where counsel does not seek to withdraw. When assigned counsel does not move to be relieved as counsel and defendant has filed a pro se supplemental brief pursuant to 22 NYCRR 1250.11 (g) (2), the People may file and serve an original and five copies of a responding brief, with proof of service of one copy on the defendant and assigned counsel, no later than 45 days after defendant has served the pro se supplemental brief.

1000.12 Transferred Proceedings.

(a) Original papers. A proceeding transferred to this Court pursuant to CPLR 7804 (g) shall be prosecuted upon the original papers, which shall include the notice of petition or order to show cause and petition, answer, any other transcript or document submitted to Supreme Court, the transcript of any proceedings at Supreme Court, the order of transfer and any other order of Supreme Court. When the proceeding has been transferred prior to the filing and service of an answer, a respondent shall file and serve an answer within 25 days of filing and service of the order of transfer. When a proceeding has been transferred to this Court pursuant to Executive Law § 298, the State Division of Human Rights shall file
with the Clerk the record of the proceedings within 45 days of the date of entry of the order of transfer.

(b) Briefs, transcripts and oral argument. Upon receipt of the order of transfer and other documents from the court from which the transfer has been made, the Clerk shall issue a schedule for the filing and service of briefs, if any, the production of necessary transcripts and the calendaring of the proceeding.

(1) A petitioner shall file 5 hard copies and one digital copy of a brief, with proof of service of one copy on each respondent, as set forth in the scheduling order. If the brief is not timely filed and served, and no motion to extend the time for filing and service is made, the proceeding shall be deemed dismissed, without the necessity of an order.

(2) A respondent shall file 5 hard copies and one digital copy of a brief, with proof of service of one copy on each other party, as set forth in the scheduling order.

1000.13 [Reserved]
1000.14 [Reserved]

1000.15 Calendar Preference or Adjournment; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Calendar preference or adjournment. A motion for a calendar preference pursuant to 22 NYCRR 1250.15 (a) (2) shall be supported by an affidavit setting forth with particularity the compelling circumstances justifying the calendar preference. A motion to adjourn the calendaring of an appeal or proceeding shall be supported by an affidavit setting forth with particularity the compelling circumstances justifying an adjournment.

(b) Scheduling Order. After an appeal is perfected or an original or transferred proceeding is filed or received, the Clerk shall, where appropriate, issue a scheduling order, which will specify the term of Court for which the matter has been scheduled and set a deadline for the service and filing of respondents’ briefs and reply briefs, if any. A party or a party’s attorney shall notify the Clerk in writing within 15 days of the date that the scheduling order was mailed of unavailability for oral argument on a specific date or on specific dates during the term.
(c) Calendar Notice. The Clerk shall prepare calendars for each day of a Court term by designating for argument or submission appeals or proceedings that have been perfected or scheduled. A notice to appear for oral argument will be sent by the Clerk to all parties or their attorneys not less than 20 days prior to the term. Parties or counsel must appear as directed or submit on the brief.

(d) Oral Argument.

(1) A party or a party’s attorney who is scheduled to argue before the Court shall sign in with the Clerk’s Office prior to 10:00 a.m. on the day of the scheduled argument. When oral argument is scheduled to commence at a time other than 10:00 a.m., a party or counsel shall sign in with the Clerk’s Office prior to the time designated for the commencement of argument. Not more than one person shall be heard on behalf of a party. In the event that parties submit a joint brief, not more than one person shall be heard in the matter. When a brief has not been filed on behalf of a party, no oral argument shall be permitted except as otherwise ordered by this Court. Requests for oral argument shall be made by indicating on the cover of the brief the amount of time requested. The amount of time allowed shall be within the discretion of the Court.

(2) Unless otherwise provided by order of this Court, oral argument shall not be permitted in the following cases:

(A) an appeal from a judgment of conviction in a criminal case that challenges only the legality or length of the sentence imposed;

(B) an appeal from a determination pursuant to the Sex Offender Registration Act;

(C) a CPLR article 78 proceeding transferred to this Court in which the sole issue is whether there is substantial evidence to support the challenged determination; and

(D) any other cause in which this Court, in its discretion, determines that oral argument is not warranted.

(3) The Court does not permit rebuttal.

(e) Post-argument submissions. Any request for leave to file a post-argument
submission shall be made in writing within five business days of oral argument, and shall be accompanied by a copy of the proposed submission.

1000.16 Orders

(a) Service of order. The party prevailing in a cause shall serve a copy of the order with notice of entry on all parties.

(b) Posting of orders. Pursuant to 22 NYCRR 1250.16 (a), a copy of the order of this Court determining a cause shall be posted on the Court's website. This rule does not apply to motion orders.

1000.17 [Reserved]
Appellate Division Electronic Filing

On February 6, 2018, Chief Judge Janet DiFiore announced in the State of Our Judiciary address that the four Departments of the Appellate Division will commence electronic filing in certain appellate matters and original proceedings, through the New York State Courts Electronic Filing (NYSCEF) system, commencing on March 1, 2018.

The joint rules of the Appellate Division on electronic filing (22 NYCRR Part 1245) may be found at www.nycourts.gov/RULES/jointappealate/22NYCRRPart1245-03-01-2018A.pdf.

The cases and case types subject to electronic filing on March 1, 2018 in each Department are as follows:

First Department: All appeals in commercial matters originating in the 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 Department.

This list of cases and case types will be enlarged in each Department in the coming months as the e-filing program expands.

Additional information about e-filing in each Department of the Appellate Division may be found at the following web locations:

First Department: http://www.nycourts.gov/courts/ad1/efiling.html
Second Department: http://www.nycourts.gov/courts/AD2/efiling
Third Department: http://www.nycourts.gov/ad3/
Fourth Department: http://ad4.nycourts.gov/efile

For additional information about electronic filing and to create a NYSCEF account, visit the NYSCEF website at www.nycourts.gov/efile or contact the NYSCEF Resource Center (phone: 646-386-3033; e-mail: efile@nycourts.gov).

For information on how to participate in e-filing, unrepresented litigants should contact the appropriate clerk in the court where the matter was filed or visit www.nycourts.gov/efile-unrepresented. Unrepresented litigants also are encouraged to visit www.nycourthelp.gov.
Electronic Filing Rules of the Appellate Division

Approved by Joint Order of the Departments of the New York State Supreme Court, Appellate Division
December 12, 2017

1245.1. Definitions.

For purposes of this section:

(a) The term “NYSCEF” shall mean the New York State Courts Electronic Filing System, and the “NYSCEF site” shall mean the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile.

(b) The phrase “authorized e-filer” shall mean a person who has registered as an authorized e-filing user with the NYSCEF system pursuant to 22 NYCRR 202.5-b (c).

(c) Any reference to the “court” or the “Appellate Division” means the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over the cause or matter; any reference to the “clerk” means the clerk of that court or a designee, unless the context of usage indicates the clerk of another court.

(d) The word “cause” or “matter” includes an appeal, a special proceeding transferred to the Appellate Division pursuant to CPLR 7804 (g), a special proceeding initiated in the Appellate Division, and an action submitted to the Appellate Division pursuant to CPLR 3222 on a case containing an agreed statement of facts upon which the controversy depends.

(e) The word “document” shall mean a brief, motion, application, record, appendix, or any other paper relating to a cause or matter. “Document” shall not include correspondence, other than letter applications.

(f) The phrase “electronically file” or “e-file” shall mean the filing and service of a document in a cause or matter by electronic means through the NYSCEF site.

(g) The phrase “hard copy” shall mean a document in paper format.

(h) The phrase “exempt litigant” or “exempt attorney” shall mean, respectively, an individual or attorney who is exempt from e-filing pursuant to section 1245.4 of this Part.

1245.2. Designation of Case Types Subject to E-filing.

The court may designate e-filing in such cases and case types as it deems appropriate.
1245.3. Entry of Initial Information for Electronic Filing.

(a) Appeals or Transferred Matters – Entry of Contact Information. In any appeal or transferred proceeding of a type designated by the Appellate Division for e-filing, counsel for the appellant or the petitioner, unless an exempt attorney, shall within 14 days of filing of a notice of appeal, or entry of an order granting leave to appeal, or entry of an order transferring a matter to the Appellate Division:

(1) register or confirm registration as an authorized e-filer with NYSCEF; and

(2) enter electronically in NYSCEF such information about the cause and parties, and e-file such documents, as the court shall require.

(b) Appeals or Transferred Matters – Service of Notice of Appellate Case or Docket Number. In any matter described in subdivision (a), counsel for the appellant or the petitioner, unless an exempt attorney, shall within seven days of receipt from the court of an appellate case or docket number for the matter:

(1) serve upon all parties in hard copy as provided by CPLR 2103 notification of that case or docket number, together with other pertinent information about the case and such documents as the court shall require, on a form approved by the Appellate Division; and

(2) e-file proof of service of this notification.

(c) Original Proceedings – Commencement by Electronic Filing. Unless an exempt attorney, counsel for a petitioner commencing an original proceeding of a type designated by the Appellate Division for e-filing shall:

(1) register or confirm registration as an authorized e-filer with NYSCEF;

(2) e-file the notice of petition (or order to show cause), petition and supporting documents;

(3) obtain from the court a case or docket number for the matter; and

(4) serve upon all parties in hard copy as provided in CPLR 2103 and court rule

   (i) the notice of petition (or order to show cause), petition and supporting documents; and

   (ii) on a form approved by the Appellate Division, notification of the case or docket number; and

(5) e-file proof of service of the submissions specified in subsection (4).
(d) Entry of Information by Respondents and Other Parties. Within 20 days of service of the notification of the case or docket number as required in subdivision (b) or (c), counsel of record to each other party to the matter, unless an exempt attorney, shall:

(1) register or confirm registration as an authorized e-filer with NYSCEF; and

(2) enter electronically in NYSCEF such contact information and additional information as the court may require.

(e) Designation of Other Persons and Electronic Filing Agents.

(1) An authorized e-filer may designate another person to e-file a document on his or her behalf using the authorized e-filer’s user identification and password, but shall retain full responsibility for any such e-filed document.

(2) Designation of an electronic filing agent. An authorized e-filer may designate another person or entity, including an appellate printer, to e-file documents on his or her behalf as a filing agent if that agent is also an authorized e-filer. Such filing agent shall e-file a statement of authorization, in a form approved by the Appellate Division, prior to or together with the first e-filing in that action by the agent. The principal authorized e-filer shall retain full responsibility for any document e-filed by such filing agent.

1245.4. Exemptions of Certain Persons from Electronic Filing.

(a) Personal Exemptions. The following persons are exempt from e-filing, and shall file, serve and be served in hard copy:

(1) “exempt litigants,” who shall be unrepresented litigants other than litigants who voluntarily participate in e-filing as set forth in subdivision (d); and

(2) “exempt attorneys,” who shall be attorneys who certify in good faith, on a form provided by the Appellate Division, that they lack either (i) the computer hardware and/or connection to the internet and/or scanner or other device by which documents may be converted to an electronic format; or (ii) the requisite knowledge in the operation of such computers and/or scanners necessary to participate, pursuant to CPLR 2111 (b) (3) (A) or (B). Such certification shall be served on all parties and filed with the court in hard copy.

(b) Notice of Hard Copy Filing. An exempt attorney shall include with each document filed in hard copy in an e-filed matter a notice of hard copy filing on a form provided by the court.
(c) Entry of Information the Other Parties. The court may direct another party to scan and upload documents filed in hard copy by an exempt attorney or exempt litigant, and to enter additional case information in NYSCEF.

(d) Voluntary Participation. A pro se or unrepresented litigant may voluntarily participate in e-filing in a cause or matter by:

(1) recording his or her consent electronically in the manner provided at the NYSCEF site;

(2) registering as an authorized e-filer with the NYSCEF site, and entering case and contact information about the particular cause; and

(3) e-filing documents as provided under this Part.

(e) Withdrawal of Consent. An unrepresented litigant who has consented to participate voluntarily in e-filing in a matter may withdraw such consent at any time by filing and serving on all parties a notice of intent to cease e-filing, on a form provided by the Appellate Division.

1245.5. Electronic Filing and Service.

(a) All authorized e-filers who have entered information for a particular cause as set forth in sections 1245.3 (a), (c) or (d) or 1245.4 (d) of this Part shall thereafter e-file and be served electronically in that matter.

(b) Prior to the expiration of the 20-day period for entry of information described in section 1245.3 (d) of this Part, filing and service of documents by, and service upon, parties who have not entered such information shall be in hard copy.

(c) Upon expiration of the 20-day period for entry of information described in section 1245.3 (d) of this Part, service and filing by and upon all parties other than exempt attorneys and exempt litigants shall be by e-filing. Thereafter, an attorney who has neither entered information nor given notice as an exempt attorney pursuant to section 1245.4 (a) (2) of this Part shall be deemed served with any e-filed document.

(d) At all times, service by and upon, and filing by, exempt attorneys and exempt litigants shall be in hard copy. E-filers shall e-file proof of any service made in hard copy.

(e) Site Instructions. Technical instructions for e-filing documents shall be set forth on the NYSCEF site (www.nycourts.gov/efile).

(f) Formatting. In addition to compliance with the court’s general rules for document formatting, e-filed documents filed pursuant to this Part shall comply with the formatting requirements set forth in attachment A.
1245.6. Hard Copy Filing and Service.

(a) Filing of Additional Hard Copies.

(1) Unless otherwise directed by the court, authorized e-filers shall, in addition to submitting electronic filings, file hard copies of documents as follows:

(i) appellate briefs, records, appendices, agreed statements in lieu of record: one original and five copies.

(ii) papers in original proceedings, transferred proceedings, motions, applications: such number as required by court rule in matters not subject to e-filing.

(2) Authorized e-filers shall delay the filing of such additional hard copies of documents until receipt of email notification that the clerk has reviewed and approved the electronic version of the document, and shall file the hard copies within two business days of such notification. A failure to file such additional hard copies of documents shall cause the filing to be deemed incomplete.

(b) Filing of Unbound Copy of Documents by Exempt Attorneys and Exempt Litigants. Exempt attorneys and exempt litigants filing and serving documents in hard copy shall additionally file, together with the bound copy or copies of the document in such number as required by court rule, a single unbound copy of the filing, containing no staples or binding other than easily removable clips or rubber bands.

(c) Motions and Applications Seeking Emergency Relief. Where a motion or application seeks interim or emergency relief, the court may permit the initial submissions of a party or parties to be filed and served in hard copy, and e-filed thereafter. All such filings, other than filings by an exempt litigant, shall be accompanied by a notice of hard copy submission on a form approved by the Appellate Division.

(d) Technical Failure.

(1) If the NYSCEF site is subject to technical failure pursuant to 22 NYCRR 202.5-b (i), authorized e-filers shall file and serve documents in hard copy and e-file those documents within three business days after restoration of normal operations at that site.

(2) If an authorized e-filer is unable to e-file a document because of technical problems with his or her computer equipment or internet connection, the e-filer shall file and serve the document in hard copy, together with a notice of hard copy
submission in a form approved by the Appellate Division, and shall e-file those documents within three business days thereafter.

1245.7. Timeliness of Filing and Service; Rejection by Clerk.

(a) Filing of E-filed documents. For purposes of timeliness under a statute or court rule or directive, an e-filed document is deemed filed when:

(1) the document has been electronically transmitted to the NYSCEF site; and

(2) the appropriate fee, if any, has been paid to the court either through the NYSCEF site or, where permitted, by delivery to the office of the Clerk.

(b) Service of E-filed Documents. Upon receipt of an e-filed document and appropriate fee, if any, NYSCEF shall immediately notify all e-filers in the matter of the receipt and location of the document. For purposes of timeliness of service under a statute or court rule, at the issuance of such notification the document shall be deemed served upon all parties other than exempt attorneys and exempt litigants.

(c) Rejection by the Clerk. An e-filed document deemed filed for purposes of timeliness under this Part may thereafter be reviewed and rejected by the Clerk for any reason provided by this Part or any applicable statute, rule or order, or as otherwise unsuitable for filing.

(d) Hard Copy Filing or Service. The timeliness of service or filing in hard copy pursuant to these rules shall be as provided by statute or court directive.

1245.8. Confidentiality; Sealed Documents; Redaction.

E-filed matters deemed confidential by statute or court directive, as well as sealed documents or documents that are the subject of an application to seal in an e-filed matter, shall be filed and maintained on the NYSCEF site in a manner that precludes viewing by the public and such other persons as the case may require. In all matters, authorized e-filers shall attest to compliance with statutory redaction requirements (e.g., General Business Law § 399-ddd) and relevant sealing requirements in filings.

1245.9. Authorized Record; Scanning of Documents by Clerk.

(a) The court may deem documents e-filed or uploaded by the parties to be the official record of a cause or matter.

(b) The clerk may scan and upload hard copy filings in a cause, and may deem such uploaded documents to be the official record copy of the filing.
1245.10. Rejection of Non-Compliant Documents; Modification of Electronic Filing Procedures.

(a) Rejection of Documents. The clerk may refuse to accept for filing or e-filing any document that does not comply with this Part or any applicable statute, rule or order, or is otherwise unsuitable for filing, and may direct that the document be refiled.

(b) Modification of Procedures. The court or its designee may at any time modify or discontinue e-filing in a matter for good cause shown.
ATTACHMENT A

Formatting Requirements for Documents Electronically Filed

1. General. In addition to compliance with the court’s general rules for document formatting, e-filed documents filed pursuant to this Part shall
   a. be identical in content to the hard copy;
   b. comply with text searchable PDF archival format (PDF/A);
   c. contain bookmarks linking the tables of contents of briefs and records to the corresponding page of the document;
   d. be paginated to correspond to the hard copy; and
   e. be scanned at a resolution sufficient to ensure legibility.


3. Corrections. Where the court directs filing of corrected documents, such corrected documents shall be filed electronically and by hard copy.

4. PDF Initial View. The "initial view" of a PDF shall be the Bookmarks Panel and Page.

5. PDF File Size. E-filed documents shall each be no greater than 100MB in size.

Please consult the electronic filing webpage of each Department of the Appellate Division for additional information about these formatting requirements.