2024 CPLR Update

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Materials By
Prof. Michael J. Hutter

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Michael J. Hutter is Special Counsel to Powers & Santola, LLP. As Special Counsel, he handles the firm's appellate works. Michael has argued appeals in the New York State Court of Appeals, and all four Departments of New York's Appellate Division, the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals for the Federal Circuit. He has argued over 400 appeals, which appeals have covered a wide range of subject matter, including Labor Law, No-Fault Law, Negligence, Criminal Law, Matrimonial Law, civil rights claims, State Constitutional Law, and unfair competition claims. Since 2015, he has been named in the Best Lawyers New York edition in the area of appellate practice.

As a Professor of Law at Albany Law School. Professor Hutter's teaching areas include Evidence, NY Practice, Federal Jurisdiction, and Procedure, Conflict of Laws, and Trade Regulation. His scholarship has been cited by many courts, including the First Circuit Court of Appeals, Fourth Circuit Court of Appeals, Illinois Appellate Court, Massachusetts Supreme Judicial Court, South Dakota Supreme Court, Wisconsin Supreme Court and the Appellate Division of the State of New York, and by numerous academic commentators.

Professor Hutter is a recognized expert in the area of Evidence. He has served as an educator to the New York State Court System, invited by the New York State Office of Court Administration, and its Judicial Institute, to teach evidence and discuss evidence developments at its annual seminars for Justices and Judges throughout the state, as well as seminars for law clerks and court attorneys. Recently, he was appointed by the Chief Judge of the State of New York to act as the Reporter to a Special Committee, composed of sitting and retired judges, charged with compiling a guide to New York's existing law of evidence that will be readily available to judges, lawyers, and the public. Professor Hutter is also the Evidence columnist for the New York Law Journal, publishing a bi-monthly article discussing recent New York evidence cases decided by the courts.

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Part One
PERSONAL JURISDICTION

I. CPLR 301 AND GENERAL JURISDICTION

A. Presence

1. Corporations

Daimler AG v. Bauman

571 US 117 (2014)

Court, in holding that a California court did not have P/J over a German corporation in an action where the alleged misconduct occurred in Argentina (violation of human rights), declared in essence that NY's well established "doing business" standard under which an unauthorized foreign corporation is subject to general jurisdiction (GJ) (jurisdiction over claims arising outside the forum) in NY is unconstitutional. Court held that such "exorbitant" and "unacceptably grasping" jurisdiction violates due process. Instead, G/J is constitutionally permissible only when a corporation is "at home." There are three such instances: (1) corporation is incorporated in the state; (2) corporation has its principal place of business in the state; and (3) "in an exceptional case" where the corporation's activities in the state are "so substantial and of such a nature as to render the corporation at home in that state." The "at home" rule for corporations was created by analogy to domicile jurisdiction over individuals.

BNSF R. Co. v. Tyrrell

137 S. Ct. 1549 (2017)

At issue was whether D railroad company could be subject to P/J in Montana with respect to a FELA claim that occurred in another state. Court (8-1) held it could not, citing *Daimler*. **COMMENT:** Court reaffirmed that where, as here, general jurisdiction is involved, D corporation must be "at home" in forum state. "Paradigm" of "at home" is the corporation's state of incorporation and principal place of business. As to the third basis, the "exceptional" case, Court found D's railroad's activities in Montana did not bring it within this basis. In so concluding, Court noted that a corporation doing business in many states cannot be "at home" in all of them, and the analysis must consider its forum state's contacts in light of its overall

activities in other states; and Court pointed to *Perkins v. Benguet* (342 US 437 [1952]) as an example, and perhaps the only example, of an exceptional case.

People v. Trump

217 AD3d 609 (1st Dept. 2023)

In this action alleging fraudulent conduct in NY, Court noted P has provided evidence that Ds Donald J. Trump Revocable Trust, DJT Holding, Managing Member, Trump Endeavor 12 LLC, and 401 North Wabash Venture LLC have their principal place of business in NY. Thus, P has made a "sufficient start" in demonstrating P/J over these Ds.

KPP III CCT v. Douglas Dev. Corp.

__ AD3d __ (1st Dept. 2023)

Court affirmed dismissal of complaint for lack of P/J. It noted neither Ds Douglas and JCC were "essentially at home" in NY, as Douglas was organized under the laws of Washington, DC, JCC was organized under the laws of PA, and both entities had their principal place of business in Washington, DC. There is also no general jurisdiction over Douglas based on the location of its subsidiaries in NY. The "mere department analysis applies only if the parent company is subject to general jurisdiction in the forum." Here, Douglas, the parent company, is not subject to general jurisdiction in NY. Moreover, P did not allege that Douglas interfered with the selection and assignment of the alter egos' executive personnel, or that it failed to observe corporate formalities, or that it controlled the alter egos' finances.

Vaval v. Stanco

219 AD2d 1466 (2d Dept. 2023)

In this products liability action, Court held P failed to demonstrate a basis for exercising general P/J over ANA and AA. A foreign corporation's designation of a NY agent for service of process does not constitute consent to the exercise of general jurisdiction in NY courts. Moreover, the facts alleged do not support a conclusion that ANA's or AA's contacts with NY were so "continuous and systematic as to render them essentially at home" in NY. This is not an "exceptional case" where ANA and AA would be subject to general jurisdiction outside of the states where they are incorporated and have their principal place of business.

2. Persons

Burnham v. Superior Court

495 US 604 (1990)

Service of process of person upon person while in NY, even if transient, is sufficient to confer G/J. **COMMENT:** Justice Sotomayor in her concurrence in *Daimler* noted the "incongruous" result created by *Daimler* when compared to *Burnham*. No Appellate Court has ruled *Daimler* overruled *Burnham*. Does *Mallory, infra*, support result in *Burnham* post-*Daimler*?

B. Consent

1. Corporation-Registration

Due Process

Mallory v. Norfolk Southern Railway

141 S. Ct. 2028 (2023)

Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. After he left the company, he moved to Pennsylvania for a period before returning to Virginia. Along the way he was diagnosed with cancer. Because he attributed his illness to his work at Norfolk Southern, Mallory sued his former employer under the FELA in Pennsylvania state court. Norfolk Southern—a company incorporated in Virginia and headquartered there. Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general P/J" over a registered foreign corporation, just as they can over domestic corporations and Norfolk Southern has complied with this law since 1998, when it registered to do business in Pennsylvania. Court held 5-4 that general jurisdiction over Norfolk Southern did not offend due process. **COMMENT:** Two facts should be noted. First, the statute was clear that foreign corporations who register to do business in Pennsylvania consent to general jurisdiction. Second, Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania and Norfolk Southern registered to do business in Pennsylvania in light of its "'regular, systematic, [and] extensive'" operations there. **COMMENT:** For a complete discussion of *Mallory* and its implications, *see* Ferstendig, NY State Law Digest, August 2023.

BCL §1301: Pre-*Aybar*

Under this statute, NY courts have held that a foreign corporation that is registered to do business in NY has consented to G/J by that registration. *See, Augsburgy Corp. v. PetroKey Corp.*, 97 AD2d 173 (3d Dept. 1983). *Augsburgy Corp* and its modern progeny are based on Judge Cardozo's decision in *Bagdon v. Philadelphia & Reading Coal* (217 NY 432 [1916]) and Justice Holmes' decision in *Pennsylvania Fire Ins. Gold Issue Mining* (243 US 93 [1917]) citing with approval *Bagdon*. The courts reach this conclusion notwithstanding the fact that the statute does not expressly provide that registration effects a consent to jurisdiction.

BCL §1301: Post-*Aybar*

Aybar v. Aybar
37 NY3d 274 (2021)

Ps NY domiciliaries were injured/killed in a MV accident in Virginia when the vehicle overturned several times. They commenced an action against Ford Motor, the manufacturer of the vehicle they were driving in and Goodyear Tire, the manufacture of the tires on the vehicle. P/J over Ds was based on their registration to do business as foreign corporations in NY. Court held 5-2 a foreign corporation does not consent to the exercise of general jurisdiction by NY courts by complying with the Business Corporation Law's registration requirements. The decision was based on the majority's view that Judge Cardozo's interpretation of the pertinent statutes, which continue in essentially the same form, as they did when Cardozo decided *Bagdon*, was wrong. Notably, the majority's decision was not based on an interpretation of the constitution. **COMMENT**: The dissent showed that the interpretation of the statutes was fully supported by the legislative history of the foreign corporation statutes when first enacted, legislative history the majority ignored. Notably, Governor Hochul vetoed a bill passed by the Legislature that would codify the pre-*Aybar* rule, a veto made on her view that the bill would deter corporations from doing business in NY. **DISCLAIMER**: I was the primary author of an *amicus* brief submitted by the NYSBA in support of P.

NY Senate/Assembly S7476 (2023), vetoed on December 28, 2023

Bill approved by the Legislature amends BCL §1301 to provide that every corporation registered to do business in NY shall consent to P/J in NY for "all actions." In 2021, Governor Hochul vetoed a similar bill. (Veto #79 12/31/21)

2. Agreement

Alvarez & Marshall Valuation Services v. Solar Eclipse Investment

216 AD3d 447 (1st Dept. 2023)

P's sole alleged basis for P/J over Ds is found in the jurisdiction and forum selection provisions of the parties' engagement letters, in which the parties agree "that any Federal Court sitting within the Southern District of NY shall have exclusive jurisdiction over any litigation arising out of this Agreement; to submit to the P/J of the Courts of the United States District Court for the Southern District of NY; and to waive any and all personal rights under the law of any jurisdiction to object on any basis (including, without limitation, inconvenience of forum) to jurisdiction or venue within the State of NY for any litigation arising in connection with this Agreement" (exclusive jurisdiction provision).It was uncontested that NY federal courts do not have subject matter jurisdiction over this dispute, as there is no diversity of citizenship or federal question presented. Under these circumstances, Couty held Supreme Court properly determined that it could not maintain jurisdiction over Ds who signed the engagement letters based on the third clause of the exclusive jurisdiction provision, namely, that they had "waive[d] any and all personal rights under the law of any jurisdiction to object on any basis (including, without limitation, inconvenience of forum) to jurisdiction or venue within the State of NY." The third and final clause of the exclusive jurisdiction provision merely clarifies what the clauses preceding it set forth: that the parties cannot avoid jurisdiction in the federal court (which is located within NY state) by raising P/J or venue objections there; the waiver clause does not apply to a state action. Court affirmed the dismissal of the action for lack of P/J.

American Express Natl. Bank v Pino Napoli Tile & Granite, LLC

79 Misc3d 668 (Sup. Ct. NY Co. 2023) (Lebovitz, J.)

Court held P bank's service of process on Ds in Arizona, where the individual D resided, was valid, where the parties' loan agreement was enforceable under Utah law and Ds consented to the NY court's jurisdiction over them through a forum selection clause contained in the agreement.

3. Other

Vaval v. Stanco

219 AD2d 1466 (2d Dept. 2023)

In this products liability action, the D's use of the NY courts in unrelated actions does not constitute consent to P/J in this action.

II. CPLR 302(a) AND SPECIFIC JURISDICTION

A. Due Process and Specific Jurisdiction

1. United States Supreme Court

Bristol-Myers Squibb Co. v. Superior Court

137 S. Ct. 1773 (2017)

In this products liability action, Court held P/J in California over a corporation incorporated in Delaware with its principal place of business could not be exercised in action brought by non-California resident who did not allege that they purchased the corporation's drug through California physicians or from any California source, and did not claim that they were injured in California or were treated for their injuries there. **COMMENT:** As there was no basis for general jurisdiction in California, Court looked to specific jurisdiction. It noted that in order for a state court to exercise specific jurisdiction, the action must "arise out of or relate to D's contacts with the forum. In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulations." For this reason, "specific jurisdiction is confined to adjudication or issues deriving from or connected with, the very controversy that establishes jurisdiction." Here, there was no link between any California contacts and Ps' cause of action. Standard is still not clear for specific jurisdiction. (*See also*, Khawaja, "Supreme Court's 'BMS' Decision Presents New Hurdles to Forum Shoppers," NYLJ, Dec. 15, 2017, p. 3, col. 3).

Ford Motor Co. v. Montana Eighth Judicial Dist.

14 S. Ct. 1017 (2021)

Montana resident and Minnesota resident commence products liability action in Montana and Minnesota state court which actions arose out of accidents in Montana and Minnesota. Ford is incorporated in Delaware and has its principal place of business in Michigan, and the vehicles involved were designed in Michigan and manufactured in Tennessee. Ford argued that specific jurisdiction was lacking in the state courts as the action did not arise out of or relate to any activities it engaged in in Montana and Minnesota. Court in an opinion authored by Justice

Kagan, with Chief Judge Roberts, and Justices Breyer, Sotomayor, and Kavanaugh joining in the opinion, rejected Ford's argument, concluding that "Ford's causation-only argument finds no support in this Court's requirement of a 'connection' between a P's suit and a D's activities." Court emphasized that the element can be satisfied when the claim either "arises out of "or "relates to" D's contacts with the forum state. The terms are different as "[t]he first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing." The absence of a causal requirement "does not mean that anything goes"; and that the term "incorporates real limits." However, it said very little about what those limits are. As to whether P's claims related to Ford's activities in Montana and Minnesota, Court concluded they did. In this connection, the Court noted that Ford regularly conducted business in those states by marketing its vehicles within the states (*Id*. at p.11); made its vehicles, including the two models in issue, available for sale at dealerships in Montana (36) and Minnesota (84); maintained relationships with individuals who purchased its vehicles by providing maintenance and repair services for the vehicles purchased, and providing replacement parts to its dealers and independent repair shops. It added that as to the claims made by Ps in their respective actions, Ford had "systematically served a market in Montana and Minnesota for the very vehicles that Ps allege and malfunctioned and injured them in those states." In sum, these facts showed a "strong relationship" which established the relate to standard and warranted the exercise of P/J. between Ford, the forums and the litigation. **COMMENT:** (1) CPLR 302(a) states only that the cause of action must "arise" out of one of the specified NY contacts. Amendment of that section in order to add "or relate to"? What is the standard for determining whether a cause of action "relates to" a forum contact? (2) For due process determinations is a D's level of activity in the forum relevant as to whether the claim is sufficiently related to it? (3) The *Ford* decision was unanimous with eight Justices participating. Three of the eight parted company sufficiently regarding some of the majority's reasoning to join concurring opinions.

2. Court of Appeals

State of New York v. Vayu, Inc.
39 NY3d 330)2023)

In this action arising out of a dispute over the operability of unmanned aerial vehicles (UAVs) D, a non-domiciliary corporation, manufactured and sold to a NY State university, Court held 5-1 (Rivera, J., dissenting) in a thoughtful decision by Judge Garcia the exercise of jurisdiction over D comported with due process, where D's minimum contacts (discussed *infra*) with NY were

such that D should reasonably have anticipated being hauled into court in the state. Court observed that due process requires first that a D have minimum contacts with the forum state such that D should reasonably anticipate being hauled into court there and second, that the prospect of having to defend a suit in NY comports with traditional notions of fair play and substantial justice. Jurisdiction will be upheld where D purposefully reaches beyond their state into another but the relationship between D and the forum state must arise out of D's own contacts with the forum and not contacts between the P (or third parties) and the forum state. D sought, negotiated, and then entered a contractual relationship with a NY State entity. D furthered that relationship through numerous telephonic and email communications with the university and continued negotiations over terms of the deal when D's CEO visited NY and met with a university representative. D's grant application, describing the university as a "partner" and projecting a two-year budget for the university's costs related to delivery of an additional 10 UAVs, further demonstrated D's understanding of the relationship with the university as ongoing and connected to NY.

B. Bases

1. CPLR 302 (a) (1) - Cause of Action "Arising From" Business Transaction in NY

D&R Global Selections v. Pineiro

29 NY3d 292 (2017)

In this commercial action involving two unauthorized foreign corporations, Court held D was subject to P/J as P's claim arose from D's transaction of business in NY. Court's discussion emphasized that D's activities showed D "purposefully availed itself of privilege" of conducting activities in NY by its described activities and P's claim arose from that transaction. Court also held the exercise of P/J did not offend due process. Initially, it noted the cause of action arose sufficiently from the NY transaction with the distributor because here was an "articulable nexus" and the NY transaction was not "completely unmoored" from the cause of action asserted. It noted that under the first due process element, D has established minimum contacts with NY by visiting the state on multiple occasions to promote its wine with the purpose of finding a United States distributor and thereafter selling wine to a NY distributor. Thus, D availed itself of the privilege of doing business in NY by taking a purposeful action, motivated by the entirely understandable wish to sell its products here. Having done so, D could reasonably foresee having to defend a lawsuit in NY. As to the second element, Court held D had not presented any

compelling reason why the exercise of jurisdiction is unreasonable. Rather, D availed itself of the privilege of conducting business in NY by promoting its wine here, soliciting a distributor here, and selling wine to that NY based distributor. Therefore, the exercise of long-arm jurisdiction over D comports with federal due process. **COMMENT:** Decision seems to liberalize arising under standard when compared to past precedent which required a direct connection between the NY conduct and the cause of action. (*See e.g., Johnson v. Ward*, 4 NY3d 516 [2005]).

State of New York v. Vayu, Inc.

39 NY3d 330 (2023)

Court held 5-1 in a thoughtful decision by Judge Garcia (Rivera, J. dissenting) that Supreme Court had P/J over D non-domiciliary corporation in this action arising out of a dispute over the operability of unmanned aerial vehicles (UAVs) D manufactured and sold to a NY State university. Court was of the view that the facts demonstrated a clear intent by D to engage purposefully in business activities within the meaning of CPLR 302 (a) (1). When assessing whether there is P/J over a D pursuant to the "transacts any business" clause of NY's long-arm statute, courts must ask whether what D did in NY constitutes a sufficient transaction to satisfy the statute. This requires an assessment of whether the non-domiciliary's activities in the state were purposeful, meaning that they were volitional acts by which the non-domiciliary availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. For two years, D projected itself into the state via calls and emails that resulted in the sale of two UAVs. The content of the communications showed that D purposefully sought to establish a substantial ongoing business relationship with the university. And, although being physically present in NY is not required, the fact that D's CEO traveled to NY to meet with a university representative in furtherance of the ongoing business relationship was significant. Moreover, P's claims were based on the sale of the two UAVs, and D's contacts in NY were directly related to efforts to resolve the dispute. Thus, there was an articulable nexus or substantial relationship between D's NY activities and the parties' contract, D's alleged breach thereof, and potential damages.

People v. JUULs Labs

212 AD3d 414 (1st Dept. 2023)

In this action alleging D's marketing and sales of electronic cigarettes violated NY law, and individual Ds who were corporate officers of D were involved, Court noted the evidence established Ds were involved in marketing strategy, which included, among other things, months of events in NY; identifying NY as the target of JUUL's northeastern US marketing

efforts, at and after launch; advertising on billboards in Times Square; hosting in-store product samplings at NY vape shops and social events; and escalating marketing efforts in the NYC metropolitan area post-launch. After NY proved to be a substantial market for JUUL's product, Ds went so far as to describe the efforts as "NYC takeover" and to declare that NYC users should be "the focus of [JUUL's] branding/marketing." Court held this evidence establishes that Ds conducted sufficient in-person activities within NY State related to the People's claims against them in this action, and sufficiently supports the exercise of specific P/J over them pursuant to CPLR 302(a)(1). Accordingly, we need not consider whether specific P/J may be exercised over them pursuant to CPLR 302(a)(1) based on their activities through an agent, *i.e.*, JUUL." Court further held due process requirements were satisfied.

Matter of New York Asbestos Lit.

212 AD2d 584 (1st Dept. 2023)

P alleged that he was employed by D at its Connecticut's offices. D maintained an office in NYC because its president wanted office space in NYC, but no day-to-day operations were conducted there. Court observed that a court may exercise specific P/J over a nondomiciliary so long as two elements are satisfied: (1) D must have conducted sufficient activities to have transacted business in the state and (2) the claims must arise from those transactions. The second step of the jurisdictional inquiry requires the existence of an articulable nexus or substantial relationship between the forum transaction and the claim asserted. Although causation is not required, there must be at minimum, "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former." In other words, jurisdiction will not be present "where the relationship between the claim and transaction is too attenuated." The court should have granted the motion to dismiss the complaint as against D for lack of P/J pursuant to CPLR 302(a)(1) because there was no record evidence suggesting that D's minimal activity in NY had an articulable nexus to P's injury. To the extent that D operated an executive and sales office in NYC, this limited activity was not substantially related to P's alleged exposure to asbestos while working with and around D's valves in Connecticut and P does not identify any other activity by D in NY that could provide a sufficient nexus to his injury. Instead, all conduct giving rise to P's claims occurred in Connecticut, as he was not a NY resident, did not purchase or work with D's valves in NY, and does not claim to have suffered harm in this State.

Aybar v. US Tires and Wheels of Queens, LLC

211 AD3d 40 (2d Dept. 2022)

In this action for personal injuries sustained in an automobile accident outside NY, P sued D, a NY mechanic shop, alleging it negligently inspected and installed tires on P's vehicle. D commenced third-party action for indemnification and contribution against the manufacturers of the tire (Goodyear, a foreign corporation) and the automobile (Ford, a foreign corporation), alleging they arose from the manufacturers' business transactions in NY. Goodyear and Ford moved to dismiss for lack of P/J. Court In a thoughtful opinion authored by Justice Genovesi noted that in order for a claim to arise from a business transaction for purposes of CPLR 302 (a)(1), there must be an articulable nexus or substantial relationship between the cause of action sued upon, or an element thereof, and D's business transactions in NY. While D did not manufacture or sell its own tires, its business centered around repairs to automobiles, as well as the sale and installation of tires from companies such as the third-party D manufacturers and D's alleged negligence occurred at its place of business in NY. Therefore, although the accident which caused P's injuries occurred outside NY, the alleged breach occurred in NY. D's third-party complaint alleged that if it was found negligent, its liability was secondary to the negligence of third-party Ds. The third-party causes of action for indemnification and contribution could not exist but for D's alleged negligence, which occurred in NY. Thus, P/J was established *prima facie* under 302(a)(1). **COMMENT:** Court observed that the section's second element, "arising from", does not require causation and is relatively permissive. All that is required is a "relatedness" between the claim and the transaction. Is Court adding "relate to" to CPLR 302 (a)(1)?

Serota v. Cooper

216 AD3d 1019 (2d Dept. 2023)

D, an attorney licensed to practice in Colorado, represented P's daughter-in-law in a divorce action against P's son in a Colorado court. He arranged for service of document subpoenas upon P pursuant to CPLR 3119, and then moved in NY via local counsel to enforce them. The petition was dismissed and P commenced an abuse of process action against D. Addressing the first element, Court observed: "Proof of one transaction in NY is sufficient to invoke jurisdiction, even though D never enters NY, so long as D's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. Purposeful activities are those with which a D, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. Although determining what facts constitute purposeful availment is an objective inquiry, it

always requires a court to closely examine D's contacts for their *quality*. Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in NY requires an examination of the totality of the circumstances. Here, D's retention of local counsel in NY was deemed insufficient.

Goldinger v. Deluca

219 AD3d 598 (2d Dept. 2023)

In this action to recover legal fees, Court held Ps failed to make a *prima facie* showing that Ds were subject to P/J in NY. The complaint alleged that Ds communicated from NM via email and mail with Ps in NY because Ps were NY domiciliaries, not because Ds were actively participating in transactions in NY. The complaint alleged only that Ps represented Ds in the NM action, not in the NY action. Further, Ps failed to allege that Ds solicited Ps' legal services. Thus, Ps failed to sufficiently allege that Ds projected themselves into NY and purposefully availed themselves of the benefits and protections of NY's laws governing lawyers. Moreover, the statement in D's affidavit that she occasionally traveled to NY to attend art fairs and to visit NM clients who have homes in NYC did not support a *prima facie* showing of P/J, as there was no showing of an articulable nexus or substantial relationship between those activities and the causes of action asserted by Ps against Ds.

Greenfader v. Chicago School of Professional Psychology

__ AD3d __ (2d Dept. 2023)

In this breach of contract action, Ds moved pursuant to CPLR 3211(a) to dismiss the complaint for lack of P/J. The Dean of the Chicago School averred that it was a not-for-profit corporation with its principal place of business in Illinois and that it did not have any NY contacts. The instructor attested that she was a Canadian citizen then residing in IL, and that she did not conduct any business in NY. In opposition, P, a NY resident, argued that beginning in March 2020, as a result of the COVID–19 pandemic, her classes had been conducted virtually, the only contact she had with Ds was either virtually or by telephone, and that therefore, Ds had transacted business in NY within the meaning of CPLR 302(a)(1). Court granted the motion. It noted P failed to show that Ds purposefully availed themselves of the privilege of conducting activities in NY so as to subject them to long-arm jurisdiction pursuant to CPLR 302(a)(1). While P attests in her affidavit that since March 2020, she has not taken a class at Ds' IL location, that the only contact she had with Ds since that date was either virtually or by telephone, and that none of the facts alleged in her complaint took place in person in IL, none of

this demonstrates that Ds were engaged in any activity in New York, let alone purposeful activity. Other than P's allegation that she is a NY resident, there is no other reference to NY in the complaint or in P's affidavit. Significantly, P's allegations are devoid of any indication that she was in NY during the time of the alleged communications with Ds. **COMMENT:** Different result if P alleged she watched the classes in NY?

Jiang v. Z&D Tour, Inc.

75 Misc.3d 583 (Sup. Ct. Richmond Co. 2022) (Casorina, J.)

P was injured in a multivehicle accident in PA where two tractor trailers owned or leased by D foreign corporations struck a bus owned by a NJ corporation in which P was a passenger that had rolled over onto its side. Court held there was specific jurisdiction over the bus company. It noted for specific jurisdiction to attach, there must be a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former. Here, D maintained a brick-and-mortar office location in NYC, where it engaged in the sale of tickets for bus tours that transport individuals from NY to other states; it contracted with the municipality for a grant of authority to utilize and maintain a bus stop location with signage directly in front of the office; and P's contract for the provided service occurred in NY, and transpired between a NY resident and a New Jersey corporation that was at home in NY. Specific jurisdiction was thus present. However, as to the tractor-trailers, the accident did not arise from or have any substantial relationship with any transaction made by Ds in NY. **COMMENT:** Judicial amendment of CPLR 302 (a)(1)? Judge Casorina's conclusion is certainly reasonable and justifiable, but supported by present language of CPLR 302 (a)(1)?

Lelchook v. Societe Generale de Banque Av Liban

67 F.4th 69 (2d Cir. 2023), certified questions accepted, 39 NY3d 1146 (2023)

In this action brought by US citizens who were injured in rocket attacks in Israel, Ps claimed D bank provided financial assistance to terrorist-groups responsible for the attacks. Court certified the following questions to the Court of Appeals: 1. Under NY law, does an entity that acquires all of another entity's liabilities and assets, but does not merge with that entity, inherit the acquired entity's status for purposes of specific P/J? 2. In what circumstances will the acquiring entity be subject to specific P/J in NY?

Edwards v. Roman Catholic Bishop of Providence

66 F.4th 69 (2d Cir. 2023)

P alleged he was sexually abused by a priest from a church in Rhode Island. P claimed P/J under CPLR 302(a)(1) based on a theory that the priest was in NY on church business to meet with Claus Bon Bulow to seek financial contributions to D. Court held there was no basis to find that the sexual abuse "arose from" the business meeting.

Relevant Sports, LLC v. United States Soccer Federation

61 F.4th 299 (2d Cir. 2023)

In this antitrust action, Court held there was P/J over FIFA by reason of the transactional acts of D, a NY not-for-profit corporation committed in NY on behalf of FIFA as D was FIFA's agent for purposes of CPLR 302(a)(1).

2. CPLR 302 (a) (2)

SOS Capital v. Recycling Paper

220 AD3d 25 (1st Dept. 2023)

Court held in a thoughtful opinion authored by Justice Pitt-Burke in this action where P alleged D non-domiciliaries made fraudulent misrepresentations in emails sent to P who was present in NY, P failed to demonstrate that Ds committed a tortious act "within the state" under CPLR 302(a)(2) where it failed to allege that Ds were physically present in NY when the misrepresentations were made. The language "within the state" means that a nondomiciliary is only subject to NY's long-arm jurisdiction when they have committed a tortious act, in person or through an agent, while physically present within the boundaries of NY. Under CPLR 302(a)(2), the mere occurrence of the injury in NY cannot serve to transmute an out-of-state tortious act into one committed within the state. Here, Ds were domiciled in FL and PA at the time the emails were sent, and there was no allegation that they or any of their agents committed the alleged tortious acts while physically within the boundaries of NY.

Bangladesh Bank v. Rizal Commercial Banking Corp.

216 AD3d 590 (1st Dept. 2023)

P Bank brought action against Philippine bank and gambling casinos, and owner of one casino, to recover funds lost in North Korean hackers' international scheme to launder money through those casinos where participants stole more than $101 million from account that bank maintained at Federal Reserve Bank of NY. Court held Supreme Court properly held that it did not have P/J over BRHI pursuant to CPLR 302(a)(2). P relies on a theory of conspiracy jurisdiction, which requires it to make a *prima facie* showing of a conspiracy, and that it allege specific facts from which it can be inferred that BRHI was a member of a conspiracy involving the commission of a tortious act in NY (*see In re Sumitomo Copper Litig.*, 120 F.Supp.2d 328, 338–340 [S.D.N.Y.2000]; *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428, 961 N.Y.S.2d 5 [1st Dept. 2013]). However, P fails to adequately allege that BRHI was aware or should have been aware that it was funds stolen from NY that were laundered at the Solaire casino, such that BRHI could be deemed to have been aware of the effects of its activities in NY. It also fails to allege that the conspirators' conduct in NY was at BRHI's direction or on its behalf.

WCVACK v. Boys & Girls Club of Greenwich

216 AD3d 1 (2nd Dept. 2023)

P alleged that D, a Connecticut not-for-profit corporation, organized a field trip for its members to an amusement park in NY, and while at the amusement park, D failed to properly supervise its members, resulting in P being sexually assaulted by another member. Although a majority of the abuse alleged by P occurred in another state, Court held in a comprehensive decision discussing P/J authored by Justice Christopher that P/J could be established under CPLR 302 (a) (2) with regard to the one incident that was alleged to have occurred in NY. The Court noted that CPLR 302 (a) (2) requires no specified level of activity within the State, but only that the P suffer some damage as a result of a tortious act committed by D or its agent in NY. The minimum contacts test has come to rest on whether a D's conduct and connection with the forum State are such that it should reasonably anticipate being hauled into court there. P alleged that D organized a field trip for its members to an amusement park in NY, and while at the amusement park, D failed to properly supervise its members, resulting in P being sexually assaulted by another member. D's presence in NY was a purposeful, deliberate action on its part of planning a trip to an amusement park as part of its summer camp program. D's presence in NY was not a random, fortuitous event; D entered the state's geographical boundaries with its members, and, as alleged by P, while in NY, committed a tortious act. Moreover, the trip to NY

was not necessarily an isolated occurrence because it was undisputed that D supervised field trips to baseball games in NY. D failed to defeat jurisdiction as constitutionally impermissible as it failed to present a compelling case that some other consideration rendered P/J unreasonable.

Redell-Witte v. Algoma Hardwoods

__ AD3d __ (1st Dept. 2023)

In this asbestos action, Court granted D's motion to dismiss for lack of P/J. There was no basis for P.J under CPLR 302(a)(2) because there is no evidence that the fire doors that allegedly caused decedent P's injury by exposing him to asbestos were manufactured in NY. To the contrary, the testimony revealed that D, a company incorporated in CA, never manufactured any products outside of CA. Thus, D did not commit a tortious act "within the state" to confer jurisdiction.

Serota v. Cooper

216 AD3d 1019 (2d Dept. 2023)

See *Serota supra*. Court rejected P's CPLR 302(a)(2)'s argument based on the acts of the NY local counsel. Court noted that to be considered an "agent" for purposes of CPLR 302(a), an individual must have engaged in purposeful activities in the State in relation to a transaction for the benefit of and with the knowledge and consent of D and D must have exercised some control over the agent in the matter. The critical factor is the degree of control D principal exercises over the agent. Here, the P failed to make a *prima facie* showing that D committed a tortious act within NY (*see* CPLR 302[a][2]), or that the local NY counsel retained by the daughter-in-law was an agent for D.

Edwards v. Roman Catholic Bishop of Providence

66 F.4th 69 (2d Cir. 2023)

P alleged he was sexually abused in NY by a priest form a church in Rhode Island. Court held there was no P/J under CPLR 302(a)(2) as the priest acted pursuant to personal motives, not for benefit of D, and thus was not D's "agent," and there was no allegation that D had contact to the church.

3. CPLR 302 (a) (3)

Bangladesh Bank v. Rizal Commercial Banking Corp.

216 AD3d 590 (1st Dept. 2023)

Court further held that Supreme Court properly concluded that it did not have jurisdiction over BRHI under CPLR 302 (a)(3)(ii). P did not sufficiently allege that BRHI expected or should have expected its conduct to have consequences in NY. Additionally, P failed to show why jurisdictional discovery should have been allowed, as it does not adequately explain what information it would seek in such discovery, or why it is not already otherwise available. Court further held Supreme Court properly found jurisdiction over EHL as the complaint adequately alleges a connection between EHL's conduct via its owner, D Wong, and the alleged acts of the conspiracy in NY. The complaint alleges Wong's coordination with D Maia Deguito to establish fictitious accounts, which support the allegation that Wong was involved in providing hackers with the requisite routing information concerning the fictitious accounts, making the transfers possible. Therefore, P adequately pleaded awareness on EHL's part that the effects of such misconduct would be felt in NY. Given the extent and nature of EHL's alleged involvement, the exercise of P/J comported with due process.

Archer-Vail v. LHV Precast, Inc.

209 AD3d 1226 (3rd Dept. 2022)

P, decedent's estate, brought action against D Spillman Co., the bridge form manufacturer, seeking damages for worker's injuries allegedly sustained when bridge form fell on him. Court affirmed denial of motion to dismiss for lack of P/J, finding jurisdiction under CPLR 302(a)(3)(ii). The evidence submitted in opposition to Spillman's motion establishes that Spillman availed itself of the interstate market, including NY, via an interactive website that allowed customers to order various products and custom designs tailored to an individual customer's needs. Spillman's website highlighted its sales to various interstate customers, including a prior NY customer who provided testimonials about Spillman's products and whose website was directly accessible utilizing a link from Spillman's website. The website also contains contact information for its employees to work with customers, including those from NY, on ordering custom-designed forms. Moreover, Spillman's responses to P's jurisdictional interrogatories further establish that the NY market was a significant part of Spillman's total business for the three-year period beginning with the year the accident took place through its final year in business. In 2016, Spillman's NY sales amounted to $398,166.42 constituting 6.0% of its total sales, and in 2017, those sales were $334,316.88, which constituted 4.2% of its total

sales. Finally, through three quarters of the 2018 fiscal year, Spillman's NY sales rose to $428,980.33 constituting 7.8% of its total sales, a figure that exceeded the percentage of overall sales generated in its home jurisdiction of Ohio. To this end, from 2016 through 2018, the percentage of Spillman's total sales that were derived from its business in Ohio slowly decreased from a high of 11.8% to 7.5%, evidencing that a substantial portion of its total sales flowed from the interstate market. This evidence showed Spillman derived substantial revenue from interstate commerce and that it should have reasonably expected that the design, creation, supply and distribution of the nesting diagram that accompanied its bridge forms could have consequences in this state.

National Union Fire Ins. v. UPS Supply Chain

74 F.4th 66 (2d Cir. 2023)

In this action, Court held third-party P had no jurisdictional basis for impleading an out-of-state third-party D whose negligence damaged property outside NY, thereby exposing the third-party P to litigation expenses and the potential payment of damages in NY court action. It noted the claimed injury to third-party P in Ny was merely the financial consequence of events that took place outside NY and NY is not where the original event occurred. The Court also noted "If prospective liability were sufficient to establish in-state injury, then §302(a)(3)'s in-state injury requirement would *always* be satisfied for third-party Ds in such cases."

III. DISCOVERY

Noris Medical v. Siev

214 AD3d 540 (1st Dept. 2023)

D moved to dismiss for lack of P/J pursuant to CPLR 302(a)(1). D submitted evidence to show that he had no contacts with NY, had not been in NY since mid-2018, and that the specific transactions alleged in the complaint involved business contacts in Texas and Rhode Island, not NY. In opposition, P did not dispute D's showing, but submitted evidence that it leased an office and opened a bank account in NY with D's approval and assistance, and an affidavit of its chief executive officer who made vague and unsubstantiated assertions that D did business on P's behalf in NY at unspecified times with unnamed employees and customers, which was insufficient to establish long-arm jurisdiction. Because P failed to make a "sufficient start, via tangible evidence," of showing that D transacted any business in NY having any substantial relationship to the claim alleged in the complaint, jurisdictional discovery was not warranted, and the complaint should have been dismissed.

Lynx Capital v. Bayes Capitol

217 AD3d 571 (1st Dept. 2023)

Court held complaint should have been dismissed as against Hockeytown for lack of P/J, as P failed to make a sufficient start in demonstrating jurisdiction under CPLR 302(a) or (3)(ii). As to P/J over Hockeytown under CPLR 302(a)(2), both the alleged transferor and the alleged transferees were NJ entities, and the complaint offers no other indicia that the transfers occurred in NY. As to CLR 302(a)(3)(ii), P has not alleged that Hockeytown derives substantial revenue from interstate or international commerce, as required to confer jurisdiction under the subsection.

IV. WAIVER OF DEFENSE OF LACK OF PERSONAL JURISDICTION

A. Generally

Body Glove IP Holdings v. On Five Corp.

217 AD3d 561 (1st Dept. 2023)

In this contempt proceeding against non-party, Court held the mere filing of a notice of appearance prior to the time required for a responsive pleading does not constitute a waiver of an objection to P/J. Here, the record reflects that non-party objected to jurisdiction at the first opportunity, in opposition to P's motion.

P.S. Finance, LLC v. Eureka Woodworks

214 AD3d 1 (2nd Dept. 2023)

In this action arising out of a litigation funding agreement between P and D corporation in which the corporation was represented by D attorneys, Court held the attorneys did not waive the defense of lack of P/J by participating in the defense of the action. It noted the attorneys' first participation in the action was to raise the defense of lack of P/J in their opposition to P's motion for S/J in lieu of complaint and, on the same date, they moved to dismiss the action insofar as asserted against them based upon lack of P/J. They later entered into a stipulation stating that nothing contained in the stipulation nor anything previously filed would be deemed a waiver of the defense of lack of P/J with respect to the attorneys. Although Ds subsequently cross-moved for S/J dismissing the action and challenged the merits of P's underlying claims, the attorneys continued to contend that NY courts lacked P/J over them.

HSBC Bank USA v. Whitelock

214 AD3d 855 (2d Dept. 2023)

In this mortgage foreclosure action, Court held D waived his objection to P/J by opposing the April 2018 motion to amend the caption on the grounds, among others, that P lacked standing to commence this action, without also asserting an affirmative objection to jurisdiction at that time. Contrary to D's contention, under the circumstances of this case, neither his January 2013 motion nor his July 2013 motion were sufficient to preserve his defense of lack of P/J such that

D could thereafter freely participate in the action without subjecting himself to the Supreme Court's jurisdiction to vacate a default judgment.

Abraham v. Hezi Torati

219 AD3d 1275 (2d Dept. 2023)

In this fraud action, Court held D waived any objection based on lack of P/J by failing to raise such objection in a responsive pleading or motion to dismiss pursuant to CPLR 3211 and by participating in the litigation of the action. Notwithstanding that a D fails to make a formal appearance, they may nonetheless be said to have acquiesced to the court's jurisdiction and participated in the action via an informal appearance. Here, D's counsel filed numerous motions listing himself as the attorney for all named D, including D, and similarly represented D at the inquest on the issue of damages.

B. Informal Appearance

Travelon, Inc. v. Maekitan

215 AD3d 710 (2nd Dept. 2023)

In this breach of contract action, Ps moved for leave to enter a default judgment. Against Ds Russo and Emsons Exim Ltd. In support of the motion, Ps did not submit any affidavits of service of process upon Russo or Emsons Exim. Instead, they contended that an affidavit from Russo (hereinafter the Russo affidavit), which was submitted by Emsons Agra LLC in opposition to the P's prior motion for a preliminary injunction, constituted an informal appearance on behalf of both Russo and Emsons Exim, that Russo and Emsons Exim had submitted to P/J of the Supreme Court despite not having been served with process, that their time to file an answer had passed, and therefore, the court could enter a default judgment against them. Court noted that an informal appearance " 'comes about when D, although not having taken any of the steps that would officially constitute an appearance under CPLR 320 (a), nevertheless participates in the case in some way relating to the merits' and that "When a D participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, D confers *in personam* jurisdiction on the court". Court concluded that Russo participated on the merits in his individual capacity by submitting the Russo affidavit on behalf of corporate Ds Emsons Agra and Emsons Exim). Since the Russo

affidavit did not constitute an informal appearance on behalf of Russo, the Supreme Court properly denied that branch of the Ps' motion which was for leave to enter a default judgment against him. However, Court concluded the Russo affidavit constituted an informal appearance on behalf of Emsons Exim. In the Russo affidavit, Russo specifically stated that he is the CEO of both Emsons Agra and Emsons Exim, and then collectively referred to both entities throughout the affidavit as "Emsons." **COMMENT:** The concept of informal appearance is thoughtfully discussed in Siegel and Connors, NY Practice (6th ed) § 112 (cited by Court) and Pillarella, "The Informal Appearance," NYLJ, 2/7/22, p. 3, col. 3).

Abraham v. Hezi Torati

219 AD3d 1275 (2d Dept. 2023)

See IV-A *supra*.

V. IN REM AND QUASI IN REM (CPLR 314)

Hetelekides v. County of Ontario

39 NY3d 272 (2023)

In this action by P, decedent's wife and executor of his estate, to recover damages allegedly incurred as a result of the tax foreclosure sale of decedent's property, Court held County Court had jurisdiction to enter a default judgment in the tax foreclosure proceeding in favor of the county Ds because the proceeding was validly commenced against the property, not against a deceased owner. It noted an action or proceeding in rem has for its subject specific property which is within the jurisdiction and control of the court to which application for relief is made. In an action *in rem*, a court obtains jurisdiction over the "res"—the property at issue in the proceeding. An action for foreclosure is in the nature of a proceeding in rem to appropriate the land. While a dead person cannot be sued, an action in rem, like a tax foreclosure proceeding, is not an action against a person, but rather the subject property on which the tax was charged and due. Property owners and interested parties are owed adequate process where their property rights are at stake through an *in rem* foreclosure proceeding.

Chaar v. Arab Bank

220 AD3d 479 (1st Dept. 2023)

P's sole basis for establishing P/J was through quasi-in-rem jurisdiction over D's correspondent bank accounts in NY. Court held that when the property serving as the jurisdictional basis, here, the corresponding bank accounts located in NY, have no relationship to the cause of action and there are no other ties among D, the forum and the litigation, quasi-in-rem jurisdiction will be lacking. Ps claim that Ds took part in real estate acquisitions and made trades on the NY Stock Exchange to provide money transfers and letters of credit; however, none of these activities were connected to Ps' claims.

Part Two
PROPER COURT

I. SUBJECT MATTER JURISDICTION

A. Generally

Henry v. New Jersey Trust Corp.
195 AD3d 444 (1st Dept. 2021), *app. dism.* 39 NY3d 361 (2023)

Court held D waived its sovereign immunity defense (*see Belfond v Petosa* [decided together]). It did not place P or the court on notice of the defense by asserting it in its responsive pleadings, during pretrial litigation, at trial or in its posttrial motion. Indeed, it raised the issue for the first time on appeal. As the defense pre-dates *Franchise Tax Bd. of California v Hyatt*, and thus was available at the time D served its answer, its litigation conduct induced substantial reliance on that conduct by P and our court, and is inescapably a clear declaration to have our courts entertain this action.

Henry v. New Jersey Transit Corp.
39 NY3d 361 (2023)

Court dismissed D's appeal. It held a State must preserve its interstate sovereign immunity defense by raising it before the trial court, and no exception to the general preservation rule applies because sovereign immunity does not implicate the subject matter jurisdiction of NY courts. Arguments or defenses that are waivable are generally subject to the preservation rule. The Supreme Court's determination in *Franchise Tax Bd. of Cal*. that interstate sovereign immunity is waivable fatally undermines the argument that interstate sovereign immunity is rooted in subject matter jurisdiction because subject matter jurisdiction, as a rule, cannot be dispensed with by litigants. Interstate sovereign immunity's waivability vitiates any legal justification for applying a broad exception to the general preservation requirement to such sovereign immunity claims. Interstate sovereign immunity is rooted and analyzed in terms of concepts that align closely with treatment of P/J issues, not subject matter jurisdiction ones. As

such, interstate sovereign immunity defenses do not fall within the subject-matter-jurisdiction exception to the general preservation requirement.

Belfand v. Petosa

196 AD3d 60 (1st Dept. 2021)

In this personal injury action commenced against NJ Transit and the operator of a bus it owned, Ds moved to dismiss on the ground Supreme Court lacked subject matter jurisdiction because the US constitution did permit a state to be sued by a private party in a sister state court without its consent, citing *Franchise Tax Bd. v. Hyatt* (193 Ct. 1485 [2019]). Court held New Jersey's consent to suits in its state courts under its Tort Claims Act (NJ Stat Ann § 59:1-1 *et seq.*) is not an express consent to suit in courts of a sister state. It noted under the US Constitution, states retain their sovereign immunity from private suits brought in the courts of other states and may only be sued by a private citizen in a sister state when they have consented to such suits. Consent to suit in a sister state by legislation will exist only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. Here, while the New Jersey Tort Claims Act unambiguously subjected New Jersey to suits in its own courts, it lacked any unequivocal expression of consent to the State being sued in a sister state court. Intrastate consent to suits cannot be deemed consent to interstate suits. Court further held D 's litigation conduct, which included conceding liability, losing at the first trial on damages and then seeking dismissal of the second trial on damages based not on the merits but on an alleged new defense of sovereign immunity, was an affirmative invocation of the court's jurisdiction and was deemed a waiver of its sovereign immunity so as to provide the court with subject matter jurisdiction over the action. In the context of Eleventh Amendment immunity, Court noted sovereignty is jurisdictional in nature and can be waived through an express and unambiguous waiver. A state may be deemed to have waived its immunity by voluntarily invoking a court's jurisdiction. In determining the clarity of a state's waiver of its sovereign immunity through litigation conduct, a court must bear in mind the need to avoid inconsistency, anomaly, unfairness, and unfair tactical advantages, all concerns equitable in nature. Here, D's litigation conduct involved an unfair tactical advantage, induced substantial reliance on that conduct by P and the NY courts, and was inescapably a clear declaration to have NY entertain the action. Court thus denied the motion to dismiss.

Colt v. New Jersey Transit Corp.

206 AD3d 126 (1st Dept. 2022)*, app. dism.* 39 NY3d 954 (2022)

P was injured when struck by a bus owned by New Jersey Transit Corporation (NJT) in NYC. NJIT and the bus operator moved to dismiss based on sovereign immunity. Court affirmed denial of the motion on the ground P lacked an available judicial forum in New Jersey state courts because the injury arose outside New Jersey's borders (*see* NJ Rules of Ct rule 4:3-2). In pitting Ds' sovereign immunity defense, which they did not waive, against P's fundamental right derived from the common law to be able to seek redress in a judicial forum for injuries inflicted by a tortfeasor, the Court weighed the burden on NY courts, the potential hardship to Ds, the availability of an alternate forum in which Ps could bring suit, the residency of the parties, the forum in which the cause of action arose, and the extent to which Ps' interests could otherwise be properly served by pursing the claim in NY. Here, NJT would not be prejudiced, given that it waited three years to move to dismiss on the ground of sovereign immunity. Nor would it be burdened in defending the action in NY, given that all the relevant witnesses and evidence were in NY, where the accident took place, and it had participated in three years' worth of discovery. Further, the ability to commence a negligence action against NJT in New Jersey state courts was dependent solely on the fortuitousness of where the accident occurred. Ps could not seek redress for NJT's tortious conduct in NY State courts under the doctrine of sovereign immunity and were precluded from suing in New Jersey state courts merely because the cause of action did not arise in that state, leaving Ps without a judicial forum. Under these circumstances, dismissal of the action against NJT in the absence of an available judicial forum in New Jersey would be an affront to justice and could not be countenanced.

Nizomov v. Jones

220 AD3d 879 (2d Dept. 2023)

In this action against NJ Transport et al, Court held D did not consent to suit or waive their sovereign immunity in NY by virtue of their extensive operations within this State. A State's consent to suit must be unequivocally expressed in the text of the relevant statute and therefore "may not be implied." Although NJT is a public entity subject to the NJ Tort Claims Act, NJ's consent to suits in its state courts under the TCA is not an express consent to suit in courts of a sister state. Furthermore, under the facts and circumstances of this case, Ds' conduct during this litigation did not amount to a waiver of sovereign immunity. **COMMENT:** Second Department relied upon First Department precedent.

Tutor-Perini v. Port Auth. of NY & NJ

221 AD3d 471 (1st Dept. 2023)

Court held the failure to comply with the conditions precedent in Unconsolidated Law §7107 governing actions against the Port Authority resulted in the withdrawal of the Port Authority's Consent to suit, depriving the Court of subject matter.

Graham v. State

212 AD3d 955 (3d Dept. 2023)

Clamant sued State in the Court of Claims "stemming from various issues related to a driveway permit issued to her by DOT. Court, upon a review of the allegations in the amended claim, noted claimant essentially challenges the actions and/or determinations made by an administrative agency. In this regard, claimant raises grievances relative to the application to DOT for a permit to construct a residential driveway and the requirements imposed by DOT and other administrative agencies. These grievances must be brought in a CPLR article 78 proceeding in Supreme Court and, therefore, the Court of Claims does not have subject matter jurisdiction to resolve them. To the extent that claimant challenges the constitutionality of certain regulations or laws, seeks strictly equitable relief or demands that an agency take particular action, the Court of Claims likewise lacks jurisdiction over those claims. Although claimant maintains that there was no final determination by an agency, such fact neither alters the essence of claimant's claims nor creates subject matter jurisdiction for the Court of Claims.

Cumberland v. State

217 AD3d 1029 (3d Dept. 2023)

Court of Claims dismissed incarcerated inmate's claim seeking monetary damages alleged he was improperly removed from his prison work assignment. Court affirmed. In an opinion authored by Justice Fisher, Court noted to the extent claimant seeks review of the denial of his several inmate grievances, the conditions of his confinement, wrongful confinement resulting from his termination from his job assignment and allegations of discriminatory treatment, including any related administrative determinations on such matters, these must be made in the context of a special proceeding in Supreme Court pursuant to CPLR article 78. To the extent that claimant may be relying on alleged violations of federal constitutional provisions, "federal constitutional claims may not be asserted [against D] in the Court of Claims, given that the

statutory basis for such claims, 42 USC § 1983, authorizes claims only against a person and D is not a person within the meaning of this statute.

Estate of Grossman

217 AD3d 1213 (3d Dept. 2023)

P commenced this proceeding under SCPA 2102, via order to show cause, seeking an order, among other things, declaring that decedent's exercise of her power of appointment through her will was valid, turning over the assets of the trust to P and directing an accounting. Respondent moved to dismiss the petition due to lack of subject matter jurisdiction. Surrogate's Court denied the motion and Court affirmed. It noted Surrogate's Court has "full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents". The controversy at issue centers on the validity of a power of appointment granted to decedent in Grossman's will, the exercise of that power in decedent's will and whether the assets of the trust should be turned over to petitioner. The issues in this proceeding thus relate to the affairs of two decedents – Grossman and decedent – and the administration of their estates. In view of this, the court had subject matter jurisdiction.

Impellizzeri v. Campagni

218 AD3d 1210 (4th Dept. 2023)

P worked as a registered nurse for nonparty SUNY Upstate Medical University. He commenced this action asserting causes of action for tortious interference with his employment, defamation, and intentional infliction of emotional distress against several Upstate administrators and an employee, Klaiber. Court held Supreme Court properly granted Ds' motion on the ground that it lacked subject matter jurisdiction over those claims. It noted the Court of Claims has exclusive "jurisdiction ... [t]o hear and determine a claim of any person ... against the state ... for the torts of its officers or employees while acting as such officers or employees" and "[a] suit against a State officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in [their] official role and involves rights asserted, not against the officer individually, but solely against the State". In contrast, where "the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest—even though it could be held secondarily liable for the tortious acts under *respondeat superior*". Here, the Upstate Ds established that the allegedly improper acts undertaken in connection with the investigation concerning P were all done in their official capacities,

showing. they had conducted their investigation pursuant to the law, as well as Upstate's internal policies, and that any deviations from Upstate's internal policies were not so severe or egregious that they raised triable issues of fact whether the Upstate Ds had acted intentionally in their individual capacity. Additionally, the Upstate Ds established that Klaiber's decision to send the NOD to the OPD - the basis of the surviving defamation claim - was done pursuant to her obligations under the Public Health Law in furtherance of her official duties for Upstate.

New York City Civil Court

In the November 2000 election, NY voters approved a ballot measure to raise the constitutional limit for NY City Civil Court to claims of up to $50,000. On June 3, 2022, Senate and Assembly passed conforming legislation amending the NY City Civil Court Act provisions to reflect the $50,000 limit.

B. Removal

Leighton v. Lowenberg

215 AD3d 474 (1st Dept. 2023)

Supreme Court denied P's motion to vacate an order of Supreme Court, which *sua sponte* transferred the action to the Civil Court pursuant to CPLR 325(d) and 22 NYCRR 202.13(a), and Court affirmed. It held Supreme Court did not abuse its discretion in denying P's motion, which, in effect, seeks removal to Supreme Court of an action that had been transferred to Civil Court pursuant to CPLR 325(d). P has unreasonably delayed seeking such relief, and has not shown that it has been prejudiced by reason of the transfer.

C. Transfer

Gleizer v. Gleizer

216 AD3d 920 (2d Dept. 2023)

P brought action against stock grantee and estate of second grantee, seeking to set aside as fraudulent conveyance of stock by grantor in corporation that owned commercial real property. Supreme Court denied motion by grantee and estate to cancel notice of pendency filed against premises and to transfer action to Surrogate's Court. Court affirmed. It noted that although a cause of action alleging fraudulent convenance may be raised in the Surrogate's Court, here, this action was already pending in the Supreme Court, and the Surrogate's Court did not direct that the action be transferred to it from the Supreme Court. As the Surrogate's Court had already declined to accept this action for determination, the Supreme Court providently exercised its discretion in denying that branch of the appellants' cross-motion which was to transfer the action to the Surrogate's Court.

II. FORUM SELECTION CLAUSE

Deutsche Bank Nat. Trust Co. v. Barclays Bank
34 NY3d 327 (2019)

The Court's observation in the opinion's initial paragraph is worth noting: "NY State is a national and international leader in commerce. As a result, large numbers of contracting parties in the U.S. include a NY choice-of-law and forum selection clause in their contracts."

Breakaway Courier Corp. v. Berkshire Hathaway
215 AD3d 565 (1st Dept. 2023)

Court held Supreme Court properly dismissed the complaint based on the forum selection clause in the Reinsurance Participation Agreement (RPA). The forum selection clause in the RPA executed by P and by D Applied Underwrites Captive Risk Assurance Company, Inc. (AUCRA) requires challenges to the RPA to be litigated in Nebraska, including the claim that the RPA itself is invalid. The controlling factor is not whether the RPA itself was illegal or unreasonable, but whether the forum selection clause itself was illegal or unreasonable. The clause, the Court held, was neither.

EPAC Technologies v. Interforum
217 AD3d 623 (1st Dept. 2023)

Court held P/J in NY over D was proper based on forum selection clause. Court held a "sufficiently close" relationship between alleged D signatory and non-signatory was present. Court rejected D's argument that wholesale application of this doctrine allows for the circumvention of federal due process requirements insofar as it dispenses with the need to perform an analysis of D's contacts with the forum state. However, this Court has already held that no separate due process analysis is necessary because "the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause."

JD2 Realty Mgt. v. Evojets, LLC

221 AD3d 407 (1st Dept. 2023)

In this breach of contract action, Court held Supreme Court properly dismissed the complaint as against My Jet Saver. As an alleged third-party beneficiary, P would be bound by the venue selection clause in the contract between My Jet Saver and Evojets, which specified venue for "any claim" "shall" be in Miami-Dade County, which makes venue there mandatory. Further, P has not established that a trial in FL would be so gravely difficult and inconvenient that P would, for all practical purposes, be deprived of its day in court.

Alvarez & Marshal Valuation Services v. Solar Eclipse

216 AD3d 447 (1st Dept. 2023)

P's sole alleged basis for P/J over the dismissed Ds is found in the jurisdiction and forum selection provisions of the parties' pre-November 2016 engagement letters, in which the parties agree "that any Federal Court sitting within the Southern District of New York shall have exclusive jurisdiction over any litigation arising out of this Agreement; to submit to the P/J of the Courts of the United States District Court for the Southern District of New York; and to waive any and all personal rights under the law of any jurisdiction to object on any basis (including, without limitation, inconvenience of forum) to jurisdiction or venue within the State of New York for any litigation arising in connection with this Agreement." It was uncontested that there exists no basis for subject matter in the federal courts. In this situation, Court held P/J over Ds could not be maintained. It noted the third and final clause of the forum selection agreement merely clarifies what the clauses preceding it set forth: that the parties cannot avoid jurisdiction in the federal court (which is located in NY stated) by raising P/J or venue objections there; the waiver clause doe s not apply to a state action.

P.S. Finance v. Eureka Woodworks

214 AD3d 1 (2d Dept. 2023)

In this action arising out of a litigation funding agreement between P and D corporation in which the corporation was represented by D attorneys, Court held in a comprehensive opinion by Justice Connolly the attorneys were bound by the NY forum selection provision of the litigation funding agreement even though the attorneys did not sign it, as the litigation funding agreement and the attorneys' signed attorney acknowledgement were related agreements that were part of the same transaction, and the attorneys had a close relationship to the corporation and the transaction. A non-signatory is a third-party beneficiary or an alter ego of a signatory or

where the non-signatory is a party to another related agreement that forms part of the same transaction. In addition, a forum selection clause may be enforced against a non-signatory under the "closely related" doctrine where the non-signatory and a party to the agreement have such a close relationship that it is foreseeable that the forum selection clause will be enforced against the non-signatory. The litigation funding agreement, attorney acknowledgement, and an irrevocable lien assigning the corporation's settlement proceeds to P related to the same subject matter, were executed on the same date, referred to each other in multiple places, and were intended to be considered one agreement. Further, the attorneys had such a close relationship to the corporation and the transaction with P that it was foreseeable that the forum selection clause would be enforced against them. **COMMENT:** Court distinguished Prospect Funding Holding v. Patz (183 AD3d 486 [1st Dept. 2022]).

BHRE Group v. Boger

216 AD3d 898 (2d Dept. 2023)

In this breach of contract action, Supreme Court granted D's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint, citing the parties underlying agreement which contained a forum selection clause designating the courts located in Tel Aviv, Israel as having exclusive jurisdiction. Court affirmed. It noted the documentary evidence submitted by Ds conclusively established that the forum selection clause in the subscription agreement required the Ps to bring the subject action in Israel. While a forum selection clause was not included in the operating agreement, the subscription agreement referenced the terms of the operating agreement, and provided that the operating and subscription agreements together "contain the entire agreement of the parties with respect to the subject matter hereof." Moreover, both the operating and subscription agreements governed the obligations of D investors at issue in this action. Contrary to the Ps' contention, the provision in the operating agreement providing that Delaware law applied to the interpretation of that agreement did not preclude the application of the forum selection clause. Further, the Ps failed to make the requisite "strong showing" that the forum selection clause should not be enforced.

PWE (Multi) QRS v. J-M Manufacturing

79 Misc.3d 1202(A) (Sup. Ct. NY Co. 2023) (Lebovits, J.)

D guarantor moved to dismiss the complaint and in the alternative, D moved under CPLR 3211(a)(4) to stay this action pending the resolution of a prior-filed action in Utah. Court held the guaranty's forum-selection clause provides that any action "arising out of or relating to this

Guaranty shall be instituted in any federal or state court in New York, New York." Landlord argued that guarantor's attempt to move under the first-in-time rule is futile because the rule "does not apply to disputes that are governed by mandatory forum selection and exclusive jurisdiction clauses." Here, both the lease and guaranty contain forum-selection clauses at issue, and both the Utah action and this action were brought in accordance with the applicable forum-selection clause. In these circumstances, the Court saw no reason why the forum-selection clause in the guaranty should render the first-in-time rule "irrelevant" to this court's analysis, as landlord suggests. Because the court concludes that the guaranty's forum-selection clause does not render the first-in-time rule inapplicable for CPLR 3211(a)(4) purposes, it then considered the application of the rule.

Spellmans Marine Inc. v. HC Composites, LLC

77 Misc.3d 318 (Sup. Ct. Suffolk Co. 2022) (Hudson, J.)

In this action arising out of a dealership agreement between P boat retailer and D out-of-state manufacturer and supplier of watercraft, Court held the agreement's forum selection clause, which provided for an “exclusive jurisdiction and venue” of North Carolina, was mandatory and enforceable. Though the Vessel Dealer Act (General Business Law §§ 810-816) provides protections to a boat dealer vis-à-vis a manufacturer, section 814 specifically states: “A cause of action to enforce the provisions of this article may be commenced in any court having jurisdiction over such action or may be resolved through arbitration pursuant to arbitration standards recognized by the American Arbitration Association. Every arbitration conducted pursuant to this article shall be conducted in this state.” When the legislature specified that an arbitration proceeding under the Vessel Dealer Act had to take place exclusively in NY, it created an irrefutable inference that the failure to include litigation within its prohibitions was intentional. Accordingly, the forum selection clause required the dispute to be heard in North Carolina.

III. FORUM NON CONVENIENS

Estate of Kainer v. UBS AG

37 NY3d 460 (2021)

In this action involving a dispute over ownership of the proceeds from the sale of a painting that had been stolen by the Nazi regime, Court held Supreme Court did not abuse its discretion in presuming P/J over Ds and addressing the merits of their *forum non conveniens* arguments. It held that the Court in stating in *Ehrlich-Bober & Co. v University of Houston* (49 NY2d 574, 579 [1980]) that "the doctrine [of *forum non conveniens*] has no application unless the court has obtained in P/J of the parties," did not hold that a court invariably must resolve any outstanding P/J issue prior to addressing *forum non conveniens*.

Clingerman v. Ali

212 AD3d 572 (1st Dept. 2023)

Court held the record supported P's argument that Ds and Ali were alter egos and that P/J over Ali can be attributed to Ds on that basis. It then held Supreme Court did not abuse its discretion in denying Ds FNC motion. It noted Ali has not appealed, and this action will proceed against him in NY; keeping Ds in the case will therefore not burden the NY courts. Although Ds' current principal lives in Uzbekistan, it appears from the record that Ali, note the current principal, will be the main witness in this case. In any event, assuming the principal's testimony is required, he can presumably appear by electronic means.

Cortlandt St. Recovery Corp. v. Wilmington Trust Co.

215 AD3d 446 (1st Dept. 2023)

In this breach of contract action, Court held Supreme Court providently exercised its discretion in declining to dismiss the complaint on *forum non conveniens* grounds, as Ds failed to satisfy their "heavy burden" of establishing that P's selection of New York as the forum to litigate this action "is not in the interest of substantial justice." Even if the majority of the underlying activities occurred abroad, Ds cannot show that New York has no, or only an insubstantial, nexus to the action, given that it has long been litigated in New York and has resulted in a New York judgment. Ds also failed to identify any hardship to the parties or to Supreme Court that would arise from further litigation of the action in NY.

EPAC Technologies v. Interforum

217 AD3d 623 (1st Dept. 2023)

In this action alleging tortious interference with a contract between P and Ds, Supreme Court entered a judgment dismissing the complaint as against Bellone and Vivendi, the alleged tortfeasors. Court held the complaint stated a valid tortious interference claim. It then addressed Bellone's and Vivendi's P/J and *forum non conveniens* challenges. Court held there were sufficient allegations to warrant jurisdictional discovery. As to the *forum non conveniens* argument, the Court declined to rule on it noting that if the Ds were found to be bound by a forum selection clause, the dismissal would not be proper on that ground.

Brandwein v. Hartig

219 AD3d 1212 (1st Dept. 2023)

Court held Supreme Court did not abuse its discretion in dismissing the complaint on the ground of *forum non conveniens*. Most of the factors considered by NY courts in deciding whether to retain jurisdiction - the burden on the NY court, the potential hardship on D, the unavailability of an alternative forum in which P may bring suit, and whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction - favor a finding that Israel has a greater stake in, and is the proper forum for, this action. Most of the relevant actions occurred in Israel while the decedent and D Hartig resided there, the relevant medical records and other documents are written in Hebrew and located in Israel, and the decedent's heirs almost entirely reside in Israel, as do most of the witnesses and the decedent's guardian. NY's retention of jurisdiction would impose a heavy, undue burden upon the court, requiring translation of the Hebrew documents into English and nuanced application of Israeli tort and inheritance law. Further, Ds have consented to Israel's jurisdiction and would suffer no significant hardship from litigating there. The fact that Ps and the New York Community Bank records and witnesses are in NY is insufficient to justify the court's retention of jurisdiction. The deposition of the NY witnesses and production of the New York Community Bank records can be conducted via the internet.

Ritchey v. Ritchey

218 AD3d 617 (2d Dept. 2023)

In this matrimonial action, to the extent Supreme Court denied P's motions involving support, Court held it was improper for it to do so *sua sponte* without the parties having had an opportunity to brief the issue.

IV. BCL §1314

American Express National Bank v. Pino Napoli Tile & Granite
79 Misc.3d 668 (Sup. Ct. NY Co. 2023) (Lebovitz, J.)

Court held P bank did not demonstrate that it could maintain an action to recover unpaid loans against Ds, a foreign corporation and a non-domiciliary, on its motion for a default judgment because it did not show that it could satisfy the requirements of BCL § 1314. Section 1314 (b) restricts actions brought in NY by a foreign corporation against another foreign corporation or nonresident; and Section 1314 (c) carves out an exemption from those requirements for any "corporation which was formed under the laws of the United States and which maintains an office in this state." NY's existing alter-ego/department test for assessing the relationship for jurisdictional purposes of parent and subsidiary corporations is the appropriate standard for the section 1314 (c) exemption, as well as for the section 1314 (b) requirements. That test is a demanding one, permitting a finding of agency for jurisdictional purposes only when the parent company's degree of control over the subsidiary's activities is so complete that the subsidiary is, in fact, merely a department of the parent. P here was headquartered in Utah and Ds were located in Florida and Arizona. P's affirmation of counsel represented that it was a subsidiary of a NY corporation that was headquartered there. However, it provided no authority for the proposition that the NY office could be, in effect, imputed to P for section 1314 (c) purposes. As an out-of-state P seeking the benefit of paragraph (c) by asking the court to disregard the corporate form, it had to establish that its parent company exercised control over P so pervasive as to render it a mere department of its parent, rather than a truly separate corporation. Because P had not done so, it did not demonstrate that it could maintain the action against Ds in order to receive a default judgment.

V. VENUE

A. Venue Selection Clause

CPLR 514, effective December 3, 2021

By L. 2021, ch. 556, CPLR 501 was amended to reference a new CPLR 514. Subdivision (1) provides that "[i]n any contract involving the sale, lease or otherwise providing of consumer goods, any portion of the contract or any clause which purports to designate, restrict, or limit the venue in which a claim shall be adjudicated or arbitrated shall be deemed void as public policy. Nothing in this section shall be deemed to affect the validity of any other aspect of a contract." Subdivision (2) defines "consumer goods" to include "[g]oods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer." The Memorandum in Support sets for the basis for this amendment: "All too often, consumers who seek judicial or arbitral relief concerning contracts involving consumer goods are limited by contractual boilerplate which purports to set venue in far flung locations which are inconvenient or impossible for consumers to attend. *e.g.*, *Karlsberg v. Hunter Mtn. Ski Bowl, Inc.*, 131 A.D.3d 1121 (2d Dept. 2015). While parties to arms-length transactions should be free to fashion venue requirements to their satisfaction, the inequities involved in consumer transactions warrant a legislative determination that boilerplate clauses which create hardship to consumers should not be enforced." Subdivision (2) voids any venue selection clause in a contract involving "consumer goods" that requires disputes to be arbitrated**. COMMENT**: (1) The amended CPLR 501 and the new CPLR 514 became effective on December 3, 2021 and "apply to all actions and arbitration proceedings which have not been commenced prior to such effective date." If an action on a contract involving "consumer goods" has been commenced prior to the effective date, any venue selection clause in the contract will still govern; (2) CPLR 514 should have no effect on a forum selection clause which requires an action to be commenced in a court in a specified state.

Williams v. Bronx Harbor Ctr.

213 AD3d 430 (1st Dept. 2023)

Court held Supreme Court providently exercised its discretion in finding that D's motion to change venue was untimely. D does not dispute that it was aware of the venue selection clause in the relevant agreement and that it had the fully executed agreement in its possession when P commenced this action. Nonetheless, before making its motion, D engaged in discovery in Bronx County for more than a year, exchanging documentary evidence with P and appearing at numerous court conferences in that county.

Knight v. New York & Presby. Hosp.

219 AD3d 75 (1st Dept. 2022)

In this action by P's decedent alleging decedent received negligent care from D DeWitt rehabilitation and nursing center, D moved to change venue from NY County to Nassau County pursuant to a venue clause in its electronic admissions agreements. Court denied motion in a carefully crafted opinion by Justice Gonzales, Court held P failed to authenticate the agreements. Court noted Ps failed to authenticate the agreements, and thus failed to show that the forum selection clauses set forth in those documents are enforceable against P. Here, P's affidavit, which highlights the irregularities in decedent's purported signatures, together with an exemplar of a known signature, raises issues of fact as to the authenticity of the signatures on the admissions agreements. Court further observed electronic signatures, by their nature, may present special considerations when their genuineness is challenged because a person's electronic signature bears little resemblance to a handwritten signature made the same day. D could have sought to establish the genuineness of decedent's electronic signature by the affidavit of someone with knowledge of the protocols and indicia of reliability, but did not.

Quarterman v. River Manor

219 AD3d 514 (2d Dept. 2023)

P as administrator of decedent's estate commenced this wrongful death action against D facility in Kings County, that county being P's County of residence. D moved to change venue to Nassau County pursuant to a clause in the admission agreement signed by decedent's granddaughter. Court noted that a venue clause in an agreement is prima facie valid and enforceable with respect to the parties to that agreement, and thus may not be enforced against a non-signatory. Here, the clause was not enforced as the agreement was not signed by either P or decedent, and

D submitted no evidence that the granddaughter had been designated a "designated representative."

Reynolds v. JOPAL Bronx

219 AD3d 518 (2d Dept. 2023)

P commenced this action against, among others, D Care Center in Bronx County. D moved to change venue to Westchester County pursuant to a venue selection clause in the admission agreement designating Westchester County as the venue for any action. Court held clause was enforceable, noting P did not dispute that she signed the agreement and that she was decedent's designated representative. Court further noted that P was not required to show that enforcement of the forum selection clause would be unreasonable, unjust or would contravene public policy, or that the forum selection clause was the result of fraud or overreaching.

B. Bases

1. Residence – Persons/Entities

Marte v. Lampert

212 AD3d 560 (1st Dept. 2023)

Court held Supreme Court improvidently exercised its discretion in granting Ds' motion to change venue. P properly placed venue in New York County based upon the corporate D's initial certificate of incorporation designating New York County as the location of its principal office although the company has no office there. While Ds annexed to their moving papers the police report for the subject motor vehicle accident indicating that Ds' vehicle was registered to a Nassau County address on the day of the accident and an affidavit from the corporate D's Vice President averring that its office was in Nassau County when the action was commenced, the corporate residence designated in the initial certificate of incorporation controls for venue purposes. There was no evidence of an amended certificate of incorporation that changed the principal place of business to Nassau County.

Prechtl v. Trane US

213 AD3d 537 (1st Dept. 2023)

Court held P properly placed venue in NY County based on D's application for authorization to conduct business, filed in 1939 and designating NY County as the location of its principal office under CPLR 503(c).

"Margaret Doe" v. Bloomberg, LP

212 AD3d 405 (1st Dept. 2023)

Court held Supreme Court properly found that P was a resident of Bronx County at the time the action was commenced. It noted the evidence established P's bona fide intent to remain in the Bronx with some degree of permanency even though she had only begun searching for an apartment there two months before commencing the action, and moved into the apartment two weeks before commencing the action. P testified that she moved because she felt isolated in New Jersey and wanted to be closer to her doctors located in New York. In addition, she submitted into evidence a change of address with the post office, her utility usage bill, a U-haul receipt of the move, a receipt for food she ordered to her apartment in the Bronx before commencement of the action, and receipts for in-person purchases in the Bronx. Although D points to charges made at P's pharmacy in New Jersey in the days leading up to commencement of the action, P explained in an affidavit and at the hearing that her significant other at the time would routinely pick them up and pay with her card.

Belli v. Lacqua

212 AD3d 701 (2d Dept. 2023)

P commenced this action against D physician in Kings County. Thereafter, D served a demand for a change of venue, and subsequently moved pursuant to CPLR 510(1) and 511 to change venue to Richmond County, asserting that neither party resided in Kings County and none of the acts or omissions alleged in the complaint occurred in Kings County. Court affirmed denial of the motion. It noted D was obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in Kings County. For purposes of determining the proper venue of an action, a party may have more than one residence, and under CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business. The affidavit submitted by D in support of his motion, in which he asserted in a

conclusory manner that the office he maintained in Kings County was not his principal office, was insufficient to demonstrate that Kings County was an improper venue for trial. While D subsequently provided a more detailed affidavit, that affidavit was not properly before Supreme Court and, thus, could not satisfy D's burden on the motion, as it was submitted for the first time with D's reply papers.

2. Claim Arose

L. 2017, ch. 366, eff. Oct. 23, 2017

Bill amended CPLR §503(a) to add an additional ground for the placing of venue – "the county in which a substantial part of the events or omissions giving rise to the claim occurred." Language comes from 28 USC §1391(b)(2). **COMMENT:** While CPLR §503 is captioned "Venue based on residence," venue can also now be based on the cause of action allegation. Legislature was of the opinion that residence alone was too restrictive. In this connection, a P is not required to place venue in the county of occurrence, even when none of the parties are residents of NY. In that instance P properly can choose any county in NY. (*see Espinal v. Lightbody*, 65 Misc.3d 728 [Sup. Ct. Bronx Co. 2019] [Higgit, J.]).

Harvard Steel Sales v. Bain

188 AD3d 79 (4th Dept. 2020)

NOTE: The decision, authored by then Justice Shirley Troutman, was the first appellate decision to analyze and apply the amendment. It still remains the only appellate precedent, An OH corporation, commenced this action in Erie County seeking damages for a fraud perpetuated by D, who is the sole member of Galvstar LLC. That company operates a steel galvanizing plant in Erie County, and P had entered into an agreement with that company to galvanize its steel at its Buffalo plant. D moved to change venue to NY County and Supreme Court granted motion pursuant to CPLR 510(1). Court affirmed. It noted that the allegedly fraudulent statements were made at a meeting in OH, and D was the only party who resided in NY, specifically NY County. Here, NY County is indisputably a proper county based upon D's residence therein. Because none of the parties resides in Erie County, the sole question before the trial court was whether "a substantial part of the events or omissions giving rise to the claim occurred" in Erie County. The question thus became whether D made fraudulent statements in Erie County that materially contributed to P's decision to enter into the agreement. Court then held that without

unambiguous allegations of specific false statements made by D in Erie County that contributed to P's decision to enter into the agreement, it could not conclude that the court abused its discretion in granting D's motion to change the place of trial to NY County. **COMMENT:** Court noted that the provision was modeled after the federal venue statute and federal case construing that provision will be helpful in construing the NY enactment.

New York Marine & General Ins. v. Wesco Ins. Co.

213 AD3d 461 (1st Dept. 2023)

Court held that in this insurance coverage action venue in Bronx County was proper under CPLR 503(a), as a substantial part of the events or omissions giving rise to the claims occurred in Bronx County. In their motion to change venue, Ds failed to sustain their burden of showing, by competent proof, that P's choice of venue on this basis was improper.

Peet's Coffee & Tea v. North Amer. Elite Ins. Co.

218 AD3d 484 (2d Dept. 2023)

In this action to recover damages for breach of an insurance policy, D moved to change venue from Kings County to NY County. Supreme Court denied motion and Court affirmed. Court noted that here, although venue would be proper in NY County based upon D's residence in that county, D failed to meet its burden of establishing that the P's choice of venue in Kings County was improper. In the complaint, the P alleged, *inter alia*, that the P operated insured locations in Kings County for which coverage was sought for business losses. In support of the motion to change venue D submitted, among other things, an affidavit from one of its own employees which substantiated the P's claim that it operated insured locations in Kings County. Thus, the record reflects that "a substantial part of the events or omissions giving rise to the claim" occurred in Kings County and venue was proper in that county.

C. Transfer

1. Improper Venue - CPLR 510(1)

Gomez v. Cypser

213 AD3d 612 (1st Dept. 2023)

Court held Supreme Court should have denied Ds' motion to change venue from Bronx County to Westchester County because it was untimely made. Ds have a reasonable excuse for their failure to make a timely demand to change venue. They learned of P's Westchester address on April 5, 2022, when they received P's medical authorizations and a copy of the Aided report, and made a prompt demand to change venue the day after, on April 6, 2022. However, pursuant to CPLR 511(b), Ds had until April 21, 2022, 15 days after service of their demand, to make the motion. Ds' motion made on April 26, 2022, 20 days after the demand, is untimely and should have been denied. D did not move within the strict time limits provided by the statute and failed to offer any explanation for the delay.

Libertas Funding v. Tempd, Inc.

__ Misc3d __ (Sup. Ct. NY Co. 2023) (Lebovitz, J.)

P sued Ds in Supreme Court, Erie County. Ds filed a timely demand for change of venue under CPLR 511(b), and in response P timely field an affidavit supporting venue in Erie County. Ds then commenced an action in Supreme Court, New York County to bring on the present motion to change venue from Erie County to New York County. In opposing motion, P contended that given its timely service of a venue affidavit, Ds must bring their motion in Erie County, not this court. Court noted that resolving this issue requires this court to construe a pre-CPLR decision of the Appellate Division, First Department, that has not been revisited in the 60 years since its issuance, *Ludlow Valve Mfg. Co. v. S.S. Silberblatt Inc.* (14 AD2d 291 [1st Dept. 1961]). This Court concludes that under *Ludlow Valve*, Ds' motion must be denied without prejudice because it was not filed in the proper forum. In the course of doing so, Court noted the Second Department in *HUT, Inc. v. Safeco* (771 AD3d 255 [2d Dept. 2010]) and Third Department in *Payne v. Civil Service* (15 AD2d 265 [3d Dept. 1961]) reject First Department's conclusion.

2. Impartial Trial - CPLR 510(3)

A.C. v. NYS Div. of Housing

213 AD3d 546 (1st Dept. 2023)

Court held Supreme Court's transfer of this article 78 proceeding to Bronx County, where petitioner formerly presided as a Judge of the Family Court, was an improvident exercise of discretion because permitting petitioner to adjudicate the matter in that county would create a "possible appearance of impropriety." For the same reason, the proceeding should not be adjudicated in New York County, where petitioner currently serves as an Acting Justice of the Supreme Court. To ensure the impartiality of the proceedings, and under the totality of the circumstances, the venue should be transferred to Kings County, as requested by respondent. Having the matter adjudicated in Kings County would not inconvenience the parties, given its proximity to New York County and the lack of witnesses anticipated in this article 78 proceeding.

Village of Malone v. Stone Mountain Prime, LLC

217 AD3d 1219 (3rd Dept. 2023)

Ds moved for a change of venue to Clinton County from Franklin County, arguing that the location of the subject buildings near the Franklin County Courthouse and an article about the action in the Malone Telegram prevented them from obtaining a fair and impartial jury in Franklin County. Ds submitted a map of downtown Malone, showing that the subject buildings are located 0.1 mile from the Franklin County Courthouse, on the main thoroughfare leading to the courthouse and a copy of a January 2020 article in the Malone Telegram, which reported on the allegations in the instant action and, among other things, identified Steinberg as the key player in the ownership of the subject buildings. The article also included quotes from present and former Malone officials, including both the current and former mayor, discussing the dangers posed by the buildings and painting Steinberg as the individual preventing them from being made safe. Court held Ds provided nothing more than mere belief and suspicion for their argument that the potential for jurors to pass by the subject buildings would prevent them from being impartial. To that end, Ds' only proof -- the map of downtown Malone -- proved only the proximity between the buildings, not that passing by the subject buildings would prevent jurors from being impartial. Similarly, Ds' presentation of the single article was insufficient to establish that a change in venue was necessary, as the article was published more than two years before the scheduled trial date, was an objective overview of the parties' dispute and did not, on its

own, establish that the entire jury pool of Franklin County, or even a significant portion of it, was prejudiced against Ds. Accordingly, Supreme Court did not abuse its discretion in denying Ds' motion seeking a change of venue inasmuch as Ds did not "demonstrate a strong possibility that an impartial trial [cannot] be obtained" in the proper county.

3. Convenience - CPLR 510(3)

Marte v. Lampert

212 AD3d 560 (1st Dept. 2023)

In denying Ds' motion for a discretionary change of venue to Nassau County, Court noted the general rule is that a transitory action, such as the subject motor vehicle accident, when other things are equal, should be tried in the county where the cause of action arose. This rule, however, is predicated on the convenience of material nonparty witnesses who are to be present at trial. While the situs of the accident provides a basis to change venue to Nassau County, Ds failed to sustain their burden, as the party moving for a discretionary change of venue pursuant to CPLR 510(3), that there are material witnesses who would be inconvenienced by a trial in New York County.

Prehtl v. Trane US

213 AD3d 537 (1st Dept. 2023)

Court held D failed to sustain its burden under CPLR 510(3) of identifying any material nonparty witnesses who would be inconvenienced by a trial in New York County rather than Delaware County. Indeed, notably lacking is any evidence that D contacted the witness to determine whether they are willing to testify on material matters and would be inconvenienced by having to do so in NY County.

New York Marine & General Ins. Co. v. Wesco Ins. Co.

213 AD3d 461 (1st Dept. 2023)

Court held Supreme Court providently exercised its discretion in denying Ds' motion to change venue under CPLR 510(3). The court noted that Ds' moving papers did not discuss whether they had contacted nonparty witnesses; whether any of those witnesses would be available and

willing to testify; or whether any of them would be inconvenienced by a trial in Bronx County, immediately adjacent to NY County. Further, the information given through counsel's affirmations was hearsay. Supreme Court properly declined to consider Ds' attempts, in their reply papers, to rectify the motion's deficiencies.

Barresi v. Halls Boat LLC

217 AD3d 437 (1st Dept. 2023)

D moved to change venue from Bronx County to Warren County. Court held Supreme Court providently exercised its discretion in denying motion. It concluded D failed to meet its burden of demonstrating that a change of venue for the convenience of material witnesses was warranted. D submitted affidavits of three law enforcement officers employed by Warren County who were involved in the search of P's decedent and the recovery of the snowmobile after the accident, and an Emergency Medical Technician employed by the Town of Lake George who rode in the ambulance with the decedent after the accident. The affidavits, which merely set forth brief and vague descriptions of the witnesses' proposed testimony, were insufficient to show that the testimony would be material and relevant to the issue of D's liability and damages. The witnesses' failure to disclose their complete addresses, however, did not render D's motion fatally flawed, since the affidavits reflect that they reside in Warren County. D also submitted affidavits of three employees who assisted in the search, observed conditions related to the accident, and are familiar with D's maintenance and the condition of its dock and facilities. Although these witnesses could provide relevant testimony on material issues, the convenience of employee witnesses is "not a weighty factor". P, on the other hand, submitted affidavits of six individuals who accompanied P's decedent on the trip, all of whom are firefighters employed in Bronx County, and who averred that they would be inconvenienced by having to travel to Warren County to testify. Their affidavits show they could provide relevant testimony as to the material issues of liability and damages. The foregoing weighed in favor of maintaining the action in Bronx County.

Joseph v. Fensterman

216 AD3d 1355 (3d Dept. 2023)

Court noted that Ds to prevail on their motion to transfer venue from Ulster to Nassau needed "to provide the [court] with the names and addresses of the nonparty witnesses that had expressed their willingness to testify, the substance and relevance of their proposed testimony, and how they would be unduly inconvenienced by appearing.

Booker v. McMindes

220 AD3d 1026 (3d Dept. 2023)

In this civil right claim against D, a corrections officer at Elmira Correctional Facility, commenced in Albany County, Supreme Court granted motion to change venue to Chemung County. Court affirmed. It noted that to the extent that P challenges the change of venue, he is correct that the parties could not be found to be material witnesses justifying a change of venue pursuant to CPLR 510(3). Nevertheless, based upon the other factors relied upon by Supreme Court - specifically, that none of the events underlying the claim occurred nor do any of the remaining Ds reside in Albany County now that the claims against Venettozzi were dismissed, and that a pending related action filed by P, among others, the remaining Ds had previously been transferred to Chemung County - Court was unpersuaded that the court abused its discretion in granting the motion for a change of venue.

D. "Friendly Reminders"

Woodward v. Millbrook Ventures LLC

148 AD3d 658 (1st Dept. 2017)

Court held Supreme Court properly concluded that Ds' motion was untimely. Having consented to electronic filing, Ds were required to serve their papers electronically, and indeed they served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015. Having served their demand, Ds were required to bring their motion to change venue within 15 days, or by July 29, 2015. However, Ds did not bring their motion until July 31, 2015, rendering it untimely. That Ds also elected to serve their demand via United States mail did not extend the deadline for their motion under. Because they consented to participate in Supreme Court's e-filing system, Ds were bound by the applicable rules governing service.

Oneida Pub. Libr. Dist. v. Town Bd.

153 AD3d 127 (3rd Dept. 2017)

Court noted in this CPLR article 78 proceeding that contrary to petitioner's contention, respondents did not waive their lack of P/J defense by moving to change venue. The reason is that CPLR 3211(e) does not prohibit a D from moving to change venue and then move under CPLR 3211 (a)(8) to dismiss for lack of P/J.

Allen v. Morningside Acquisition

205 AD3d 861 (2d Dept. 2022)

P, as administrator of the decedent's estate of Dorothy Shaw (hereinafter the decedent), commenced this action against D that owned and operated a nursing home located in Bronx County. With respect to the basis of venue, the complaint alleged that Bronx County was P's residence and the location where the acts alleged in the complaint occurred. D interposed an answer in Bronx County, and subsequently moved, in the Supreme Court, Nassau County, pursuant to CPLR 501, 509, 511, to change the venue of the action from Bronx County to Nassau County. The basis for the change of venue was a forum selection clause contained in an admission agreement which allegedly was signed by the decedent's great grandson. Court held that although a D is not required to utilize the special procedure set forth in CPLR 511 (a) and (b) when it seeks to enforce a contractual forum selection clause pursuant to CPLR 501, a D that fails to comply with the requirements of that special procedure lacks the authority to notice the motion in its specified venue pursuant to CPLR 511 (b). "Under such circumstances, and without more, the preferred practice is to move in the county in which the objectionable venue was laid." As the motion was made in the wrong county, Court denied the motion. **COMMENT**: Professor Connors questions the correctness of this decision. See Siegel and Connors, New York Practice (6th ed) §123.

Part Three
COMMENCEMENT OF ACTION: FILING AND SERVICE OF PROCESS

I. FILING OF PROCESS

E-Filing – C. 2015, ch. 238

In the aftermath of this legislative approval of e-filing, all counties except Allegheny County permit some form of e-filing. Under AO/373/21, effective e December 22, 2021, the Chief Administrative Judge authorized consensual e-filing of "all civil matters" that are not subject to mandatory or mandatory in part e-filing. For a complete discussion of the evolution and scope of e-filing, see Siegel & Connors, NY Civil Practice (6th ed) §63A and January 2024 Supplement.

Park Premium Enterprises v. Norben Lofts

220 AD3d 661 (2d Dept. 2023)

P filed a complaint without a summons. Ds moved to dismiss on the ground the action was a nullity as no summons had been filed. Supreme Court granted motion and Court affirmed. It noted the failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity. Her, since P did not file or serve a summons, the jurisdiction of the court was never invoked and the purported action was a nullity. Court rejected P's further argument that the failure to file a summons should have been disregarded pursuant to CPLR 2001 as it was improperly raised for the first time on appeal, and, in any event, without merit, as the complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001.

II. SUMMONS

A. Generally

Mariette v. Amber Court

213 AD3d 413 (1st Dept. 2023)

P, as administrator for his father, alleges that his father died as the result of injuries sustained when he was a dementia patient at a nursing home operating under the name Amber Court of Pelham Gardens. A subsequent investigation by the NYSDOH substantiated P's complaint against Amber Court of Pelham Gardens. P then commenced this negligence action naming D Amber Court of Pelham Gardens LHCSA, LLC. D moved to dismiss the complaint against it based on evidence that it was not formed until after the accident that led to P's decedent's death and noting that the SOL had expired. P moved to amend the complaint to correct D's name to Judith Lynn Home d/b/a Amber Court of Pelham Gardens. In support, P's counsel averred that Judith Lynn Home was properly served with the summons and complaint and submitted evidence that Judith Lynn Home was doing business as Amber Court of Pelham Gardens at the same address where the accident occurred. Court held Supreme Court providently exercised its discretion in granting P's motion for leave to amend the complaint to correct D's name. Court noted the summons and complaint alleged that D was operating a nursing home located at 1800 Waring Avenue in the Bronx, which is the address listed on the summons, and P submitted evidence that Judith Lynn Home was doing business under the name Amber Court of Pelham Gardens at that location and had the same chief financial officer as D. Thus, the allegations in the complaint made clear that Judith Lynn Homes d/b/a Amber Court of Pelham Gardens was the intended D, despite the fact that P had mistakenly added the letters "LHSCA, LLC' to that name. In light of the foregoing, Judith Lynn Homes was not prejudiced by the amendment.

Jonke v. Foot Locker, Inc.

213 AD3d 490 (1st Dept. 2023)

P sought to bind "Foot Locker, Inc." as the successor in interest to the default judgment obtained against "The Foot Locker, Inc." Ps motion to amend the caption was properly denied since this is not a case involving a simple misnomer. Venator Group, Inc. did not change its name to Foot Locker, Inc. until 2001 – two years after P initiated the action against Venator's subsidiaries. P did not include Venator as a D or serve it. P served "The Foot Locker, Inc." and

Boot Locker through the Secretary of State at their registered address, to which Foot Locker had no connection.

Bank of NY Mellon v. Silverberg
201 AD3d 695 (2d Dept. 2022)

Court held Supreme Court providently exercised its discretion in denying dismissal of the complaint insofar as asserted against Ds on the ground that the summons was jurisdictionally defective because it was not signed. Court noted the summons as filed was in proper form, and Ds failed to show that they suffered any confusion or prejudice on account of the summons being unsigned. Ds also failed to establish that either the S&C, which was signed, was frivolous. Furthermore, the omission of a signature on the summons was promptly remedied by P.
COMMENT: Uniform Trial Rule 202.5(d)(i)(iv) states that if a paper is not signed, the clerk "shall refuse to accept it for filing."

B. Summons With Notice

CPLR 3012(a)

L.2021, chapter 593, effective May 7, 2022, amended CPLR 3012(a) to preclude the use of a summons with notice to commence an action arising out of a consumer credit transaction.

III. SERVICE OF PROCESS

A. Bases for Service and Compliance

1. CPLR 308

(a) Personal Service (1)

FRIENDLY REMINDERS

Matticore Holdings LLC v. Hawkins

76 Misc3d 511 (Civ. Ct. NY Co. 2022) (Lutwak, J.)

In this holdover proceeding, Court held that because respondent resisted service, the process server effectuated service by personal delivery when he left the papers in respondent's general vicinity. **COMMENT:** Respondent took the process and ripped it up, throwing it into the garbage.

Matticore Holdings LLC v. Hawkins

76 Misc3d 511 (Civ. Ct. Bronx Co. 2022) (Lutwak, J.)

In this holdover eviction proceeding, respondent moved to dismiss on the ground of improper service. Court noted the "black-letter law" principle that "where D resists service, it suffices to leave the summons in his general vicinity." Here, the process server, in his detailed affidavit, described respondent resisting service when he tried to deliver the papers to her in hand. Respondent did not dispute these allegations in her affidavit, and merely denied receipt of a copy of the papers by regular mail. Court held it was reasonable and appropriate for the process server to affix the papers to the door when respondent "told me to do what I had to do, while pointing to the door." Thus, when he left the papers in respondent's general vicinity the process server effectuated service by personal delivery, and such service was complete "immediately upon such personal delivery."

(b) Nail and Mail (4)

Wilmington Savings Fund Soc. V. Zabrowsky

212 AD3d 866 (2d Dept. 2023)

In this foreclosure action, the affidavits of service contained sworn allegations reciting that the process server served both Ds with the summons and complaint, along with the notice, at their residence at 3:36 p.m. on March 16, 2016, by affixing a true copy of each to the door of the premises. The process server averred that he had been unable with due diligence to find Ds or a person of suitable age and discretion at the home, having called there on five prior occasions, which he detailed, and which were on different days of the week at varied times of the day. The process server further averred that he also mailed a copy by first class mail to each D at their residence on March 17, 2016. Ds did not deny having received the documents affixed to their door or mailed to their home. Instead, they asserted that the process server did not attempt with "due diligence" to effect personal service before resorting to the "affix and mail" method. Ds relied upon the affirmation of Zabrowsky stated generally that she was home when the process server purported to attempt service, because the purported attempts were made in the weeks leading up to a particular holiday, for which she would have been home preparing. She did not, however, address the specific dates and times that the process server averred to have attempted service, but rather stated generally that it was inconceivable that she would not have been home and answered the door on at least one of the dates identified in the affidavit. Court held these general assertions, did not constitute a "detailed and specific contradiction of the allegations in the process server's affidavit", sufficient to rebut the presumption of proper service upon them, and, therefore, no evidentiary hearing on the issue was warranted.

Prego v. Batkowski

216 AD3d 679 (2nd Dept. 2023)

Court held P failed to demonstrate that the process server acted with due diligence before relying on affix and mail service. In particular, the process server did not establish through the affidavit that D could reasonably be expected to be at the Brooklyn address at the times of attempted service.

Trujillo v. Collado

217 AD3d 891 (2nd Dept. 2023)

Court held P's pre-answer motion pursuant to dismiss was not untimely, as it was made before service of the responsive pleading was required. Specifically, Trujillo was served with the third-party complaint pursuant to CPLR 308(4) by affixing a copy of the summons and third-party complaint to his door on November 8, 2019, and mailing a copy of the summons and third-party complaint to him within two days of such affixing. The affidavit of service was filed with the court on November 25, 2019. CPLR 320(a) provides, in pertinent part, that where, as here, process is served pursuant to CPLR 308(4), D's appearance by answer, notice of appearance, or motion having the effect of extending the time to answer, must be made within 30 days after service is complete. Service via "affix and mail" is complete 10 days after proof of service is filed with the court. Thus, service of the third-party complaint in the present case was complete on December 5, 2019, 10 days after the filing of proof of service. Trujillo's appearance therefore would have been required by January 4, 2020, except that January 4, 2020, fell on a Saturday, such that the time for Trujillo's appearance was extended to Monday, January 6, 2020. The motion to dismiss was therefore timely.

Bank of America v. Fischer

220 AD3d 722 (2d Dept. 2023)

In this mortgage foreclosure action, Court granted D's motion to vacate judgment of foreclosure and to dismiss the complaint for lack of proper jurisdiction. It noted the process server made prior attempts at personal delivery of the S&C at D's residence at different times of the day between Thursday, December 21, 2017, and Friday, December 29, 2017. Although one of those times was on December 23, 2017, a Saturday, the attempts at service occurred at the height of the holiday season, when D may have had reasons not to be home. The process server noted that holiday lights were on in the windows of the residence on December 23, 2017, and that both floors of the residence were illuminated on December 26, 2017. Nevertheless, considering the holiday season, the process server's observations were not a sufficient basis to believe that D was evading service. Moreover, the process server stated that he was "unable" to speak to a neighbor regarding D's whereabouts. Lastly, no effort was made to serve D at his place of employment, known to P, due to P's application for a loan modification.

Niebling v. Piorek

__ AD3d __ (2d Dept. 2023)

In this breach of contract action, Ds moved to vacate pursuant to CPLR 5015(a)(4) a default judgment entered upon D's failure to appear. Court granted the motion. It noted P failed to demonstrate that the process server acted with due diligence before relying on affix and mail service pursuant to CPLR 308(4). The process server averred that he made two attempts to personally serve D at his home before affixing the S&C to the door of D's home. There was no evidence that the process server made any genuine inquiries about D's whereabouts and place of employment, which was known to P.

(c) Alternative Service (5)

Dixon v. New York City Health & Hosp.

__ AD3d __ (1st Dept. 2023)

Court held P is entitled to effectuate service by alternative means, as she made a showing that service on Dr. Hanandeh was impracticable, and that service by email was reasonably calculated to apprise him of this action.

Kelsey v. Catena

217 AD3d 1233 (3d Dept. 2023)

P, a convicted sex offender, commenced the instant civil rights action against, among others, Nethawayt, the court reporter at his trial. Supreme Court ordered P to serve an amended summons and complaint on by first class mail. The Ds then moved to dismiss the amended complaint on the bases that, as is relevant here, Nethaway had not been properly served. Court noted initially that Supreme Court's order allowing for service by mail is unspecific with respect to where such service should be effectuated. The authority to effectuate service by mail cannot simply be directed at any address; rather, service should be undertaken in a manner that is reasonably calculated to apprise a party of the pendency of an action. As relevant here, as Supreme Court provided no indication as to the appropriate address to effectuate service on Nethaway, P contended that he properly sent notice by regular mail to her actual place of business. However, there is no dispute that Nethaway was retired at the time of service and, accordingly, service at the Montgomery County courthouse would not suffice as her actual place of business. Further, the fact that the letter was eventually forwarded to Nethaway by a relative

still working at the courthouse is insufficient to confer jurisdiction. Thus, Court agreed with Supreme Court's determination to dismiss the claims against Nethaway based upon P's failure to establish that jurisdiction was obtained.

Walkoff Holdings, LLC v. Waverly Homes Devel.

80 Misc3d 358 (Sup. Ct. Sullivan Co. 2023) (Galligon, J.))

Court dismissed complaint for lack of P/J noting P's process server did not exercise due diligence in attempting personal service before resorting to substituted service under CPLR 308(4). Here, P's process server made 92 total appearances over four days in the month of February at 23 residences attributed to Ds, which were all in the same condominium complex that Ds used as summer residences, but not a single person was ever present other than a caretaker. Regardless of the legality of the attempts at service made during or very near the conclusion of the Sabbath where P's counsel allegedly knew of Ds' observance of Orthodox Judaism based on the fact that that underlying contracts were made pursuant to Torah law, the non-presence of every moving D at a time when at least a substantial portion of those observing a Sabbath would likely be at or near their residences should have put P on notice that Ds were not reasonably likely to be found in those residences during the month of February. Moreover, counsel made only a minimal effort to find Ds' addresses by reviewing a complaint in a companion case, and therefore did not sufficient demonstrate that P reasonably expected Ds would be found or received mail at the condominium complex in February.

2. CPLR 311

Banks v. New York City Trans. Auth.

216 AD3d 449 (1st Dept. 2023)

Court granted MTABC's cross-motion to dismiss for lack of P/J because D failed to meet his burden of showing that MTABC was served in accordance with CPLR 311(a)(1). The affidavit of service states that on July 15, 2019, P's process server served the summons and verified complaint on MTABC at 130 Livingston Street in Brooklyn, not at its principal place of business at 2 Broadway in Manhattan. That service of process was effectuated on the MTA, who was previously a D in this action, at 2 Broadway on the same day that MTABC was purportedly served in Brooklyn is of no moment, because the process server did not aver, as required, that

the individual he served was an authorized representative of MTABC. The affidavit of service states only that the server delivered a copy of the summons and complaint to the "recipient's actual place of business" and does not mention any individual. Further, P's counsel's affirmation in support of his motion merely avers in conclusory fashion that the individual was authorized to accept service on behalf of MTABC as well as the MTA at 2 Broadway. Court further noted that MTABC submitted the affidavit of its associate staff analyst who explained that although MTABC is a subsidiary of the MTA, they are "distinct legal entities which must be sued and served separately," they "are not responsible for each other's torts," and they "maintain entirely separate offices and must be served at separate locations within 2 Broadway" because if "service of process is served on the MTA at 2 Broadway . . . it generally will not be received by [MTABC]." MTABC's affidavit is reinforced by the fact that the copy of the summons and complaint served at 2 Broadway was stamped "ACCEPTED FOR MTA ONLY."

3. Business Corporation Law

BCL §304, as amended by L. 2021, Ch.56, §1, part KK, §1,1-b

BCL §304 was amended, effective January 1, 2023 by the addition of a new subdivision (d). It provides: Any designated post office address to which the secretary of state shall mail a copy of process served upon him or her as agent of a domestic corporation or a foreign corporation, shall continue until the filing of a certificate or other instrument under this chapter directing the mailing to a different post office address and any designated email address to which the secretary of state shall email notice of the fact that process has been electronically served upon him or her as agent of a domestic corporation or foreign corporation shall continue until the filing of a certificate or other instrument under this chapter changing or deleting the email address.

BCL §304-a), as added by L. 2021, Ch.56, §1, part KK, §1-b

”The secretary of state shall advise any corporation subject to the laws of this chapter in prominent written form as follows: (a) electronic service of process authorized by the provisions of this chapter is an optional program at no additional cost to the user; (b) any corporation subject to the laws of this chapter will continue to receive service of process by mail unless such corporation notifies the secretary of an affirmative choice to receive service of process by way of the program through electronic means, in which case digital copies will be made accessible but paper documents will not be mailed; and (c) such choice may be reversed by the corporation at any time and, thereafter, service by mail will resume.”

BCL §306, as amended by L. 2021, Ch.56, §1, part KK, §2

The amendment (b)(ii) allows a P to serve a corporation through the secretary of state by “Electronically submitting a copy of the process to the department of state together with the statutory fee, which fee shall be a taxable disbursement, through an electronic system operated by the department of state, provided the domestic or authorized foreign corporation has an email address on file in the department of state to which the secretary of state shall email a notice of the fact that process has been served electronically on the secretary of state. Service of process on such corporation shall be complete when the secretary of state has reviewed and accepted service of such process. The secretary of state shall promptly send a notice of the fact

that process has been served to such corporation at the email address on file in the department of state, specified for the purpose and shall make a copy of the process available to such corporation,"

BCL §307, as amended by L. 2021, Ch.56, §1, part KK, §3

(b) now allows process that must be served on the secretary of state to be submitted electronically**.**

4. Limited Liability Law §304

Port Authority of New York & New Jersey v. Logistics Kone

77 Misc.3d 1143(Sup. Ct. NY Co. 2023) (Lebovitz, J.)

Court held in this action to collect unpaid tolls brought against D unauthorized foreign limited liability company, P's failure to file an affidavit of service that satisfied the statutory requirements of Limited Liability Company Law § 304 (e) deprived the court of P/J. Limited Liability Company Law § 304 imposes a three-step process for service: delivering the summons and complaint to the Secretary of State; providing notice to D of that delivery, either by personal delivery of notice or by registered mail, return receipt requested; and filing an affidavit of compliance with the statute's delivery and notice requirements. If P provides notice of delivery to D via registered mail, the affidavit of compliance must attach either a copy of the return receipt or a copy of the envelope "with a notation by the postal authorities that acceptance" of the mailing "was refused" by its recipient (Limited Liability Company Law § 304 [e]). A P must strictly comply with the statute, including as to the filing of an affidavit of compliance. P's affidavit reflected that P's process server gave notice of delivery by registered mail, but the affidavit did not attach either a return receipt or an officially marked envelope reflecting refusal of the mailing.

5. *Unincorporated Associations*

Makhnevich v. Board of Managers

217 AD3d 630 (1st Dept. 2023)

Court held Supreme Court correctly dismissed the complaint against D for lack of P/J. It is undisputed that P sought to serve D by delivering the S&C to a paralegal at the managing agent's office. This is not proper service on an unincorporated association under GAL §13, which requires service of process on an officer of the unincorporated association "in the manner provided by law for the service of a summons on a natural person." Because delivery to an employee at the managing agent's office does not constitute service upon a board member pursuant to a method of service provided under CPLR 308, service on the Board was not proper. Court also noted P failed to submit sufficient evidence to substantiate her claim that the condominium was an incorporated entity so as to warrant a traverse hearing.

6. *Mail - CPLR 312-a*

Carney v. Metropolitan Transp. Auth.

221 AD3d 447 (1st Dept. 2023)

In this action, P argued she served Ds pursuant to CPLR 312-a. Of note, P did not send a statement of service by mail or an acknowledgment of receipt to the Ds. Court noted that "[m]ailing the S&C via first-class mail, standing alone, is insufficient to establish service because CPLR 312-a(b) specifies that service is complete only if D returns a signed acknowledgment of receipt." As a result, service was never completed and the action was never properly commenced and the time for Ds to file an answer or move to dismiss never started running because P did not include an acknowledgment of receipt with the S&C.

B. Estoppel

Davis v. Blev Realty

217 AD3d 563 (1st Dept. 2023)

Court held D's motion to vacate the default judgment was correctly denied, as the record shows that its failure to personally receive notice of the summons was the result of a deliberate attempt to avoid such notice. While D submitted an affidavit of its managing member, Abramson, averring that the address maintained with the SOS for service of process was the home address of D's organizer and former member D offered no reasonable explanation as to why the same outdated address was contained in the three most recent biennial statements filed with the SOS, the last two of which Abramson himself verified. Under the circumstances, D's failure to maintain a proper address with the SOS raises an inference of a deliberate attempt to avoid service.

Castillo-Florez v. Charlecius

220 AD3d 1 (2d Dept. 2023)

Upon a thorough and complete examination of prior precedent, Court held a D may not be estopped from contesting service of a S&C at a former addressed based solely on their failure to update their address with DMV as, standing alone, that failure does not equate with a deliberate attempt to avoid service. Although service upon a natural person must be made in strict compliance with the methods of service set forth in CPLR 308, there are circumstances in which a D may be estopped from challenging the location or propriety of service. Estoppel may preclude a D from challenging service if that D has engaged in affirmative conduct which misleads a party into serving process at an incorrect address. This includes situations where a D willfully misrepresents their address or engages in conduct calculated to prevent P from learning their actual place of residence. A D's failure to update their address with the DMV may be a relevant factor to consider in determining whether they have engaged in a deliberate attempt to avoid service, but that failure, standing alone, does not warrant estopping a D from challenging service. **COMMENT:** Justice Warhit's opinion is a must read!

HSBA v. Rothbend

212 AD3d 912 (3rd Dept. 2023)

P commenced this foreclosure action and served D Prince Home through the Secretary of State and D Rothbend by personal service. Neither of those Ds appeared in the action or served an answer. On December 16, 2020, P moved for an order of reference and default judgment against them. Prince Home then cross-moved to, among other things, extend its time to answer pursuant to CPLR 317, 3012(b), and 2004. Supreme Court granted P's motion and denied Prince Home's cross motion. Court affirmed. It noted CPLR 317 allows a D an opportunity to be heard, despite its default in appearance, if the entity was not personally served and moves within the specified time frames and service upon the Secretary of State is not considered personal service. Although that statute does not require establishing a reasonable excuse for the default, it does require a showing that D did not personally receive notice of the summons in time to defend and has a meritorious defense"; and in contrast, CPLR 3012(d) and 2004 permit a court to extend the time for a D to appear or plead, or permit late service of an answer "upon a showing of a reasonable excuse for the delay and a meritorious defense to the action. Prince Home contends that Supreme Court erred in denying its motion pursuant to CPLR 317 because it did not deliberately avoid service of process. We disagree. Although this Court has held that a failure to maintain a correct address with the Secretary of State will not preclude relief pursuant to CPLR 317, that relief is not automatic and may be denied "where, for example, a D's failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice". Here, Prince Home was on notice that its service address listed with the Secretary of State was undeliverable. Notwithstanding this notice, Prince Home failed to notify the Secretary of State of its purported change of address for a period of five years. "Under these circumstances, it can be inferred that D's failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice." Prince Home failed to rebut this inference. The conclusory and unsubstantiated employee affidavits proffered by Prince Home as to how it learned of the foreclosure action, and that it "inadvertently" failed to notify the Secretary of State, do not constitute a detailed and credible explanation for its five-year failure to correct its address. Additionally, Prince Home's contention that P's attorneys knew Prince Home's attorney's address and could have served process in a different manner is belied by the record. In contrast to a motion under CPLR 317, a motion pursuant to CPLR 3012(d) and 2004 requires the movant to establish a reasonable excuse. "[T]here is no per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an 'excusable default.' Rather, a court should consider, among other factors, the length of time for which the address had not been kept current". Where, as here, Prince Home was put on notice that its address was incorrect and failed to provide a correct address for five years, it has not provided a reasonable excuse. Thus, Court saw no need to

determine whether Prince Home demonstrated the existence of a meritorious defense. **COMMENT**: Justice Reynolds-Fitzpatrick's comprehensive and thoughtful opinion is worth the read due to its informative nature.

C. Affidavits of Service

FRIENDLY REMINDERS

Estate of Perlman v. Kelley

175 A.D.3d 1249 (2d Dept. 2019)

In this action to recover legal fees, commencement occurred on December 31, 2015, and an AOS was filed on January 21, 2016 which stated that service had been effected under (2) by delivery of the summons at D's office on January 14, 2016, but no reference was made to any mailing. Two months later P moved for a default judgment which attached an AOS stating that P had mailed a second copy to D on February 13, 2016, but submitted no proof that an affidavit of such service was filed. Court affirmed dismissal of the action for lack of P/J. The Court noted that P failed to comply with (2)'s strict requirements. P did not mail the pleadings to D within 20 days after delivery and never filed an AOS with the clerk indicating that the mailing had been done. The Court concluded that the delay in mailing was not a "technical infirmity" under CPLR 2001, but rather a jurisdictional defect. **COMMENT:** Note compliance with one prong was not enough to excuse under CPLR 2001 the failure regarding the second prong. Justifiable where D received the summons?

Zheleznyak v. Gordon & Gordon, PC

175 A.D.3d 1360 (2d Dept. 2019)

In this legal malpractice action, D moved to dismiss based upon P's failure to serve it within 120 days after the filing of the S&C. Although P submitted a copy of an AOS in opposition to D's motion, the trial court granted the motion to dismiss the complaint because the AOS was not filed. Court affirmed, noting that "while the failure to timely file and AOS with the clerk of the court as required by (4) may, in the absence of prejudice, be corrected by court order pursuant to CPLR 2004," P failed to seek this relief and trial court declined to extend the time to file proof of service *sua sponte*. **COMMENT:** Ouch!

Divito v. Fiandach

160 AD3d 1404 (4th Dept. 2018)

Court held P's late filing of proof of service as required by (2) a nullity because P "never applied to the court for leave to file a late proof of service."

IV. EXTENSIONS OF TIME - CPLR 306-b

Gjurashaj v. ABM Industry Groups

213 AD3d 479 (1st Dept. 2023)

Court held Supreme Court providently exercised its discretion in granting P's motion for an extension of time to effect service in the interest of justice and denying D's motion to dismiss the complaint. Court noted that although D cites P's lack of diligence in service, diligence or lack thereof is one of several factors that may be considered by a court under an interest of justice analysis. The record demonstrates that the SOL had not expired at the time of P's motion, P alleges potentially meritorious claims, there was a short delay in service, P promptly requested an extension, and D has not demonstrated that he would be prejudiced if the extension were granted.

Krembs v. NYU Langone

214 AD3d 453 (1st Dept. 2023)

Court held: "Supreme Court providently exercised its discretion in denying P's motion for an extension of time to serve SOM in the interest of justice. In 2017, the court granted P's motion to add SOM as a D. P subsequently made no attempt to serve SOM and did not move for relief until seven months after Ds moved for S/J, arguing that any claims against SOM should be dismissed as abandoned since it was never served, and the SOL had since expired. While diligence and delay are not threshold issues when seeking an extension of time in the interest of justice, they remain factors to be considered by the court, and, under these circumstances, we agree that an extension of time was not warranted."

Dixon v. New York City Health & Hosp.

__ AD3d __ (1st Dept. 2023)

Court held Supreme Court improvidently exercised its discretion in denying P a second extension to serve Dr. D under CPLR 306-b, as P established good cause for the late service by proffering evidence of diligent efforts to serve the doctor. P attempted service at an Ohio address obtained through investigation, which turned out to be the home of Dr. D's parents and brother, and also attempted service at Dr. D's last known NY address as provided by his former employer, D.

Green Tree Servicing v. Barnes

215 AD3d 808 (2d Dept. 2023)

Supreme Court denied that branch of D's motion which was to dismiss the complaint insofar as asserted her with prejudice. D appeals, contending that the court improvidently exercised its discretion by, in effect, directing dismissal of the complaint insofar as asserted against her without prejudice. Court rejected D's contention. It noted dismissals for failure to timely serve process are not on the merits and are without prejudice. Moreover, "[a] dismissal 'with prejudice' generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the P." Here, the dismissal was not on the merits, and D failed to demonstrate the existence of extraordinary circumstances warranting dismissal with prejudice. Since the dismissal of the complaint insofar as asserted against D was based on lack of proper service and nothing more, a dismissal without prejudice was appropriate.

Deutsche Bank v. Lottihall

217 AD3d 653 (2d Dept. 2023)

In this mortgage foreclosure action, Court held Supreme Court improvidently exercised its discretion in denying the P's motion pursuant to extend the time to serve Cruz with the summons and complaint in the interest of justice, considering, *inter alia*, the expiration of the SOL, the meritorious nature of the P's cause of action, the P's prompt request for the extension, and the lack of demonstrable prejudice to Cruz.

Country-Wide Home Loans v. Lyons

219 AD3d 1404 (2d Dept. 2023)

In this mortgage foreclosure action, Court held P failed to demonstrate good cause for an extension of time to serve D under CPLR 306-b. In support of the motion, P offered nothing more than the AOS of its process server. While a process server's AOS creates a presumption of proper service, Supreme Court had already determined that D presented sufficient evidence to warrant a hearing on the validity of service of process. However, P established its entitlement to an extension of time to serve D with the S&C in the interest of justice. P established that the action was timely commenced, that service was timely attempted and was perceived by P to have been made within 120 days after the commencement of the action, and that P promptly sought an extension of time to serve D with the S&C after D challenged service on the ground that it was defective. P also established that the SOL had expired when P made its motion to extend the time to serve, that P had a potentially meritorious claim, and there would be no prejudice to D.

Naomi R. v. New York State Office of Children and Family Services

216 AD3d 1235 (3rd Dept. 2023)

On September 13, 2021, Ps commenced this proceeding to partially annul OCFS's determination, noticing the petition to be heard on October 18, 2021. No hearing occurred on that return date. On November 3, 2021, Supreme Court advised petitioners that it would not take action on their application until their affidavits of service upon respondents were filed with the court. On November 10, 2021, petitioners filed affidavits indicating that they had personally served the Attorney General on November 5, 2021, and OCFS on November 8, 2021. Respondents then moved to dismiss the petition for failure to comply with the 20-day notice requirement of CPLR 7804 (c). Petitioners opposed the motion and requested that the court permit them the opportunity to file an amended notice of petition or otherwise set a return date for the parties. Supreme Court granted respondents' motion, finding that petitioners' service after September 28, 2021, was a fatal jurisdictional defect, necessitating dismissal of the proceeding. Court reversed. It noted that pursuant to CPLR 7804 (c), "a notice of petition, together with the petition and affidavits specified in the notice, shall be served . . . at least [20] days before the time at which the petition is noticed to be heard." However, CPLR 2001 authorizes a court to "permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." In deciding whether a defect in service is a "technical infirmity", Court observed that courts must be guided by the principle of notice to the [respondent]—notice that must be reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". Although the reasons were not clear upon the record before the Court, it was nonetheless wholly undisputed that the subject application was not heard on the return date proposed by petitioners, nor was there any appearance before Supreme Court, either held or calendared, prior to respondents' motion. It is further undisputed that, apart from failing to strictly comply with CPLR 7804 (c), petitioners properly served respondents. Thus, this case is functionally no different than those in which a return date has been omitted from a notice of petition, and such failures have been held to be technical infirmities within the scope of CPLR 2001. Given these facts, although the return date on the notice of petition was defective at the time of service, we find that the service effectuated by petitioners was reasonably calculated to apprise respondents of this proceeding and afford them the opportunity to defend against it. The Court further found the failure to disregard or permit correction of this technical infirmity to have been an abuse of discretion, particularly given that respondents' proffer of prejudice is entirely theoretical.

FRIENDLY REMINDER

Silvering v. Sunrise Family Medical

161 AD3d 1021 (2d Dept. 2018)

Court held: "To the extent the Supreme Court concluded that it lacked discretion to consider the Ps' application pursuant to CPLR 306-b to extend their time to serve D, 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."

Part Four
RESPONDING TO SERVICE OF PROCESS

I. RESPONDING

A. Generally

21st Mortgage Corp. v Raghu
197 AD3d 1212 (2d Dept. 2021)

In the context of a mortgage foreclosure proceeding, the Second Department provided a roadmap for appearing to avoid a default. It wrote:

> "After having been served with process, D who wants to avoid a default must respond in a proper and timely manner, A D must appear within 20 days of service of a summons, or within 30 days of service where service was made by delivering the summons "to an official of the state authorized to receive service in his [or her] behalf," (CPLR 320[a]). The CPLR sets forth three ways that a D may appear in the action: "[t]he D appears [1] by serving an answer or [2] [by serving] a notice of appearance, or [3] by making a motion which has the effect of extending the time to answer." (*Id.*) A D's failure to respond to a S&C [in one of the three ways specified "amounts to what CPLR 3215 . . . calls a failure to appear."

The first way for a D to appear within the meaning of the statute is by serving an answer. An answer "is [the] D's pleading in response to a complaint". The failure to interpose a timely answer constitutes a default in pleading, an independent default basis that is analytically "distinct from a failure to appear. A D who has defaulted in answering admits all traversable allegations in the complaint, including the basic allegation of liability".

A NOM pursuant to CPLR 3211(a) is the second way that a D may appear in the action. Service of a NOM to dismiss a complaint extends a D's time to answer the complaint. Such a motion must be made "before service of the responsive pleading is require.", or it is untimely.

Service of "a notice of appearance" is the third way in which a D may appear in an action pursuant to. The recursive nature of the terminology used in provides an obvious opportunity for confusion. However, in this context, a notice of appearance is "a simple document that notifies P that D is appearing in the action." A notice of appearance "is the response generally reserved for the situation in which P's process consisted of a summons with notice as authorized by CPLR 305 [b]). Although a D "appears" by merely serving a notice of appearance, service of a notice of appearance does not "absolve a D from complying with the time restrictions imposed by CPLR 320(a) which govern the service of an answer or the making of a motion pursuant to CPLR 3211. Accordingly, a D who serves a timely notice of appearance may nevertheless default in answering. More generally, "[a] D who has duly appeared can be guilty of a default at [any] later stage of the action, such as by failing to show up at the trial at the scheduled time". Again, a D's failure to respond to a S&C in one of the three ways enumerated in "'amounts to what CPLR 3215. calls a failure to appear.'" The consequences of a total failure to appear in an action are more significant than the consequences that stem from other species of default.

B. Granting Additional Time to Appear

US Bank Assoc. v. Barker Project

220 AD3d 588 (1st Dept. 2023)

Court affirmed the denial of D's motion to serve a late answer pursuant to PLCR 3012(d). It noted Ds based their good cause on the fact that counsel purportedly "engaged in communications with attorneys, whom she believed represented P, on August 10, 2021 - even before the service of process on Ds was effectuated," without providing any details about, or substantiation of, these alleged communications. Noting this, the Court has found that "[s]ettlement negotiations alone are an insufficient excuse for delay," and since Ds failed to demonstrate either "good cause" or a "reasonable excuse" for the delay in answering, the motion for leave to file a late answer was providently denied.

Bansi v. Nugacon Building Serv.

218 AD3d 723 (2d Dept. 2023)

P moved pursuant to CPLR 3215 for leave to enter a default judgment against D based on its failure to timely appear or answer the complaint. D opposed the motion and cross-moved, among other things, pursuant to CPLR 2004 and 3012(d) to compel P to accept its late answer.

Court affirmed grant of D's cross-motion. It noted that "In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a P to accept an untimely answer where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of D, that there would be no prejudice to P, and that a potentially meritorious defense exists" pursuant to CPLR 3012(d). Here, the record reflects that there would be no prejudice to P resulting from D's short delay in appearing and seeking to serve an answer to the complaint, and that there was no willfulness on the part of D. Additionally, P does not contend that D failed to demonstrate a potentially meritorious defense to the action. Under the circumstances, and given the public policy favoring the resolution of cases on their merits, the Supreme Court providently exercised its discretion in denying P's motion for leave to enter a default judgment against D, and granting that branch of D's cross-motion which was to compel P to accept its late answer.

Citibank v. Saldarriaga

213 AD3d 732 (2d Dept. 2023)

In this mortgage foreclosure action, Court held Supreme Court erred in striking D's amended answer as untimely. Although D filed her amended answer approximately 20 months after filing her original answer, well beyond the period within which an amended pleading could have been served as of right without obtaining leave of court or the stipulation of all parties to the amendment, P did not reject the amended answer. By retaining the amended pleading without objection, P waived any "objection as to untimeliness."

Lemberg Foundation v. Shuttleworth Artists

78 Misc.3d 278 (Sup. Ct. NY Co. 2023) (Billings, J.)

Court held that as Ds failed to present a reasonable excuse for their default, they were not entitled to an extension of time to answer the complaint.

Regateiro v. Regateiro

219 AD3d 516 (2d Dept. 2023)

P moved to enter a default judgment against D when no answer was served, and D cross-moved pursuant to CPLR 3012(b) and CPLR 2005 to compel P to accept late service of an answer. Court affirmed entry of a default judgment and denied cross-motion. It noted D's conclusory and unsubstantiated assertions that his former attorney neglected his case and led him to

believe that "everything was fine" were insufficient to establish a reasonable excuse for his default in answering the complaint or appearing. Since D failed to establish a reasonable excuse for his default, it is unnecessary to determine whether he sufficiently demonstrated the existence of a potentially meritorious defense.

II. DEMAND FOR COMPLAINT

Fawn Second Avenue v. First American Title Ins.

192 AD3d 478 (1st Dept. 2021)

Supreme Court denied D's motion to dismiss the complaint pursuant to CPLR 3012(b) and granted Ps' motion for an extension of time pursuant to CPLR 2004. Court reversed, ruling that "[b]ecause D's motion to dismiss the complaint pursuant to CPLR 3012(b) preceded Ps' motion for an extension of time pursuant to CPLR 2004, the case should be analyzed under CPLR 3012(b). Although the Court agreed with Supreme Court's that Ps' delay in serving the complaint was excusable on the basis of law office failure, it concluded that Ps' motion to extend its answering time, which the Court apparently treated under CPLR 3012(d), should have been denied because they failed to make a showing of the merits of the case. It noted that Ps' motion was only supported by an attorney affirmation and an unverified complaint. COMMENT: As noted in an extensive discussion by Prof. Connors in Practice Commentaries to CPLR 3012 (2012) in McKinneys, the holding is questionable as the "standard in CPLR 3012(d) should cover any motion for an extension of time to serve a pleading, regardless of whether the motion is made before or after D makes a motion to dismiss under CPLR 3012(b)."

C.N. v. West Islip Union Free Dist.

215 AD3d 684 (2d Dept. 2023)

In this CVA action, D moved to dismiss the complaint pursuant to CPLR 3012(b), arguing the verified complaint in this case was served 35 days after the initial demand for the complaint was served. In opposition, P argued that the delay in serving the complaint was excusable, since P could not file a detailed complaint using P's full name while P was awaiting a decision on the motion for leave to proceed anonymously. Court noted that as a general rule, to avoid dismissal of an action for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), P must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action. Here, P proffered

compelling reasons for the 15-day delay in serving the complaint, which was in part attributable to circumstances beyond P's control. P promptly moved for leave to proceed anonymously and was denied a temporary restraining order which would have permitted the filing of the complaint with an anonymous caption while that motion was pending, and that motion was not decided until after the time to comply with the first demand for a complaint had expired. Thus, contrary to the Supreme Court's determination, P demonstrated a reasonable excuse for the delay. Moreover, the court's determination that P has not alleged a meritorious claim is not supported by the record.

Barker v. Gervera

218 AD3d 1159 (4th Dept. 2023)

P failed to serve a timely complaint following a demand pursuant to CPLR 3012(b) and Ds moved to dismiss. While P opposed the motion, he did not move for an extension of time to serve under CPLR 3012(d). Court noted that to avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), P must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action. Here, P submitted both an affidavit of merit and a proposed verified complaint in opposition to each motion. Based on the evidence submitted, each court determined that P demonstrated merit to his proposed cause of action for conversion, and Ds do not take issue with the courts' rulings in that regard. Court concluded Ds' motions should have bene denied in their entirety. P was not required to demonstrate merit to all of his proposed causes of action. The affirmation of P's attorney, submitted in opposition to the motions, established that the default was of short duration, was partially attributable to law office failure, and was not willful. Considering our preference for resolving disputes on the merits, Court then granted the motion.

III. LIMITED SCOPE REPRESENTATION

CPLR 321(d), effective December 16, 2022

This provision provides that an attorney may "appear on behalf of a party in a civil action or proceeding for limited purposes." Thus, the attorney can limit his/her appearance to certain matters and for a specified duration. The attorney must file a "notice of limited scope appearance" specifying the limited appearance purpose. For an excellent discussion of this provision, see Siegel and Connors, NY Civil Practice (6th ed) §115 (January 2024 Supplement).

Part Five
NOTICE OF CLAIM

I. ADEQUACY, NEED, AMENDMENT

A. General Municipal Law

Wiggins v. City of New York

201 AD3d 22 (1st Dept 2021)

At issue was whether as a prerequisite to suing individual municipal employees pursuant to GML §50-e, the employee Ds must be named in a notice of claim. The Second, Third and Fourth Department hold that they need not be named but the First held pre-Wiggins that they did not have to be named. The Court on a revisiting of its past precedent rejected it and aligned itself with the other departments. It held § 50-e does not mandate the naming of individual municipal employees in a notice of claim. Thus, P's notice of claim comported with the statutory requirements of section 50-e and was sufficient even though it did not name the individual municipal employees involved. It noted the statute requires a notice of claim to contain the claimant's and their attorney's name and address; the nature of the claim; the time, place, and manner in which the claim arose; and the damages or injuries claimed to have been sustained (*see* General Municipal Law § 50-e [2]). The plain language of 50-e does not require a claimant to name individual municipal employees and a notice of claim is sufficient so long as it includes enough information to enable a municipal D to investigate P's allegations, and nothing more may be required. Armed with the statutorily required information, the municipal D is in at least as good a position as P to identify and interview the individual municipal employees involved in the claim. **COMMENT**: Although all of the departments are in agreement, Court of Appeals has not addressed the issue. It may be the safer course until then to name employees in the Notice of Claim. *See* Siegel & Connors, NY Practice (6th ed) §32 (Jan 2023 Supp.).

RSRNC, LLC v. Wilson

220 AD3d 1139 (3d Dept. 2023)

In this action against County DSS to recover value of Medicaid eligible services, Court held the claim sounded in contract and thus there was no need to file and serve a notice of claim upon the County.

Xiao v. City of New York

79 Misc3d 982 (Sup. Ct. Queens Co. 2021) (REPORTED July 2023) (Campano-Fox, J.)

P, is the administratrix of the estate of the decedent who died by suicide more than three months after timely filing a notice of claim for personal injuries sustained when she was a passenger on Ds' bus that was involved in a MVA. Court held she was entitled to amend the notice of claim to add wrongful death and conscious pain and suffering claims on behalf of the decedent. Here, P established good faith for the added claims and that they were derivative of the pain and suffering and personal injury claims already pleaded; the wrongful death claim could not have been included in the original notice of claim as the decedent died after it was filed; and P argued the merits of the wrongful death claim by alleging that the decedent committed suicide due to the severe injuries sustained as a result of Ds' negligence I the MVA. P further established that there was no prejudice to Ds, as they could depose P and obtain medical documentation with regard to the added claims. Notwithstanding Ds' argument that the wrongful death claim could not be causally related to the MVA where the original notice of claim alleged three specific injuries, a fractured coccyx, a cut to lips, and broken teeth, while suicide involves mental rather than physical injuries, at the pre-discovery stage it could not be said that the deceased's suicide was not in conjunction with or caused by the personal injuries sustained in the accident.

B. Court of Claims Act

Smith v. State

213 AD3d 789 (2d Dept. 2023)

The claimant's infant daughter allegedly was injured on a sharp edge of a ladder in the deep end of the outdoor pool at Bear Mountain State Park. Her claim was not timely filed as required by Court of Claims Act § 10(3) and the claimant offered no reasonable excuse for her failure to timely file the claim. D moved pursuant to CPLR 3211(a)(2) and (7) to dismiss the claim and the claimant cross-moved for leave to file a late claim pursuant to Court of Claims Act § 10(6). The Court of Claims granted the motion on the ground that the court lacked subject matter jurisdiction and denied the cross-motion. Court affirmed. It held the proposed claim did not adequately describe the place where the claim arose, as it did not allege which of the three ladders in the deep end of the pool contained an alleged sharp. Even when a claimant has no other avenue of recovery, this failure is a fatal jurisdictional defect.

Wagner v. State

214 AD3d 930 (2d Dept. 2023)

In this CVA action, Court denied State's motion to dismiss. It held the Court of Claims incorrectly determined that the claimant was required to allege the exact date on which the sexual abuse occurred. The claimant's allegations, including that the abuse occurred in 1993 while she was 14 years old and attending a gym class at Sagamore, were sufficient to satisfy the "time when" requirement of Court of Claims Act §11(b). Court also held the claimant's allegations set forth the nature of her claim with sufficient particularity in compliance with Court of Claims Act § 11(b), since she adequately "[stated] the manner in which [she] was injured and how the State was negligent."

Fletcher v. State

218 AD3d 647 (2d Dept. 2023)

In this CVA action, the alleged sexual abuse occurred more than 40 years ago when claimant was a child. Court held under the particular circumstances of this case, the date ranges provided in the claim indicating that the sexual abuse began when the claimant was 4 years old and "occurred between two to three times a week to three to four times a year" until she was 12 years

old while she resided in a foster home, along with other information contained in the claim, including the identities of the claimant's foster parents, the address of the foster home, and names of the claimant's alleged abusers, were sufficient to satisfy the "time when" requirement of the Court of Claims Act § 11(b). Court also held the claim sufficiently provided D with a description of the manner in which the claimant was injured, and how D was negligent in allegedly failing to protect the claimant from sexual abuse while she resided in a foster home. It observed: "The claimant is not required to set forth the evidentiary facts underlying the allegations of negligence in order to satisfy the section 11(b) nature of the claim requirement." **COMMENT:** For further discussion of the CVA cases, see Ferstendig, NYS Law Digest, December 2023, pp. 3-4.

Sardegna v. State

218 AD3d 700 (2d Dept. 2023)

Court affirmed denial of application to file a late notice of claim. It noted the claim failed to satisfy the jurisdictional requirements of section 11(b) since it failed to state any factual allegations about the MVA other than the time and place. Even if, as the claimant argues, the defect did not deprive the State of the ability to investigate the claim in light of the claimant's notice of intention setting forth the requisite factual allegations, the lack of prejudice to the State is immaterial, as `a court is without power to dispense with applicable jurisdictional requirements of law based upon its own concepts of justice.

II. TIMELINESS AND SERVICE

A. General Municipal Law

Pales v. New York City Health & Hosp.

216 AD3d 807 (2d Dept. 2023)

In this medical malpractice action, Court held the notice of claim and the amended notice of claim served on the New York City Comptroller were not sufficient to constitute the requisite service on the hospital Ds. However, Supreme Court properly determined that, under the circumstances of this case, the hospital Ds were equitably estopped from raising a defense based on Ps' failure to serve a timely notice of claim on them. Ps' evidence submitted in opposition to the hospital Ds' motion demonstrated that the hospital Ds negligently engaged in conduct that misled or discouraged Ps from serving a timely notice of claim, upon which Ps justifiably relied. **COMMENT:** Court does not detail the Ds' conduct.

Watts v. Jamaica Hosp. Med. Ctr.

__ AD3d __ (2d Dept. 2023)

With respect to the causes of action to recover damages for medical malpractice and the intentional infliction of emotional distress insofar as asserted against the City Ds, P was required to serve a notice of claim, at the latest, on or before August 10, 2016, 90 days from the date of the decedent's death. (GML §50-e[1][a]). While P alleges that he attempted to timely serve a notice of claim on August 7, 2016, there is nothing in the record to support that allegation. In any event, the City Ds demonstrated that they received a notice of claim by ordinary mail on August 17, 2016, and rejected and returned that notice of claim to P on September 2, 2016, on the ground of improper service under GML §50-e. Accordingly, the City Ds demonstrated as a matter of law that P failed to timely serve a notice of claim with respect to the causes of action to recover damages for medical malpractice and the intentional infliction of emotional distress.

III. GML 50-h HEARING

Murphy v. Town of Waterford

215 AD3d 1097 (3d Dept. 2023)

Ps commenced this action on August 3, 2021. After issue was joined, D moved to dismiss the action because the GML §50-h examination had not been held. Supreme Court denied the motion, and Court affirmed. It noted that generally, a claimant must comply with a municipality's request for a GML §50-h examination as a condition precedent to commencing an action. That examination must be held within 90 days of service of the demand. (see GML 50-h [5]). When, as here, the examination is postponed beyond that 90-day window, it is incumbent on the municipality to serve a subsequent demand reestablishing an examination date. D failed to do so and, as such, Supreme Court's denial of the motion was proper.

IV. LATE NOTICE

A. General Municipal law

Benavides v. New York City Health & Hosps. Corp.

220 AD3d 458 (1st Dept. 2023)

Court affirmed grant of application to file a late notice of claim. Court noted P's physical incapacity weighs heavily in favor of granting leave to file a late notice of claim. On September 6, 2020, P was admitted for severe injuries, which were exacerbated by his allegedly suffering an ischemic stroke. P suffered traumatic brain injury, the loss of use in his right arm, hand, and leg, and spent the next 15 months recovering from his injuries while receiving inpatient treatment and treatment at two rehabilitative facilities. Following his discharge, he was confined to a wheelchair in his parents' apartment. These injuries provide a reasonable excuse for his late filing. Court noted D failed to show it would be substantially prejudiced if application was granted.

Salazar v. MTA

220 AD3d 1237 (1st Dept. 2023)

Petitioner alleged that she was injured on October 10, 2021, when a bus on which she was a passenger stopped short, causing her to fall to the floor. She served a notice of claim on respondents on January 13, 2022, 95 days after the incident. Court held Supreme Court providently exercised its discretion in denying P's application to file a late notice of claim. P did not establish that respondents acquired actual knowledge of the essential facts constituting the claim within 90 days of the alleged accident. Even assuming that the bus operator saw the incident, his knowledge that P had fallen did nothing to inform respondents that she was actually injured, let alone the extent of her injuries. In addition, P failed to establish a reasonable excuse for the delay as her assertion that she did not know about the notice of claim requirement or the deadline within which to file a notice of claim does not constitute a valid excuse. Equally unavailing is the later excuse, proffered by her counsel, of law office failure, especially since counsel admitted that he was retained before the notice of claim deadline had expired but offered no excuse for failing to serve the notice of claim within the statutory timeframe. Finally, P failed to show that respondents will not be substantially prejudiced by the delay in serving a notice of claim, as the failure to give notice deprived them of the opportunity to conduct a prompt investigation of the allegations.

Clark v. New York City Trans.

__ AD3d __ (1st Dept. 2023)

Court granted motion for leave to serve a late notice of claim. P was injured when a bus owned by D and driven by an employee of D struck his van. Court noted the accident involved a D-owned bus and a D driver, and was immediately investigated by a D supervisor. Therefore, P sustained his burden of showing that Ds would not be substantially prejudiced in maintaining a defense on the merits if he were permitted leave to file a late notice of claim. Ds offered no particularized evidence suggesting that they would be prejudiced by the delay. As to P's law office failure excuse, although law office failure generally is not a reasonable excuse for failing to timely serve a notice of claim, failure to offer a reasonable excuse is not necessarily fatal to a motion for leave to serve a late notice. Under the circumstances presented, where Ds had actual knowledge of the relevant facts, P's excuse of law office failure does not mandate denial of his motion.

R.M. v. Bd. of Education of Long Beach City School Dist.

212 AD3d 812 (2d Dept. 2023)

Court denied P's application to file a late notice of claim alleging inadequate supervision. It noted in support of the petition Ps submitted, among other things, an accident claim form. The form, which was signed by the school principal states that the accident occurred when the infant petitioner "ran into a pole while being chased at recess by classmates." It also states that three employees of the school had supervised the recess. A checkbox labeled "No" beside the names of those employees is marked with an "x" to indicate that none of those employees witnessed the accident. Court then held the accident form was insufficient to establish actual knowledge; and that P had failed to show a reasonable excuse. Despite P's showing of prejudice, Court denied the application.

Roman v. New York City Housing

212 AD3d 817 (2d Dept. 2023)

Court affirmed denial of application. It noted P's claim accrued in February 2018, when she received test results that she alleges indicate that the child had blood lead levels exceeding safe limits, and P failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for the approximately 11–month delay in serving a notice of claim. P failed to demonstrate any nexus between the child's infancy and the failure to serve a timely notice of claim. P's submissions, which included the medical records of the child, show that the child's blood was tested for lead approximately once a month. Likewise, the petitioner's attestation that she moved apartments on or around the 32nd day of the 90–day period to serve a timely notice of claim also does not support her contention that she was preoccupied to such an extent that she could not comply with the statutory requirement. Court also noted P failed to present "some evidence or plausible argument" of prejudice to D.

M.S. v. Rye Neck Union Free School District

212 AD3d 857 (2d Dept. 2023)

Court granted P's application to file a late notice of claim. It noted Supreme Court properly considered the relevant statutory factors, particularly Ps' showing that the School District had actual knowledge of the facts underlying the claim within the statutory period of time and that it would not be substantially prejudiced by the delay. The nexus between a claimant's infancy and the failure to serve a timely notice of claim is among the discretionary factors a court may

consider, but its absence is not fatal to a claim. Separate from those discretionary considerations, Cout noted, is the distinct question of whether the claim or cause of action would be time-barred by GML §50-i(1)(c). Here, Supreme Court erred in concluding that any claim by the infant P based upon incidents that occurred prior to May 31, 2017, would be time-barred. CPLR 208 tolls a SOL for the period of infancy, including the limitation set forth in GML §50-i(1)(c). It is undisputed that the infant P was an infant at the time of the events underlying this action and at the time that the action was commenced.

Brown v. City of New York

218 AD3d 466 (2d Dept. 2023)

Court granted the application to file a late notice of claim. It noted since D had actual knowledge of the essential facts underlying the claim and no substantial prejudice to D was demonstrated, P's failure to provide a reasonable excuse for the delay in serving the notice of claim did not serve as a bar to granting leave to serve a late notice of claim.

Dominquez v. State

218 AD3d 440 (2d Dept. 2023)

Court affirmed denial of application to file a late notice of claim. Court noted claimant failed to demonstrate that the State had timely notice of the essential facts constituting the proposed claim. Here, the police accident report did not give the State notice of the essential facts constituting the claim, as the description of the happening of the accident contained in the report differed materially from the alleged facts upon which the claimant's theories of liability were based. The claimant also failed to demonstrate a reasonable excuse for her failure to file a timely claim as she failed to explain the gap of several months between her initial efforts to obtain the police accident report and her retention of her current counsel, who was able to obtain the report and identify the driver of the allegedly offending vehicle. The purported failure of her prior counsel to properly investigate her claim is not a reasonable excuse.

Quinn v. Wallkill School Dist.

215 AD3d 1113 (3d Dept. 2023)

In July 2018, P served D with a notice of claim alleging that D negligently supervised its students, failed to protect P from bullying by other students and failed to keep P separated from the bullying students. P commenced this action against D on March 8, 2019, alleging one cause of action, negligent supervision. Following joinder of issue, D moved to dismiss the complaint for failure to timely file a notice of claim or to seek leave to file a late notice of claim. P opposed the motion and cross-moved to amend the complaint. Supreme Court granted D's motion finding that the notice of claim was untimely and denied P's cross-motion to amend the complaint. Court affirmed. It noted P never sought leave to file a late notice of claim. As such, the dispositive question is whether the July 2018 notice was timely. Court held it was not. While P alleges a continuing course of bullying throughout the school years 2009 through 2018, it is uncontested that he transferred out of D's school district in March 2016. Under the concept of *in loco parentis*, as P was no longer in D's physical custody, any duty D had to P terminated the last day P was bullied as a student at D's school in March 2016 and the action began to accrue at said time. Accordingly, in order for any notice of claim to be timely it must have been filed within 90 days of March 2016.

Turner v. Roswell Park Cancer Center

214 AD3d 1376 (4th Dept. 2023)

In this medical malpractice action, Supreme Court granted application to file a late notice of claim with respect to P's medical malpractice action. It noted claimant demonstrated that she had a reasonable excuse for her delay because, following the surgery, she was informed by D personnel that she had to wait a year to see if the damage to the nerve from the surgery would be permanent, a representation on which she reasonably relied. Upon learning from D that the damage would be permanent, claimant immediately filed the underlying application seeking leave to serve a late notice of claim. Claimant also demonstrated, through the submission of her medical records, that D had actual knowledge of her claim through its medical records which indicated that, during the surgery, the doctor performing the procedure knew that he had severed the nerve and that it "seemed to be compromised." According to his operative report, the doctor sutured the nerve before finishing the surgery prematurely. Claimant's post-surgery medical records and continued treatment at D demonstrate that she presented there with symptoms associated with the severed nerve that could result in permanent nerve damage. Based on what occurred during the surgery and claimant's post-surgery symptoms, Court

concluded that D timely acquired actual knowledge of the essential facts constituting the claim, and that knowledge established that D would not be prejudiced by the late filing.

Watt v. Urban Dove Team

78 Misc.3d 760 (Sup. Ct. Lings Co. 2023) (Melendez, J.)

In this action alleging claims for wrongful death and conscious pain and suffering arising after the decedent, a minor student, was shot and killed at the time of school dismissal, Court granted P, the decedent's parent and the administrator of the decedent's estate, leave to file late notice of claim as to respondent charter school but not respondent municipality and its education department. Petitioner's notice of claim was deemed timely filed as to the wrongful death claim against respondent charter school, as it was filed within 90 days after petitioner was appointed administrator of the decedent's estate. However, the time to file a notice of claim differs between wrongful death claims and conscious pain and suffering claims, as service of the latter must be made within 90 days after the claim arises. Nevertheless, though petitioner was not an infant at the time of the incident and the notice of claim could have been filed prior to petitioner being appointed as administrator of the decedent's estate, petitioner established that respondent charter school had timely notice of the facts underlying the claim, and prejudice could not be claimed by that respondent, given the communications between petitioner and the decedent's coach, as well as the fact that school employees witnessed the shooting. By contrast, respondent municipality and its education department were improper parties, as respondent charter school was an independent and autonomous public school that was not owned, controlled, operated or managed by the municipal respondents.

B. Court of Claims Act

Alam v. State

212 AD3d 697 (2d Dept. 2023)

On October 15, 2019, the claimant filed a notice of intention to file a claim against the State, *inter alia*, to recover damages for civil rights violations pursuant to 42 USC §1983 based on allegations of judicial misconduct in the divorce action. On that same date, the State rejected the notice on the ground that it was unverified. On or about December 17, 2019, the claimant filed and served the instant claim alleging, *inter alia*, that various State court justices and judges had made errors, engaged in judicial misconduct. Court affirmed dismissal of the claim. It noted the claim accrued at the latest, on May 9, 2019 when the Court of Appeals denied the claimant's motion for leave to appeal. However, the claimant did not file his notice of intention to file a claim until more than five months later, on October 15, 2019. Moreover, the notice of intention to file a claim was not properly verified, and the State properly rejected it as a nullity. Under such circumstances, the notice of intention to file a claim did not serve to extend the claimant's time to file and serve a claim beyond the 90-day statutory period. Therefore, the claim, filed approximately seven months after accrual of the claim, was untimely with regard to the remainder of the claims, and the Court of Claims properly directed their dismissal.

Goines v. State

78 Misc.3d 698 (Ct, Claims 2023) (Chaudhry, J.)

Court initially held movant, who sought to bring a personal injury action to recover damages for serious injuries, including paraplegia, allegedly sustained as a result of a high-speed police chase, did not establish that he suffered from a qualifying legal disability under Court of Claims Act § 10 (5) at the time his claim accrued for purposes of bringing his claim as of right after the time period for bringing a claim had expired. Court noted that although the statute does not define the term “legal disability,” infancy and incompetency have been recognized as the two quintessential legal disabilities permitting application of section 10 (5)' s toll. Despite movant's extensive physical injuries and long hospitalization for medical treatment after the incident, he did not establish that he was incompetent or otherwise mentally incapacitated as required for a claimant to obtain relief under the statute. His physical disability—including his paraplegia and related injuries that, from the time of the incident to date, prevented him from engaging in the basic activities of daily life—did not constitute a legal disability. The application of section 10 (5) has not been expanded beyond infancy and incompetency because section 10 (5)—like all other

filing requirements of Court of Claims Act § 10—is jurisdictional in nature and, thus, is to be strictly applied. However, Court granted permission to file a late claim under Court of Claims Act § 10 (6). Given the extensive documentation of movant's serious injuries, as well as his prolonged hospitalization and medical treatment, movant established a reasonable excuse for the delay. The State received actual notice of the facts constituting the claim because the incident involved a state trooper driving a state police vehicle and the State immediately commenced and conducted a lengthy investigation, and the State did not dispute movant's assertion that he had no other alternate remedy. Finally, there was sufficient information within the proposed claim and the accompanying submissions to indicate that the claim was not patently groundless, or that movant might not be able to show, after a greater development of the facts, that he had a valid cause of action, even under the demanding reckless disregard standard.

Part Six
STATUTES OF LIMITATIONS

I. COVID 19 TOLLS

Governor Cuomo issued an Executive Order on March 20, 2020 tolling all statutes of limitations in the state up through April 9, 2020. That end-of-toll date was repeatedly extended by subsequent Executive Orders "through November 3 2020." On November 3, 2020, NY Governor Andrew M. Cuomo issued Executive Order 202.72 that ended, effective November 4, 2020, the tolling of the SOL that first went into effect on March 20, 2020 for all civil cases governed by NY's SOL

Brash v. Richards

195 AD3d 582 (2d Dept. 2021)

On motions to dismiss an appeal, the issue of whether the series of executive orders issued by Governor Andrew Cuomo, as a result of the COVID-19 pandemic, constituted a toll or, alternatively, a suspension of filing deadlines applicable to litigation in the NY courts was raided. The Court. concluded that the subject executive orders constituted a toll of such filing deadlines. Here, order was served with notice of entry on October 2,2020 and NOA was served and filed on November 10, 2020. The subject executive orders tolled the time limitation contained in CPLR 5513(a) for the taking of an appeal until November 3, 2020. Accordingly, the notice of appeal, which was served and filed on November 10, 2020, well within 30 days of November 3, 2020, was timely. **COMMENT**: The First (*Murphy v. Harris*, 210 AD3d 410 [2022]), Third (*Matter of Roach v. Cornell Univ.*, 207 AD3d 931 [2022]), and Fourth (*Harden v. Weinraub*, 221 AD3d 1460 [2023]) Departments have followed *Brash*.

II. STATUTORY PERIODS

A. Contract – CPLR 213(2)

MLRN LLC v. U.S. Bank
214 AD3d 602 (1st Dept. 2023)

P alleged repurchase-related claims for loans. Supreme Court denied D's motion to dismiss the causes of action for pre- and post-EOD breaches of its duties to repurchase loans with document exceptions or representation and warranty breaches with respect to 57 of the certificates at issue. Court held Supreme Court should not have found that the claims accrued in NY and were timely under NY's six-year SOL. In contract cases involving a purely economic injury, accrual is determined by the "place of injury," which usually is determined by applying the "plaintiff-residence" rule; this rule asks where P resides and where it feels the economic impact of the loss.
COMMENT: As to CPLR 202 issue, see *infra*.

State v. Mason

78 Misc3d 437 (Sup. Ct. Suffolk Co. 2023) (Pastoresso, J.)

P commenced this action to recover payment for medical services provided to D at Stony Brook Hospital. Action was commenced in July 2022 and the services were rendered in September 2016. D argued that the action is untimely pursuant to CPLR 213-d, which was enacted in April 2020, and provides that an action on a medical debt shall be commenced within three years of treatment. P contends that the statute should not be applied retroactively and that prior law provides for a six-year SOL based on breach of contract. Court held that as the statue was remedial, it would be applied retroactively.

B. Intentional Tort – CPLR 215 and EPTL 5-4.1 (2)

Rosas v. Petkovich

218 AD3d 814 (2023)

P's complaint alleged that D fled from their home with P's medication and "negligently and recklessly assaulted, battered, and injured" P while she was lawfully attempting to recover the medication. D moved to dismiss the complaint, arguing that the allegations arose out of an intentional act and were barred by the one-year SOL. (CPLR §215[3]). In response P submitted an amended complaint wherein she alleged D negligently and recklessly caused her injuries by "blindly clos[ing] the door" on her, and her affidavit, in which she averred that as she approached the door, D "quickly slammed it behind him and directly in front of her." Court held the only inference that may be drawn from the evidence and P's allegations is that her alleged injuries resulted solely from D's intentional act of closing the door on her. Even if D lacked any intent to make physical contact with, or otherwise injure, P, the conduct attributed to D constituted intentional, rather than negligent, conduct. Under these circumstances, P cannot avoid the running of the SOL by couching her cause of action as sounding in negligence.

Souza v. Exotic Island

69 F.4th 99 (2d Cir. 2023)

In this action alleging a right of publicity claim pursuant to Civil Rights Law §§50, 51, Court held that the one-year SOL applied to right of publicity claims.

C. Medical Malpractice

1. Negligence v. Malpractice

Trofimova v. Seniorcare Emergency

221 AD3d 516 (1st Dept. 2023)

Court held the allegations in the complaint sound in medical malpractice rather than ordinary negligence. Ps seek to hold D liable for its failure to provide decedent with an advance life support (ALS) ambulance after being advised that decedent was suffering from shortness of breath. The type of ambulance provided by D bears a substantial relationship to the rendition of medical treatment, and thus Ps' claims must be viewed within a medical malpractice framework. The dispatcher would need to understand the significance of "shortness of breath," have specialized knowledge of the equipment or devices that could treat or care for the possible conditions arising from this symptom and be familiar with accepted practice in providing an ALS ambulance.

Kelty v. Genovese Drug Stores

214 AD3d 776 (2d Dept. 2023)

P commenced this consolidated action against her physician, D Hito, among others, to recover damages for injuries she allegedly sustained when her dosage for a certain medication was reduced from 200 micrograms to 25 micrograms due to an unclear prescription. The subject prescription was prepared by Hito during a medical appointment with P on May 14, 2012, in connection with his treatment of P's hypothyroidism. Following discovery, Hito moved for S/J dismissing the complaint insofar as asserted against him as barred by the 2½-year SOL for medical malpractice actions. In opposition, P argued, *inter alia*, that this action insofar as asserted against Hito sounded in ordinary negligence and not medical malpractice. Court held

conduct alleged in the complaint insofar as asserted against Hito bears a substantial relationship to his medical treatment of P, and sounds in medical malpractice. Thus, Supreme Court properly determined that the action insofar as asserted against Hito was barred by the 2½-year SOL for medical malpractice action.

Currie v. Oneida Health Systems

__ AD3d __ (3d Dept. 2023)

Decedent fell several times while at D's residential facility, despite, allegedly, decedent's acknowledged fall risk and D's prior cessation of blood thinner due to risk of falls. At issue was whether the D's conduct sounded in medical malpractice or ordinary negligence. In a comprehensive discussion of the issue with discussion of the case law, Court analyzed P's claims. **COMMENT:** Judge Fisher's opinion is one that should be filed in your trial notebook.

2. Exceptions

Rock v. Lavelle

216 AD3d 1323 (3d Dept. 2023)

This medical malpractice action, commenced on January 27, 2016, stems from P's September 19, 2012 spinal fusion, performed by D Lavelle, a partner of D Upstate Orthopedics, and certain postoperative care and treatment provided to her. Ds moved for S/J dismissing, among other claims, any allegations of malpractice preceding July 29, 2013 as time-barred, arguing that a more than 16-month break in P's postoperative treatment, during which she engaged the services of other physicians, rendered the continuous treatment doctrine inapplicable. As relevant here, Supreme Court denied the motion, finding triable issues of fact as to the applicability of the tolling doctrine. Court affirmed. In a careful analysis of the facts, Court noted, among other things, that P raised an issue of fact as to whether, notwithstanding the lengthy gap between office visits, both she and Ds reasonably intended a continuous course of treatment, Ds to P's treatment with other providers, Court noted that merely because P treated with other providers does not in and of itself terminate a continuous treating relationship with the original physician. In this connection, Court held Ds did not establish as a matter of law that P had terminated her relationship.

Baker v. Eastern Niagara Hosp.

217 AD3d 1331 (4th Dept. 2023)

In this medical malpractice action alleging the failure to remove a foreign objection, a sponge, upon completion of surgery, D argued the action was time-barred. Court held decedent's medical records and P's deposition testify submitted by Ds did not establish that decedent was aware of the foreign body more than one year before she commenced this action. Court also held D failed to establish that, more than one year prior to commencing this action, decedent had discovered facts that "would reasonably lead" to the discovery of the foreign object. Ds' reliance on decedent's failure to discover the presence of the foreign body based on the gastrointestinal symptoms that she suffered for approximately three years between 2013 and 2016 was without merit. The medical records establish that decedent "made timely and persistent inquiries to medical . . . professionals with respect to [her symptoms] following the surger[ies]."

Sogojeva v. Staffenberg

80 Misc3d 536 (Sup. Ct. Kings Co. 2023) (Melendez, J.)

Court held P's medical malpractice action, based on a drill bit left in her face after a surgical procedure was not time-barred, citing the foreign object exception. It noted the doctor who did not become aware of the presence of the drill bit at the time he reviewed P's craniofacial CT scan approximately four months before the second surgery, and that doctor's potential opportunity to identify the drill bit at the time of the CT scan was insufficient to establish the date of reasonable discovery. Though P complained of "weird" sensations and a "touching inside" feeling prior to the second surgery, there was no indication that P had reason to be aware of the introduction of a foreign object into their body, or that the source of any pain or discomfort would be attributable to a negligently introduced foreign object. P underwent multiple operations within a period of four years to treat and correct his orbital fracture, and a reasonable person could conclude that the pain they endured was the result of consistent surgery and intentionally implanted materials.

From the time of the initial injury to the removal of the foreign objection, P consistently sought consultation to discover the source of his discomfort. **COMMENT:** Judge Melendez's decision is well-worth the read.

3. Lavern's Law

Saffa v. Katz

81 Misc3d 389 (Sup. Ct. Queens Co. 2023) (Catapano-Fox, J.)

In this medical malpractice action, P alleged D's failure to diagnose vaginal cancer after performing an MRI which identified a cancerous mass. Court held it was not time-barred under the tolling provisions of "Lavern's Law," as P's cause of action accrued not from the date of the MRI report but rather when P discovered she had a cancerous mass and was diagnosed by another doctor. CPLR 214-a was amended by "Lavern's Law," which permits medical malpractice cases alleging the negligent failure to diagnose cancer or a malignant tumor to be commenced with 2 ½ years of when a P knew or reasonably should have known of such alleged negligent act or mission and knew or reasonably should have known that such alleged negligence act or omission caused injury. Court noted the focus and intention of the language is on the date when a P became aware of malpractice and not necessarily when they became aware of a medical condition. The cause of action against D did not accrue until P discovered she had a cancerous mass that had been identified in D's prior MRI report. P's claim of failure to diagnose vaginal cancer was not apparent to P until she was diagnosed by another doctor, and therefore the SOL was tolled. **COMMENT:** Decision is based on a careful reading of Lavern's Law.

D. CPLR 214-g (CVA)

Dolgas v. Wales

215 AD3d 51 (3d Dept. 2023)

In this CVA action, at issue, *inter alia*, was whether CPLR 214-g revived Ps' section 1983 claim. Court noted the Fourth Department answered this question in the negative, first noting that when a federal court borrows a state SOL, it also generally borrows any related revival statute. (*see BL Doe 3 v Female Academy of the Sacred Heart,* 199 AD3d 1419, 1421 [4th Dept 2021]). The Fourth Department then held that "CPLR 214-g is not a revival statute *related* to the residual personal injury SOL applicable to P's section 1983 cause of action." (*id.*). Although Ps argued that the Fourth Department's holding was incorrect, Court disagreed.

DiSalvo v. Wayland-Cohocton School Dist.

218 AD3d 1169 (4th Dept. 2023)

In this CVA action, Ds moved, *inter alia*, to dismiss the complaint against them in its entirety as time-barred on the ground that CPLR 208(b) extended the SOL only until age 55 and Ps were both over that age when they commenced this action. Ds argued that the "revival" period codified by CPLR 214-g - which, for a limited time, permitted individuals to bring otherwise time-barred civil actions based on allegations of child sexual abuse - was restricted by the age limit contained in CPLR 208(b). As relevant here, Supreme Court denied the motion insofar as it sought to dismiss the complaint against Ds in its entirety as time-barred under CPLR 208(b). Court affirmed. It concluded CPLR 208(b) is irrelevant as to whether an action commenced pursuant to CPLR 214-g is timely. So long as the action was commenced during the revival period – as is the case here – the action is timely under CPLR 214-g regardless of P's age.

E. CPLR 214-j

CPLR 214-j

Provision was enacted effective May 24, 2022. L. 2022, c. 203, §1. It revives claims for adult survivors of sexual abuse, *i.e.*, those who were 18 or over at the time they were abused.

F. Municipal and State

Jorge v. City of New York

220 AD3d 593 (1st Dept. 2023)

In this action alleging excessive use of force and assault by D's police officers, Court held the claim was time barred as the action was governed by CPLR 217-a (1 year and 90 days), and the claim accrued on October 30, 2007, and action was not commenced until January 12, 2012.

Wiltz v. State of New York

77 Misc.3d 195 (Court of Claims 2022) (Vargas, J.)

Claimant's claim against D State of New York arising from claimant's complaint filed with the New York State Division of Human Rights (DHR) alleging discriminatory intent with respect to an eviction proceeding was time-barred and jurisdictionally defective, as the claim was filed 588 days after accrual of claimant's alleged harm.

G. Article 78

Fiondella v. Town of East Hampton

212 AD3d 811 (2d Dept. 2023)

Court denied D's motion to dismiss the Article 78 proceeding. It noted that based on the undisputed evidence demonstrating the mailing of the determination to P occurred on April 29, 2019, it is presumed that P received the determination on May 4, 2019. Thus, his time to commence the instant proceeding did not expire until four months later, on September 4, 2019. Therefore, the instant proceeding was timely commenced.

III. TERMINATION / NEW ACTION: CPLR 205

US Bank National Assoc. v. Fox

212 AD3d 422 (1st Dept. 2023)

Court held the action was not time-barred, as it was brought within six months of the dismissal of the prior foreclosure action. While the prior action was dismissed due to P's unreadiness to go forward with the trial as scheduled, the trial court, in dismissing the case, did not set forth on the record any additional instances of neglect by P that could "demonstrate *a general pattern of delay* in proceeding with the litigation," as opposed to one particular lapse, namely, the lack of readiness on the trial date. The court's statement that the case had been "languishing since 2010" does not suffice, inasmuch as it fails to specify any "*specific conduct* ... demonstrat[ing] a general pattern of delay." Court emphasized that a "general pattern of delay" must comprise more than one instance of dilatory conduct. In brief, a single data point does not a "general pattern" make. Court noted that the dissent misplaces its focus on whether the order dismissing action may nonetheless be deemed to have been a dismissal "for neglect to prosecute the action made pursuant to [CPLR 3216] *or otherwise* " within the meaning of CPLR 205(a). Even if the action was dismissed for neglect, the concluding sentence of CPLR 205(a) requires an on-the-record recitation of sufficient examples of neglect in prosecuting the action to "demonstrate a general pattern of delay in proceeding with the litigation."

Concepcion v. Lessel Trans. Corp.

213 AD3d 449 (1st Dept. 2023)

Court held Supreme Court properly denied Ds' motion to dismiss the complaint (the second action) as time-barred. P timely commenced the action within the six-month period provided for in the savings provision of CPLR 205(a). Contrary to Ds' contention, (the first action) was not dismissed for neglect to prosecute. Rather, the dismissal was due to P's failure to respond to three notices issued by the court directing the filing of certain discovery-related stipulations. Court noted P was in substantial compliance with the discovery orders in the first action. Supreme Court also properly declined to dismiss the complaint on the ground that appeals in the first action were pending. Although CPLR 205(a) extends the tolling period until six months after the exhaustion of all appeals as of right, P need not have waited until the appeals in the first action were resolved before commencing the second action.

MRE Technology v. Smith's Detection

216 AD3d 430 (1st Dept. 2023)

Court noted that CPLR 205(a) does not apply where the earlier decision was filed in Maryland.

Kogut v. Village of Chestnut Ridge

214 AD3d 777 (2d Dept. 2023)

Court held the requirements of CPLR 205(a) have been satisfied. This action would have been timely at the commencement of the first proceeding, and this action was commenced within six months of the issuance of the order directing dismissal of the causes of action in the first proceeding which were for declaratory relief. Further, the determination directing dismissal of those causes of action was not based upon a voluntary discontinuance, lack of P/J, neglect to prosecute the first proceeding, or a final judgment on the merits.

Islam v. 495 McDonald Ave.

216 AD3d 751 (2d Dept. 2023)

Court held CPLR 205(a) was not available to extend the limitations period beyond the termination of the 2001 action, since that action was terminated by means of a voluntary discontinuance. P affirmatively requested the discontinuance, and it was granted at his behest and over his adversary's objection. An action may be voluntarily discontinued either by a stipulation or notice, pursuant to CPLR 3217(a), or by a court order, pursuant to CPLR 3217(b). Contrary to P's contention, a discontinuance sought by a P and effectuated by a court order under CPLR 3217(b) is no less voluntary within the meaning of CPLR 205(a) than a discontinuance effectuated by a stipulation or notice under CPLR 3217(a). **COMMENT:** Court then stated: "To the extent that the decision of the Appellate Division, First Department, in *Censor v Mead Reinsurance Corp.* (176 AD2d 600) supports a contrary conclusion, we decline to follow it."

Crudele v. Price

218 AD3d 536 (2d Dept. 2023)

Court held the prior action was not dismissed for "neglect to prosecute within the meaning of CPLR 205(a). It noted that although Supreme Court set forth on the record that P failed to appear for a single conference and failed to supply an effective authorization for certain relevant medical records, such conduct did not demonstrate a general pattern of delay in proceeding with the litigation. The court's conclusory statements, to the effect that P had engaged in a general pattern of delay, do not satisfy the statutory requirements that a court 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."

CPLR 205-a

Added by L. 2022, c. 821, eff. 12/30/22, this provision governs the savings statements in any action listed in CPLR 213(4), which includes an action upon a bond or note or upon a mortgage of real property.

IV. RELATION-BACK - CPLR 203(f)

Matter of Nemeth v. K-Tooling

__ NY3d __ (2023)

In this zoning dispute matter, Court addressed the third element of the relation-back doctrine set forth in CPLR 203 for adding a new party and *Buran v. Coupal* (87 NY2d 173 [1995]), namely, the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading. Court held the doctrine applied when the "party knew or should have known that, but for the mistake - be it simple oversight or a mistake of law (*i.e.*, that the amending party failed to recognize the other party as a legally necessary party) - the non-amending party would have been named initially." Here, Court found the omission of the party sought to be added could not have been under the circumstances anything other than an oversight. **COMMENT:** As attorney Matt Lerner has aptly noted, decision should be read now with a clear head, rather than when you may need to relay on the doctrine. Lerner, Civil Law Update, Albany County Bar Association December 2023 Newsletter at p. 5. *See also* for another

excellent discussion of the decision Flath, "Recent Application of the Relation back Doctrine," NYLJ, December 26, 2023.

Herrera v. Highgate Hotels

213 AD3d 465 (1st Dept. 2023)

Court granted P's cross-motion to amend the complaint to assert direct causes of action against third-party D Subway Real Estate Corp. (Subway) and second third-party Ds Bidhan Biswas and Nexus BDS, Inc. (together, the Nexus Ds). It held because the third-party and second third-party actions were commenced within the applicable SOLs, P's direct claims against Subway and the Nexus Ds relate back, for SOL purposes, to the date of service of the third-party and second third-party complaints.

Mignone v. Nyack Hosp.

212 AD3d 802 (2d Dept. 2023)

In this medical malpractice action, P presented to the D's emergency room. Bhadra, an orthopedic surgeon employed by nonparty Northeast Orthopedics, performed an open reduction and internal fixation to repair P's left tibia fracture. P alleged that her postoperative treatment was complicated by compartment syndrome, which P alleged was not timely diagnosed and appropriately repaired. On April 25, 2016, at Nyack Hospital, D Theresa Impeduglia performed a decompression fasciotomy on P, and P was discharged from Nyack Hospital on April 26, 2016. After P timely commenced this medical malpractice action against Nyack Hospital and Impeduglia, Impeduglia commenced a third-party action against Bhadra for indemnification and contribution. P filed an amended complaint adding Bhadra as a D. Bhadra moved pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against him as time-barred. Court held P satisfied the three-point test for the applicability of the doctrine. After noting that there was no dispute that the first element was satisfied, Court held P satisfied the second prong of the test as P established that Bhadra and Nyack Hospital were united in interest It noted that where, as here, a patient enters a hospital through its emergency room seeking treatment from the hospital, and not from a particular physician of the patient's choosing, the hospital may be held vicariously liable for the negligence of the treating physician, an independent contractor, under a theory of apparent agency. The vicarious liability of the hospital allows for a finding of unity of interest. Court then held P satisfied the third prong of the test, which focuses, *inter alia*, on whether D could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at

all and that the matter has been laid to rest as far as he [or she] is concerned. P's medical records from Nyack Hospital contain several notes authored by Bhadra, P developed compartment syndrome shortly after the surgery performed by Bhadra, and Bhadra was aware that P developed compartment syndrome, as evidenced by the discharge summary he wrote. Given these facts, it would not have been reasonable for Bhadra to conclude that P intended to proceed against only Ds named in the original complaint.

Sanders v. Guida

213 AD3d 712 (2d Dept. 2023)

In this medical malpractice action, Court held P failed to establish that the physician assistant Ds are united in interest with the doctor Ds, as she has failed to show that the doctor Ds are vicariously liable for the PA's alleged negligent acts or omissions. As the PA Ds were employed by the practice, not the individual doctor Ds, there is no vicarious liability based on *respondeat superior*. Court also held P failed to satisfy the third prong. The record is devoid of evidence that the PA Ds had notice that an action had been commenced against the doctor Ds prior to the expiration in 2014 of the SOL for the medical malpractice and wrongful death causes of action.

Dixon v. DeFour Jones

217 AD3d 838 (2d Dept. 2023)

P moved for leave to amend her complaint to add Smith as a D, a physician's assistant who was employed in D's medical practice. Court held, noting the linchpin of the relation-back doctrine is whether the new D had notice within the applicable limitations period. Ps failed to meet their burden as to the third prong of the relation-back doctrine. The record establishes that Smith was no longer working for the practice at the time of the commencement of the action, and there is no evidence that she had actual or constructive knowledge within the limitations period of the commencement of the action. Accordingly, under these circumstances, Ps failed to establish that Smith knew or should have known that, but for a mistake as to the identity of the proper parties, this action would have been commenced against her as well.

Wilson v. Rye Family Realty

218 AD3d 836 (2d Dept. 7/26/23)

P initially sued Kings Autoshow, Inc. Subsequently, P sought leave to amend the complaint to add Kings Autoshow II as a D pursuant to the relation-back doctrine. Court noted the "linchpin" of the relation-back doctrine is whether the new D had notice within the applicable limitations period. Here, there is no dispute among the parties that the first and third prongs of the relation-back doctrine were established, and are not at issue on appeal. P also established the second prong of the relation-back doctrine, *i.e.*, that Kings Autoshow I and Kings Autoshow II were "united in interest," by demonstrating that, under the particular circumstances presented, Kings Autoshow I and Kings Autoshow II, "intentionally or not, often blurred the distinction between them."

Baselice v. Long Island Railroad

79 Misc3d 1070 (Sup. Ct. Queens Co. 2023) (Velasquez, J.)

Court held P, the administrator of his wife's estate, was entitled to amend the complaint he and his wife had filed in 2017 alleging injuries resulting from a 2016 train derailment accident, to add a cause of action for wrongful death based on his wife's fatal car accident in 2020. Here, decedent wife suffered serious personal injuries in the train derailment, including a traumatic brain injury. The fatal car accident resulted from decedent crashing head-on into a concrete retaining wall at a high rate of speed and the death certificate listed the cause of death as "probable neurological event." P's forensic pathologist opined that the train derailment injuries more likely than not caused the car accident, either by a neurological event causing decedent to lose control or perhaps to commit suicide. While the SOL for the wrongful death cause of action had expired, even with the tolling periods in effect during the COVID-19 pandemic, the relation-back doctrine applied to make the cause of action timely where the original complaint gave notice of the transactions and occurrences; P's allegations and medical evidence presented at least an issue as to whether the train derailment was a contributing factor in the fatal car accident. Inasmuch as the action was not yet on the trial calendar and D had been aware of decedent's death since at least August 2020, there was no showing of prejudice.

V. BORROWING STATUTE – CPLR 202

Andes Petroleum v. Occidental Petroleum

213 AD3d 403 (1st Dept. 2023)

Court held Supreme Court erred in determining P's causes of action for fraudulent conveyance were timely. Where, as here, the claims are timely under NY law, the issue turns on whether the claims would have been timely filed if they could have been brought under the laws of the foreign state, in this case, Ecuador. This requires a determination as to which foreign causes of action and related limitations period would apply had the claims been brought in the foreign jurisdiction. If the foreign state does not have causes of action directly analogous to the NY causes of action, the limitations period of the foreign causes of action that are most closely analogous to the NY claims are to be applied. In performing the foregoing analysis, Supreme Court found applicable Ecuador's default statute, which has a 10-year SOL, and thereby found P's claims timely filed, despite the expert testimony establishing that Ecuador's default statute is not directly applicable to P's fraudulent conveyance claims and not the Ecuadorian cause of action most closely analogous to the NY causes of action. Court vacated the denial of the motion to dismiss and remanded the matter to the court for consideration of the expert evidence provided by each side concerning what Ecuadorian causes of action are most closely analogous to the NY claims.

MLRN LLC v. US Bank

214 AD3d 602 (1st Dept. 2023)

Court held certain of P's claims were time-barred. While the claims were timely under NY law, applying CPLR 202 they were time-barred as the cause of action accrued in the Cayman Islands, and they were barred under its SOL.

National Auditing Services v. Assa

217 AD3d 503 (1st Dept. 2023)

P commenced this post-judgment enforcement action alleging that transfers of NY real property by one entity D to the other entity co-Ds were fraudulent conveyances under the Debtor and Creditor Law and should be set aside. P further alleges that the individual D aided and abetted the fraudulent transfers and was also a beneficiary of them. Here, P is a resident of Connecticut

and alleges only economic injury. Moreover, it does not dispute that, under Connecticut law, where the claims accrued for purposes of the borrowing statute, the SOLfor the asserted causes of action has expired.

Erdely v. Estate of Airday

215 AD3d 1032 (3d Dept. 2023)

P commenced this action as the personal representative of Rosenthal's estate alleging that Airday, the wife and the Plan transferred the real estate with the intent to defraud, hinder and delay creditors, as the transfer rendered Airday and, thus, his estate, insolvent and unable to satisfy Florida judgments. Ds, Airday's estate, the wife and the Plan, moved to dismiss the complaint alleging, among other things, untimely filing of the action. Supreme Court denied the motion. While P argued a distinction between tort and contract matters as it pertains to the principle that locates his economic harm - and thus accrual of his various causes of action - in his state of residence, Court found little support for that premise. Although the tortious act may have occurred when the property was transferred in this state, that does not establish that the accompanying injury to P was also felt in this state or that the cause of action accrued here. Rather, the application of CPLR 202 in tort matters based upon economic injury suffered in a foreign state finds consistent support, including in matters predicated on the same causes of action asserted by P here. As P does not contend that his injury was anything other than purely economic in nature, Court held that CPLR 202 is applicable. The Court then found the action untimely under Florida law.

VI. ESTOPPEL

Angeli v. Barket

211 AD3d 896 (2d Dept. 2022)

P, an attorney, and D, an attorney, formed a partnership after D's law firm was retained to represent a non-party in a federal action. P's and D's law firm dissolved. After the federal action was settled, resulting in a legal fee, P & D disagreed as to the percentage P would receive. This action, alleging, *inter alia*, a breach of action claim, was commenced, and D argued that claim was time-barred. Court held P failed to raise a question of fact as to whether D should have been prohibited from asserting a SOL defense with regard to these claims based on the doctrine of equitable estoppel. D's alleged oral promises in 2011 that he would pay her the funds in question upon settlement of the federal action were insufficient to establish the type of deception, fraud, or misrepresentation necessary to invoke the doctrine. Regardless, P failed to demonstrate that it was reasonable for her to rely upon these alleged statements in delaying pursuit of legal action against D.

Part Seven
PARTIES AND PLEADINGS

I. PARTIES

A. Generally

Waterfall Victoria Master Fund v. Estate of Creese
217 AD3d 996 (2d Dept. 2023)

In this foreclosure action Dennis F. Creese died on June 9, 2014. On or about December 19, 2014, P commenced this action, *inter alia*, to foreclose a mortgage on real property owned by the decedent, naming the decedent as a D, along with any potential John Does. Prior to the commencement of the action, Lincoln Creese, the decedent's brother, filed a petition with the Surrogate's Court for letters of administration, but the letters did not issue until nearly five years later, on March 7, 2019. Nonetheless, in approximately January 2015, Creese filed a *pro se* answer purportedly on behalf of the decedent's estate. That answer subsequently was stricken by Supreme Court. In approximately June 2016, P moved, *inter alia*, for leave to amend the complaint to substitute the decedent's estate in his place, and to join, among others, Creese as an heir-at-law. Supreme Court granted the motion. Court noted that an action may not be commenced against a dead person, and, thus, an action brought after the person's death must be brought against the personal representative of the decedent's estate. Here, although P purported to commence the action against the decedent, Supreme Court subsequently granted P's motion, *inter alia*, to substitute the Estate for the decedent and to join, among others, certain known and unknown heirs. Creese does not protest the use of substitution pursuant to CPLR 1015(a) under the circumstances, but instead contends that P was obligated to substitute the representative of the Estate pursuant to CPLR 1015(a), and that P failed to do so and failed to obtain jurisdiction over the Estate. P contended that Creese cannot seek to vacate the order and judgment of foreclosure and sale and any underlying orders because his answer was stricken and he was in default. At the time that Creese filed a *pro se* answer in approximately January 2015, however, he was not the administrator of the Estate, and the Estate was not a D in the action. Thus, his answer could not have constituted an appearance that conferred P/J.

B. Consolidation and Joinder

Steele v. Consolidated Edison

__ AD3d __ (1st Dept. 2023)

The action arose from an incident that occurred when P and his friend, Moran, were together in P's basement apartment, when a nearby underground fire allegedly caused the emission of carbon monoxide fumes into the apartment, causing both men to suffer injury. P commenced this action asserting four causes of action against Ds, and Moran commenced an action against the same three Ds asserting essentially the same four causes of action, about a year and a half later. Court held Supreme Court improvidently exercised its discretion in denying Ds' motion to consolidate based solely on the potential for delay. Since the two actions arise out of the same underlying occurrence, they have common questions of law and significantly overlapping facts, so that consolidation would serve the interest of judicial economy and prevention of inconsistent determinations based on the same facts. Further, P did not meet his burden to demonstrate that consolidation would prejudice a substantial right. Although the actions were at different stages of discovery, discovery in this action has not yet been completed. Under the circumstances here, where the cases arise out of the same incident, the two Ps allegedly suffered injury in the same manner and assert the same claims against the same Ds, any prejudice to P and potential for delay can be mitigated by expedited discovery in the Moran action.

HSBC v. Francis

214 AD3d 58 (2d Dept. 2023)

P had successfully obtained a judgment of foreclosure, which was later vacated so that a corrected judgment could be entered. No judgment was entered, and the action was never discontinued or dismissed. Several years later P commenced the present action to foreclose the same mortgage, and subsequently moved to consolidate the present action with the prior action. In a comprehensive opinion authored by Justice Dillon, Court held that pursuant to CPLR 602(a), consolidation should be denied where one of the cases to be consolidated is subject to a meritorious motion to dismiss, as a precondition for merging two or more actions is that each action should be viable. Thus, Court held Supreme Court improvidently exercised its discretion in granting consolidation of two mortgage foreclosure actions where, faced with an apparently meritorious motion to dismiss the complaint as time-barred, P sought to avoid dismissal by moving to consolidate the action with an earlier timely commenced action.

Sherpa v. Ford Motor Co.

216 AD3d 834 (2d Dept. 2023)

Decedent was driving a leased vehicle when it struck a highway guardrail, causing property damage to the vehicle and personal injuries to decedent. Decedent commenced this action in Supreme Court, alleging the vehicle was defective and negligently maintained by the lessor Travez. After decedent died, Travez commenced an action in Civil Court to recover damages for the property damage to the vehicle. The administrator moved in this action pursuant to CPLR 602(b) to remove the Civil Court action to Supreme Court and consolidate it with this action. Court granted the motion to the extent of removing the action from Civil Court and directing the actions to be tried jointly. It noted the two actions involve significant common questions of law and fact; a failure to try them jointly would result in a duplication of trials, unnecessary costs and expense, and a danger of an injustice resulting from divergent decisions; and there has been no showing of prejudice by Travez. Since a joint trial, rather than consolidation, is appropriate where a party is both a P and a D, Supreme Court should have granted the motion to the extent of removing the Civil Court action to the Supreme Court and joining the two actions for trial.

FPG 94 Amity, LLC v. Pizzarotti

218 AD3d 654 (2d Dept. 2023)

P commenced this action against Pizzarotti, *inter alia*, to recover damages for breach of contract. P alleged in the second cause of action, to recover damages for breach of the letter agreement, that Pizzarotti breached the letter agreement by failing to properly supervise the progress of the construction and provide critical personnel. In an amended complaint, P added Fidelity as a D and added a cause of action asserted against Fidelity. Thereafter, P moved pursuant to CPLR 603 to sever the action insofar as asserted against Fidelity. Supreme Court denied the motion and Court affirmed. It noted severance is inappropriate where the claims against Ds involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial. Here, the causes of action asserted against Ds involved common factual and legal issues, and the interests of judicial economy and consistency of verdicts would be served by having a single trial. Further, P failed to establish that it would suffer prejudice to a substantial right if the cause of action asserted against Fidelity was not severed.

Bogumil v. Greenbaum Family Holdings

220 AD3d 1193 (4th Dept. 2023)

In this slip and fall action, Court held Supreme Court abused its discretion in granting Ds' motion to bifurcate the trial with respect to the issues of liability and damages. It noted that as general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately. Here, however, where the issue of liability is not distinct from the issue of P's injuries because P made statements to several of his medical care providers following his fall that render the testimony of several medical witnesses as well as hospital and medical records relevant to the liability phase of the trial. P has thus established that bifurcation would not assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action. (22 NYCRR 202.42 [a]).

II. COMPLAINT

A. Sufficiency

126 Main St. v. Kreigsman

218 AD3d 524 (2d Dept. 2023)

Ds moved to dismiss the complaint alleging a legal malpractice claim on the ground it failed to state a cause of action. Court granted the motion. It noted that conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative. Here, P failed to state a cause of action to recover damages for legal malpractice because P's allegation that the restaurant would have had increased profits but for Ds' alleged malpractice is conclusory and speculative.

B. Standing

Matter of Cayuga Notion v. Town of Seneca Falls

213 AD3d 1250 (4th Dept. 2023)

In this Article 78 proceeding challenging a zoning code provision, Supreme Court dismissed a cause of action on the ground Ps lacked standing. Court reversed. It noted standing is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation. Nonetheless, a party's lack of standing does not constitute a jurisdictional defect, and therefore a challenge to a party's standing is waived if the defense is not asserted in either the answer or a pre-answer motion to dismiss. Here, the Town's motion with respect to the second cause of action was not based on petitioners' alleged lack of standing. Thus, we conclude that Supreme Court erred in *sua sponte* reaching the issue of standing with respect to that cause of action.

Matter of Borrello v. Hochul

221 AD3d 1484 (4th Dept. 2023)

Petitioners, three members of the Legislature, and an advocacy organization commenced a hybrid article 78 proceeding and declaratory judgment action seeking, among other things, a declaration that respondents promulgated the COVID-19 regulation in violation of the State Constitution and the separation of powers doctrine and that the regulation is invalid, as well as an injunction preventing respondents from implementing or enforcing the regulation. Supreme Court, without addressing whether petitioners had standing despite respondents having raised that threshold issue in their answer and opposition papers, determined that respondents violated the separation of powers doctrine in promulgating the regulation by exceeding the scope of their delegated powers and encroaching upon the legislative domain of policymaking. The court therefore adjudged 10 NYCRR 2.13 null, void, and unenforceable and permanently enjoined respondents from enforcing and from readopting that regulation. Court reversed. In a thorough examination of the law governing legislative standing, Court determined that as there was no voter nullification involved and the legislators suffered no direct harm, the legislators had no standing. It then held the organization petitioner also lacks standing. First, the organization petitioner failed to demonstrate that at least one of its members would have standing to sue. Court then concluded: "We are cognizant that standing rules should not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review. However, inasmuch as the legislature retains its power to address the regulation and there exists a large pool of potential challengers to the regulation

who could assert a concrete and particularized harm, we conclude that this is not a case where to deny standing to these petitioners would insulate government action from judicial scrutiny."

III. ANSWER

A. Failure to Serve

Romano v. New York City Trans. Auth.

213 AD3d 506 (1st Dept. 2023)

In this Labor Law action, Court held Supreme Court correctly dismissed D's cross-claim for contractual indemnification against Five Star. While D asserted the cross-claim in their answer to P's initial complaint, they never interposed an answer to the amended complaint, which superseded the original complaint. Given P's amended pleadings, D's original answer and the cross-claims asserted therein had no effect. Court rejected D's further argument that the amended complaint was a nullity.

B. Allegations

Rule 6, Rules of Practice for Commercial Division

Effective September 12, 2022, a new subdivision (d) was added to Rule 6. It provides:

(d) Interlineation of Responsive Pleadings (1) For every responsive pleading, the party preparing the responsive pleading shall interlineate each allegation of the pleading to which it is responding with the party's response to that allegation, and in doing so, shall preserve the content and numbering of the allegation. (2) The party who prepared a pleading to which a responsive pleading is required shall, upon request, promptly provide a copy of its pleading in the same word processing software application in which the pleading was prepared to the party preparing the responsive pleading. This rule applies to D's answer to the complaint, P's reply to a counterclaim, co-D's answer to a cross-claim when answer is demanded, and a third-party D's answer. Interlineation is defined as "the act of writing something between the lines of an earlier

writing." (Black's Law Dictionary [11th ed.]). As noted in Siegel & Connors, NY Practice (6th ed) §12A (Jan. 2023 Supp.): "The aim of the amendment is to, for example, permit the parties and the court to read the answer as a single document without having to refer back to the complaint to ascertain the allegations being addressed."

FRIENDLY REMINDERS

Majerski v. City of New York

193 AD3d 715 (2d Dept. 2021)

In this Labor Law action, Court noted that although the Ps did not establish their entitlement to S/J, contrary to Ds' contention, under the facts of this case, Ps' failure to proffer evidence showing that Ds are the owner, operator, and/or contractor of the premises is not a basis to deny their motion. Here, Ds' denials of "knowledge or information sufficient to form a belief" (CPLR 3018[a]) set forth in paragraph 2 of their answer responding to the allegations in the complaint regarding Ds' status as the owner, operator and/or contractor of the premises was improper as the truth or falsity of the information alleged within those paragraphs of the complaint is wholly within the possession of Ds. Accordingly, each DKI should be deemed an admission to those allegations.

U.S. Bank NA v. Saff

191 AD3d 733 (2d Dept. 2021)

Court held: "We agree with P's contention that those paragraphs of the complaint to which Ds interposed the answer of "Neither Admitted nor Denied," which is not a recognized pleading response in our civil practice, should be deemed as admitted (see CPLR 3018[a]).

C. Affirmative Défense

Lorens v. New York Central Mutual Fire Ins.

212 AD3d 927 (3d Dept. 2023)

In this action for breach of an insurance contract, Court noted that Ps would not be entitled to S/J on their alleged theory without first moving to amend their pleadings to assert an estoppel claim as a proper basis for relief.

IV. CONTRIBUTION AND INDEMNIFICATION

Velazquez-Guadalupe v. Ideal Builders & Constr.

216 AD3d 63 (2d Dept., 2023)

In a thoughtful opinion authored by Justice Wan, Court held Workers' Compensation Law §11(1) precludes recovery by any third person for contribution or indemnity against an entity determined by the WCB to be P's employer except where the injured employee has sustained a grave injury or where the employer has expressly agreed in writing to contribute or indemnify. Here, the employer established, *prima facie*, its entitlement to judgment as a matter of law by demonstrating that the WCB determined it to be P's employer. In opposition, the third parties failed to raise a triable issue of fact. Evidence disputing the existence of an employer-employee relationship between the employer and P was incapable of rebutting the employer's *prima facie* showing as controversies regarding the applicability of the Workers' Compensation Law rest within the primary jurisdiction of the WCB, including issues as to the existence of an employer-employee relationship. Likewise, evidence concerning whether the employer may invoke the common-law doctrine of collateral estoppel is inapposite, since the employer's entitlement to dismissal of the contribution and common-law indemnification cross-claims asserted against it by any third person arose under the Workers' Compensation Law §11.

Kingston Check Cashing v. Nussbaum

218 AD3d 760 (2d Dept. 2023)

In this accounting malpractice action, Court noted the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but

rather is a separate duty owed the indemnitee by the indemnitor. Thus, Supreme Court should have granted that branch of the third-party D's cross-motion which was for S/J dismissing the third-party cause of action seeking indemnification as the third-party complaint does not allege the existence of any duty owed by the third-party D to third-party P.

V. AMENDMENTS

A. Complaint

Flowers v. Mombrun

212 AD3d 713 (2d Dept. 2023)

P moved to amend complaint, and D opposed, arguing it was prejudiced by the delay of more than 10 months between the event leading to the amendment and P moving to amend. Court granted the motion. It noted that a court in exercising its discretion should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered. However, mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine. Here, D failed to demonstrate that it would be surprised or prejudiced by the proposed amendments.

Miah v. Pipe Dreams Realty

214 AD3d 575 (1st Dept. 2023)

In this personal injury action, Court held Supreme Court providently exercised its discretion in permitting Ps to amend the BOP before filing the NOI. First, there was no prejudice or surprise to D in pleading additional statutory violations, as the original complaint alleged that the building's fire alarm system and its heat and electrical systems were not kept in good repair. Second, Ps have shown that the amendment is not palpably insufficient or devoid of merit.

National Loan Investors v. New Zion Church

213 AD3d 860 (2d Dept. 2023)

In this mortgage foreclosure action, Court held P's failure to include a proposed amended complaint as an exhibit to its motion is a "technical defect, which the court should have overlooked."

Rice-Tamsen v. Tamsen

214 AD3d 685 (2d Dept. 2023)

In this divorce action, Court held Supreme Court did not err in denying that branch of P's motion which was for leave to amend the complaint. It noted that when leave is sought on the eve of trial, judicial discretion should be exercised sparingly. In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom. Here, P offered no excuse for her delay in requesting leave to amend, and, contrary to her contention, D would suffer prejudice from an order granting leave for P to amend the complaint on the eve of trial.

Bodkin v. 112 Automotive Ctr.

214 AD3d 620 (2d Dept. 2020)

In this breach of a lease action, Court noted that there was no dispute that P sought to add the moving Ds to this action by amending the complaint after the time to do so as of right had expired and without seeking leave from the Supreme Court to do so. Although the two stipulations he entered into with the original Ds permitted him, without leave of court, to file an amended complaint outside the time table set by CPLR 3025, neither stipulation permitted him to add new Ds to this action without leave of court as required by CPLR 1003. Since P failed to comply with CPLR 1003 in his attempt to add the moving Ds as parties to this action, the amended complaint was therefore a legal nullity warranting dismissal of the amended complaint insofar as asserted against the moving D for lack of P/J.

Rosas v. Petkovich

218 AD3d 814 (2d Dept. 2023)

Court held Supreme Court erred in determining that P required leave of court to amend the complaint. CPLR 3025(a) provides that "[a] party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Pursuant to CPLR 3211(f), service by D of the pre-answer motion pursuant to CPLR 3211(a) to dismiss the complaint extended D's time to answer the complaint until 10 days after service of notice of entry of the order determining the motion, and therefore extended the time in which P could amend the complaint as of right. Since P was entitled to amend the complaint as of right at the time that she opposed D's motion to dismiss, the original complaint was thus superseded by the amended complaint and no longer viable.

VI. BILL OF PARTICULARS

Carroll v. Niagara Falls Mem. Med. Ctr.

218 AD3d 1373 (4th Dept. 2023)

In this medical malpractice action, Ds argued pursuant to *Bubar v. Brodman* (177 AD3d 1358 [4th Dept. 2019]) Supreme Court was required, and failed, to grant them partial S/J dismissing each of the particularized *factual allegations* contained in the BOP that were not expressly addressed by P's expert in opposition to the motion. Court held: "We reject that assertion and, in doing so, we take this opportunity to clarify our holdings by resolving the apparent tension between *Abbotov v. Kurss* (52 AD3d 1311 [4th Dept. 2018]), and *Bubar* and its progeny. As we previously stated in *Abbotoy*, the assertion that a D is entitled to partial S/J with respect to each allegation in the BOP not specifically addressed by a P's expert in opposition to the motion "is based on a misperception of the function of a BOP. "'[A] BOP is not a pleading, but just an expansion of one,'" and thus a P opposing a motion for S/J is "not required to submit an expert opinion with respect to each *allegation* in the BOP inasmuch as the BOP merely amplifie[s] th[e] causes of action"). Notably, the individual allegations in Ps' BOP in *Abbotoy* amplified a single cohesive theory of medical malpractice. Nothing in our decision in *Abbotoy* was intended to preclude a D in a medical malpractice action from seeking partial S/J where the complaint, as amplified by a BOP, asserts more than one distinct theory (*i.e.*, more than one claim) of malpractice. *Bubar* and its progeny should be read as consistent with that approach, and nothing therein should be interpreted as contrary to the holding in *Abbotoy*. In sum, a P opposing a motion for S/J is not required to submit an expert opinion with respect to each allegation in the BOP, but rather must raise a triable issue of fact with respect to each distinct theory or claim of malpractice on which D made a *prima facie* showing of entitlement to judgment as a matter of law, and D will be entitled to partial S/J dismissing any distinct theory or claim of malpractice left unaddressed or unopposed by P in opposition to the motion.

Strobel v. Talarico

77 Misc.3d 1051 (Sup. Ct. Steuben Co. 2023) (Doyle, J.)

In this medical malpractice against D physician alleging various claims of negligence surrounding P's gallbladder surgery, Court dismissed certain claims contained in P's BOP that were not addressed by P's expert when responding to D's S/J motion as abandoned. Court noted that in support of his S/J motion D submitted his own affidavit which addressed each claim of negligence set forth in P's BOP. The affidavit submitted by P's expert in response

addressed some, but not all, of the claims of negligence. Court held a medical malpractice D may seek dismissal of claims of negligence contained in a BOP on a principle of abandonment should P not specifically support each allegation of negligence contained in their BOP in responding to a defense S/J motion in which D met their initial burden. A ruling dismissing unaddressed claims in the BOP as abandoned does not dismiss an action, or a defense, or find that particular facts are not in issue—but it does have the practical effect of potentially limiting P's proof by restricting the theories of negligence relied upon at trial which purportedly support the medical malpractice cause of action.

Part Eight
MOTIONS

I. GENERALLY

A. Uniform Rules

Effective July 1, 2022, the Uniform Rules governing motion practice, as made effected February 1, 2021, have been amended in several respects. The changes effect print type, margins and backgrounds; word count limits; statements of material facts; and sur-reply papers. (See, 22 NYCRR §§202.5[a][2]; 8-b[a]; 8-c; 8-g). For commentary on the rules as amended, see Siegel & Connors §3 (Jan. 2023 Supp.); Ferstendig, NY State Law Digest, 741 (Aug. 2022).

Effective February 1, 2021, significant amendments had been made to the Uniform Rules. For excellent articles on these rules, *see* Connors, "Rifting on Rules," NYLJ, 7/16/21, p. 3, col. 3; Ferstendig, "Significant Amendment to Uniform Rules," NYSBA Journal, March/April 2021, p. 25 (Part 1) and May/June, p. 24 (Part 2).

B. Order to Show Cause

Uniform Trial Rule §202.8-d

"Motions shall be brought on by order to show cause only when there is genuine urgency

(*e.g.*, applications for provisional relief), a stay is required or a statute mandates a proceeding."
COMMENT: CPLR 2214(b) permits a court to grant an order to show cause "in a proper case."

Cook v. Estate of Achzet

214 AD3d 1369 (4th Dept. 2023)

Court rejected P's argument that bringing a pre-answer motion to dismiss via order to show cause necessarily converts the motion into one for S/J. It is incontestable that a pre-answer

motion to dismiss may be brought by order to show cause. The case law relied upon by Ps stands for the unremarkable proposition that a motion by a P to obtain the ultimate relief requested in the complaint is in the nature of S/J. That case law is inapposite here as Ds' motion brought by order to show cause is undoubtably not one for S/J but, instead, in the nature of a pre-answer motion to dismiss pursuant to CPLR 3211(a).

Cook v. Estate of Achzet

214 AD3d 1369 (4th Dept. 2023)

Ps commenced this action under RPAPL Article 15. Ds moved by OTSC for an order dismissing the complaint on the grounds of res judicata and collateral estoppel. Supreme Court granted the motion. Ps initially argued the pre-answer motion as "premature" because an OTSC constitutes a motion for S/J, and the motion was therefore improperly brought before issue was joined. Court concluded that "Ps' contention is devoid of merit and constitutes an affront to rudimentary precepts of civil practice." Court then held that Ds properly made their motion by OTSC in lieu of a motion as there was genuine urgency here - and Ps do not contend otherwise - inasmuch as the notice of pendency was disrupting the sale of the property, preventing Ds from conveying good title to the third-party buyer, and delaying a scheduled closing. CPLR 2214(a) and Uniform Trial Rule §202.8-d requirement was satisfied.

Torres v. Sedgwick Ave. Dignity

75 Misc.3d 839 (Sup. Ct. Bronx Co. 2022) (Ibrahim, J.)

Court denied P's motion to hold respondents in civil contempt was denied on ground of improper service because the signed order to show cause required P to serve the motion and the papers annexed thereto on respondents' counsel by upload to NYSCEF and P uploaded only the supporting papers. It is necessary that service, as ordered by the court, be strictly complied with. CPLR 2214 (b) requires notices of motions and supporting papers be served and Uniform Rules for Trial Courts 202.8(c) requires the moving party to "serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion." Consequently, a movant must serve the notice of motion (here the order to show cause) together with the supporting papers. In other words, the moving party cannot take a piecemeal approach to service of a motion and its supporting papers. Although the court uploaded the signed order to show cause to NYSCEF, petitioner never filed a complete order to show cause with supporting papers on NYSCEF after the court signed his application. **COMMENT**: Never deviate from OTSC's directives.

C. Cross-Motions

Pizzo v. Lustig

216 AD3d 38 (2d Dept. 2023)

Court held P's improper filing of a cross-motion to preclude D's use of surveillance videos disclosed after P moved for S/J caused no prejudice as to warrant its denial on procedural grounds. The express language of CPLR 2215 is clear that cross-motions are solely for seeking relief against the initial moving party. Nevertheless, CPLR 2001 vests the courts at any stage of an action with discretion to correct a party's mistake, omission, defect or irregularity upon such terms as may be just, or to disregard the mistake if substantial right of a party is not prejudiced. D submitted fulsome opposition to P's preclusion application which was then considered by the court on the merits.

II. MOTION PRACTICE

A. Generally

Uniform Trial Rules. Part 202

Familiarity with the various rules governing motion practice in Part 202 is a must.

Anuchina v. Marine Transp. Logistics

216 AD3d 1126 (2d Dept. 2023)

In the course of affirming the denial of P's motion, Court noted Supreme Court incorrectly determined that P failed to submit word count certifications with her motion pursuant to the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR 202.8–b [a],[c]). The record reveals that P submitted the required certifications. Even if P had failed to do so, the court should have overlooked such a technical defect.

B. Timeliness

Giordano v. Giordano

216 AD3d 425 (1st Dept. 2023)

Court held P established a reasonable excuse for his default in failing to timely file his cross-motion and opposition to Ds' motion for S/J. P's counsel stated that he mistakenly believed that the papers could be filed at any time on the return date of December 15, 2021, and that the e-filing at 10:58 p.m. on that date was timely, despite the fact that the papers were, in fact, due to be filed two days before the return date. Thus, the default resulted from law office failure, which a court may excuse in its discretion under CPLR 2005. Moreover, there was no evidence that the default was deliberate or part of a pattern of dilatory conduct by P.

Palmer v. Cadman Plaza North

215 AD3d 759 (2d Dept. 2023)

Court held Supreme Court providently exercised its discretion in denying P's request for an additional adjournment of the return date and an extension of time to file opposition papers. P did not make an adequate showing of good cause, as he did not offer a valid excuse for the extension and the record reflects that the need for an adjournment resulted from a lack of due diligence on P's part.

Garner v. Rosa Cohen Jewish Home

189 AD3d 2105 (4th Dept. 2023)

Court held Supreme Court did not abuse its discretion in declining to consider the papers submitted in opposition to the motion. The court's scheduling order, with which Ds complied in making their motion, unequivocally stated that responding papers were to be served within 30 days of receipt of the moving papers. The motion papers reiterated that deadline. P failed to seek leave of court to file after the deadline set forth in the scheduling order, and did not submit any reason for the delay other than a vague claim that amounts to law office failure, which the motion court found incredible. Court observed: "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. In light of P's failure to establish, or even allege, good cause for the delay, and P's

contentions concerning the lack of prejudice to Ds do not require a different result. An untimely response is not permitted simply because it has merit and the adversary is not prejudiced.

C. Reply and Sur-Reply Papers

22 NYCRR 202.8(c)

This rule provides: Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind. **COMMENT**: Can parties stipulate to service of additional papers?

D. Orders

RLF II Stillwell v. Riley

80 Misc3d 171 (Sup. Ct. Bronx Co. 2023) (Hummel, J.)

Court held that where a prior decision granted judgment in P's favor and directed P to "settle order," P was required to submit the proposed orders for signature with proof of service on all parties within 60 days under 22 NYCRR 202.48(a). The phrase "settle order" inherently calls for notice and triggers 202.48(a). Thus, further directive that the orders be settled "on notice" was not required. Nevertheless, even though P belatedly field the proposed orders, the court exercised its discretion to accept them. The delay was caused by P's consultation with its title company to ensure that the proposed orders contained the language needed to protect P's rights, and there was no apparent prejudiced to D as a result of the delay.

III. SUMMARY JUDGMENT

A. Generally

Sackett v. State Farm

217 AD3d 1166 (3d Dept. 2023)

P commenced this declaratory judgment action regarding coverage under his policy. P then filed and served an OTSC seeking the same relief. Court found no error with Supreme Court treating P's OTSC, filed two days after commencement of the action, essentially as a motion for S/J seeking ultimate relief. However, a motion for S/J may not be made before issue is joined and the requirement is strictly adhered to, particularly in an action for declaratory judgment.

McCarthy v. Town of Messina

218 AD3d 1082 (3d Dept. 2023)

In this action Supreme Court found that, because P failed to comply with the Uniform Rules for Trial Courts (22 NYCRR) former § 202.8-g by serving a proper counter-statement of material facts, all of the factual assertions presented in each D's statement of material facts were deemed admitted. This was an error, as the Third Department previously rejected the rigid construction that a trial court must deem factual assertions in a statement of material fact to be admitted in situations where, like here, P failed to respond to that statement in the appropriate manner. Although it would have been the better practice for P to submit a paragraph-by-paragraph response to each moving D's statement of material facts rather than a general denial, blind adherence to the procedure set forth in 22 NYCRR 202.8-g is not required if the proof does not support granting S/J or the circumstances otherwise warrant a departure from that procedure.

B. Premature

Sotelo v. TRM Contracting

212 AD3d 488 (1t Dept. 2023)

Court rejected Ds' argument in this Labor Law action that P's motion as premature. It noted Ds failed to demonstrate that facts essential to justify opposition to P's motion were within the exclusive knowledge of P, the moving party. Ds' argument was also undermined by their own failure to use the time and the opportunity they had to obtain whatever third-party testimony they needed in order to oppose P's motion.

Tarasuik v. Levoritz

216 AD3d 1031 (2d Dept. 2023)

In this personal injury action, Court held Supreme Court properly denied D's S/J motion on the ground it was premature. Court noted that a party who contends that a S/J motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope that additional discovery may lead to sufficient evidence to defeat a S/J motion is insufficient to deny such a motion. Here, P demonstrated that discovery might lead to relevant evidence that would justify opposition to those branches of the motion.

C. Opposing Papers

Melendez v. Picone, Inc.

215 AD3d 665 (2d Dept. 2023)

Court affirmed order granting P's motion to vacate an order granting Ds' unopposed motion for S/J. Court held Supreme Court providently exercised its discretion in determining that P's excuse for her failure to oppose Ds' motion due to law office failure was reasonable. The affirmation of P's attorney submitted in support of P's motion, explaining, *inter alia*, that an email notifying his firm of the return date of Ds' motion had been deleted before the date was entered into the firm's office calendaring system was sufficient to establish the proffered excuse of law office failure, especially given the absence of prejudice to Ds or a pattern of delay by P,

that P moved expeditiously to cure her default, and the strong public policy in favor of resolving cases on the merits. Additionally, contrary to Ds' contention, P demonstrated that she had a potentially meritorious opposition to Ds' motion.

D. Admissible Proof

Li v. Karim

__ AD3d __ (1st Dept. 2023)

Court granted P's motion for partial S/J on liability and dismissal of affirmative defense of comparative negligence. After finding P's papers were sufficient, it held D's papers were not sufficient to raise any issue of fact. It specifically noted the uncertified police accident report prepared by an officer who did not witness the accident is not admissible for the purpose of establishing the cause of the accident.

CPLR 2106, amended by l. 2023, ch. 38

Effective January 1, 2024, and applicable to pending actions, any person may submit an affirmation under penalty of perjury in lieu of an affidavit. Amendment also states "such affirmation shall be in substantially the following form: I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law." **COMMENT:** For a discussion of this new statute, see Feigin, "Attorney Affirmations, Beware!", NYLJ, 12/19/23, p. 3, col. 3.

E. Successive Motions

Wilson v. New York City Trans. Auth.

219 AD3d 1563 (2d Dept. 2023)

In this passenger/bus accident action, D moved for S/J dismissing the complaint and P cross-moved for S/J on the issue of liability. Court held that generally successive motions for S/J

should not be entertained, absent a showing of newly discovered evidence or other sufficient cause. Thus, successive motions for S/J should not be made based upon facts or arguments which could have been submitted on the original motion for S/J. Here, P failed to demonstrate that his second motion for S/J was based on arguments which could not have been submitted on the original motion for S/J, and Supreme Court properly denied his cross-motion.

F. CPLR 3213

Buckley v. Nicklous

210 AD3d 575 (1st Dept. 2023)

Court held a settlement agreement qualifies as an "instrument for the payment of money."

IV. MOTION TO DISMISS

A. Generally

RCM/CMG Portfolio Holding v. Giordano

214 AD3d 486 (1st Dept. 2023)

D moved to dismiss pursuant to CPLR 3211(a)(7). Court held in view of the parties' extensive evidentiary submissions, it treated the motion as solely for S/J. Even if the motion to dismiss were separately analyzed, Court was of the view that the affidavits submitted in opposition to it would be properly considered to remedy any defects in the complaint.

B. Factual Submissions and Convert

Champion Mortgage Co. v. Antoine

214 AD3d 698 (2d Dept. 2023)

Court held Supreme Court erred in converting D's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against her into a motion for S/J. It noted Supreme Court failed to provide the requisite notice to the parties, and none of the recognized exceptions to the notice requirement applied. Neither party made a specific request for S/J and neither indicated that the case involved a purely legal question rather than any issues of fact and the parties submissions were not so extensive as to make it unequivocally clear that they were laying bare their proof and deliberately charting a S/J course. Accordingly, the court should not have considered whether D was entitled to S/J dismissing the complaint insofar as asserted against her and declaring that the mortgage on the subject property was null and void.

Pioneer Bank v. Teal Becker

77 Misc3d 360 (Sup. Ct. Albany Co. 2023) (Platkin, J.)

In this malpractice action commenced by P bank against D accounting firm and two of its CPS, Court held Ds' fact-based causation defense and their partial challenge to the timeliness of P's

claim should have been the subject of a properly supported motion for S/J under CPLR 3212, not a motion for dismissal under CPLR 3211(a)(7) accompanied by an invitation for the court to convert the motion into one for S/J under CPLR 3211(c). Though the Court of Appeals has left open the possibility that a D may obtain dismissal under CPLR 3211(a)(7) through the submission of "conclusive" affidavits and evidence, Court held it was obliged to follow the Third Department's recent precedent, which teaches that a court resolving a motion to dismiss for failure to state a claim cannot base the determination upon submissions by D, no matter how compelling claims made in such submissions may appear**. COMMENT:** Judge Platkin thoughtfully noted that an evidence-based motion to dismiss under CPLR 3211(a)(7) also injects needless uncertainty and delay into the motion practice, and may allow litigants to evade the proscription against successive S/J motions. Ds did not challenge the legal sufficiency of P's claim for accounting malpractice, and their unconverted, post-answer CPLR 3211(a)(7) motion is not an appropriate procedural vehicle by which to interpose a fact-based causation defense or assert the partial expiration of the SOL.

C. CPLR 3211(a)(1)

Maursky v. Latham

219 AD3d 473 (2d Dept. 2023)

Ds moved to dismiss this legal malpractice action pursuant to CPLR 3211(a)(1) and (7), submitting the S&C, P's disability policy and the insurer's denial letter in which she averred she was unable to work and various correspondence. P submitted in response his affidavit. Supreme Court granted motion and Court denied the motion. It noted that the coverage denial letter from P's insurer did not constitute documentary evidence within the intendment of CPLR 3211(a)(1) and in any event, the coverage denial letter and P's insurance policy did not utterly refute or conclusively establish a defense to P's claims.

D. CPLR 3211(a)(4)

Alvarez & Marsal Valuation Services v. Solar Eclipse Invest.

216 AD3d 447 (1st Dept. 2023)

Supreme Court providently dismissed the action against the dismissed Ds on the ground that there is a pending action in California. It noted CPLR 3211(a)(4) vests a court with "broad discretion" in determining whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action. Here, the California action involves a broader set of parties and issues than the instant action, which was commenced before the NY action, discovery is already underway in the California action, and the indemnification cross-claims filed by P in the California action were compulsory. If this action were permitted to proceed, identical parties would be litigating identical claims based on identical provisions in the engagement letters, in two different states, presenting a risk of inconsistent judgments.

E. Intervene

U.S. Bank v. 21647 LLC

217 AD3d 429 (1st Dept. 2023)

Court in denying motion to intervene held a motion seeking leave to intervene, whether made pursuant to CPLR 1012 or 1013, must include the proposed intervenor's proposed pleading. Here, the movant intervenor did not submit a proposed pleading with her motion for leave to intervene, nor did she submit an affidavit which in some cases may excuse the failure to attach a proposed pleading.

F. Successive Motions

Newlands Asset Holding Trust v. Vasquez

218 AD3d 786 (2d Dept. 2023)

In this mortgage foreclosure action, Court rejected P's contention that Supreme Court erred in concluding that the "single motion rule" applied to bar consideration of that branch of D's second motion to dismiss which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him on the ground that he was not properly served with the S&C. The "single motion rule," which is contained in CPLR 3211(e), provides that "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted." Thus, by the plain language of CPLR 3211(e), the "single motion rule" applies to pre-answer motions to dismiss. Here, D allegedly was personally served with the S&C in August 2008. Therefore, the first motion to dismiss and the second motion to dismiss, which were made in 2017 and 2018, respectively, did not constitute motions to dismiss before service of a responsive pleading is required under CPLR 3211(e). Thus, the "single motion rule" does not apply to bar consideration of that branch of the second motion to dismiss which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against D. In any event, the second motion to dismiss did not violate the "single motion rule" since the first motion to dismiss was not decided on the merits.

V. RENEWAL

Wilmington Trust v. Fife

212 AD3d 550 (1st Dept. 2023)

Supreme Court granted P's motion to renew D's S/J motion and upon renewal denied the motion; and Court reversed, dismissing the complaint. Court noted a motion for leave to renew based upon an alleged change in the law must be made prior to the entry of a final judgment, or before the time to appeal has fully expired. P's renewal motion was made after its time to appeal from the January 29, 2020 order granting D S/J dismissing the complaint had lapsed. P had filed a NOA from that order on February 27, 2020, and, although it had six months from that date, or until August 27, 2020, to perfect the appeal, its' time to perfect was extended by this Court's March 17, 2020 order, issued in response to the COVID-19 pandemic, which temporarily suspended the perfection deadlines until May 8, 2020, when the March 17, 2020 order was rescinded. Thus, P's time to perfect the appeal expired, at the latest, in November 2020, and its renewal motion, filed April 30, 2021 was untimely.

Tollinchi v. Jamaica Hosp. Med. Ctr.

216 AD3d 842 (2d Dept. 2023)

In this medical malpractice action, Supreme Court granted the motion of non-party Pozo for leave to renew his prior motion, in effect, to be substituted as P in the action and thereupon, to restore the action to active status and his opposition to that branch of the prior cross-motion of Ds which was pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against them for failure to seek a timely substitution for the deceased P, which had been granted. Court denied motion. It held, *inter alia*, that renewal was not warranted by the affirmation of Tumelty. P's explanation for not submitting an affirmation from Tumelty in support of his prior motion or in opposition to the prior cross-motion demonstrated that Pozo merely failed to lay bare his proof on the underlying motion and cross-motion, and that Pozo was using his motion, *inter alia*, for leave to renew as a second chance to make his evidentiary presentation.

Carlucci v. Dowd

216 AD3d 1286 (3d Dept. 2023)

Supreme Court granted D's motion for leave to renew their prior motion for S/J pursuant to CPLR 2221(e) but upon renewal adhered to prior decision. Court affirmed. It noted a motion for leave to renew based upon new factual information, the proponent must not only set forth new facts not offered on the prior motion but also a reasonable justification for the failure to previously present such facts. Here, the limited facts proffered by Ds on renewal concern only the alleged agency relationship between them and the Dowds and the Dowds' alleged knowledge of the dog's vicious propensities. Their justification for not previously offering those facts was, expectedly, Ps' belated addition of agency allegations to their complaint. There was, however, no effort by Ds to justify revisiting the theories of recovery that were unaffected by Ps' amendment. Although courts did, at one time, ignore this requirement and, in the exercise of discretion, grant motions to renew in the interest of justice, reasonable justification is now required by statute. In the absence of any attempt to articulate why the substance of the prior motion should be revisited, we agree with Ps that it was an abuse of discretion to grant Ds leave to renew, and there is therefore no basis to disturb Supreme Court's adherence to the prior denial of Ds' motion for S/J dismissing Ps' original complaint. Ds' challenge to Ps' second cause of action, seeking damages for P's emotional injuries, was a legal one, and thus what they essentially sought in this respect was not renewal but reargument and no appeal lies from the denial of reargument. **COMMENT:** For a thoughtful decision on the implications of the decision, see Lerner, "Civil Law Update," Bar News (Alb. Co. Bar. Assoc.) May 2023, pp. 14-15.

Deutsche Bank v. Quinn

217 AD3d 1157 (3d Dept. 2023)

P moved to renew dismissal of its complaint as time-barred, based upon a change of law. Court affirmed denial of motion. It noted that here, the initial order dismissing the complaint was a final order and that P was served in June 2020. Thus, the time to appeal from that order had long expired when P moved for leave to renew in July 2021. Consequently, Supreme Court properly denied P's motion for leave to renew, premised on a change in the law, as untimely.

VI. CPLR 3216 AND CPLR 3404

Morales v. Valeo

218 AD3d 676 (2d Dept. 2023)

Court affirmed Supreme Court's denial of D's motion pursuant to CPLR 3216 to dismiss the complaint. It noted that a precondition for relief is that where, as here, a written demand to resume prosecution of the action within 90 days of receipt of such demand is made by the court, "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." (CPLR 3216[b][3]). Here, the certification order dated October 8, 2019, did not constitute a valid 90-day demand pursuant to CPLR 3216 because it failed to set forth any specific conduct constituting neglect by Ps.

Designer Limousine v. Authority Trans.

218 AD3d 540 (2d Dept. 2023)

P moved to vacate an order directing dismissal of complaint *sua sponte* pursuant to CPLR 3216. Court granted motion. It noted the procedural device of dismissing a complaint for failure to prosecute is a legislative creation, not a part of a court's inherent power, and, therefore, a court may not dismiss a complaint based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met. Here, Supreme Court failed to give the parties notice and an opportunity to be heard prior to considering whether to dismiss the complaint pursuant to CPLR 3216. Even assuming that the order dated July 17, 2019, or the order dated August 15, 2019, could be deemed to satisfy the notice requirement of CPLR 3216(a), if the orders had been served, Ps denied having received them prior to the dismissal, and there is no proof in the record that either of those orders was served upon Ps. Since at least one of the statutory preconditions to dismissal was not met, Supreme Court erred in directing dismissal of the complaint pursuant to CPLR 3216.

Turner v. Fuchs Cooperstein & Greengold

216 AD3d 1037 (2d Dept. 2023)

Court affirmed grating of D's motion to dismiss pursuant to 3216. It noted where, as here, P has been served with a 90-day demand by D pursuant to CPLR 3216(b)(3), P must comply with the demand by filing a NOI or by moving, before the default date, either to vacate the demand or to extend the 90-day demand period. P here did neither. Moreover, in opposition to D's motion to dismiss the complaint, P was required to demonstrate a justifiable excuse for the failure to timely abide by the 90-day demand, as well as the existence of a potentially meritorious cause of action. Here, P failed to assert any excuse or attempt to demonstrate the existence of a potentially meritorious cause of action in opposition to D's motion.

Rosario v. Cummins

__ AD3d __ (2d Dept. 2023)

In this breach of contract action, pursuant to a so-ordered stipulation dated January 5, 2020, P was required to file a NOI on or before March 6, 2020. P did not file a NOI by that date, and in February 2021, P moved, among other things, to restore the action to the active calendar and to extend the time to file a NOI. Court granted the motion. It noted that when a P has failed to file a NOI by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27. In the absence of those two circumstances, the court need not consider whether P had a reasonable excuse for failing to timely file a NOI. Here, the so-ordered stipulation did not suffice as a predicate notice for dismissal pursuant to CPLR 3216. The restoration of the action to the active calendar should have been automatic.

Part Nine
DISCOVERY

I. DISCOVERABLE MATTER

A. Generally

Joseph v. Edun

212 AD3d 507 (1st Dept 2023)

Court held Supreme Court improvidently exercised its discretion when it denied D's motion seeking authorizations for P's college records and past medical records, including records from Jacobi Hospital related to a 2014 assault, P's records for treatment at Jamaica Hospital in 2015, and records from Lenox Hill Radiology for a 2015 X-ray. P 's supplemental bill of particulars included claims for post-traumatic stress disorder, anxiety, depression, irritability, difficulty sleeping, and substantial impairment to his ability to engage in normal daily activities. The bill of particulars also asserted that the accident exacerbated pre-existing asymptomatic conditions. However, records from Brunswick Hospital, where P was treated after the accident, revealed notes from a social worker who interviewed P's mother and father around one year after the accident underlying this complaint; both of them stated that P's behavior changed while he was away at college because of a trauma he suffered there. Thus, D is entitled to P's academic and medical records to determine to what extent the injuries complained of are attributable, if at all, to the trauma P suffered in college.

Badia v. City of New York

214 AD3d 551 (1st Dept. 2023)

Court held Supreme Court should not have imposed a limitation precluding P from seeking records directly from Ds instead of under FOIL. It stated: “When a public agency is one of the litigants, . . . it has the distinct disadvantage of having to offer its adversary two routes into its records”, and the availability of FOIL does not replace the concomitant right to disclosure under the CPLR.

Lane v. City of New York

__ AD3d __ (1st Dept. 2023)

Court held Supreme Court should have granted P's request that Ds provide the date of birth of the nonparty witness. The identity of an active participant in an incident is discoverable because the witness was so closely related to the incident that his testimony became essential in establishing its happening. Here, P sought disclosure of the date of birth and social security number of the nonparty witness, who was also P's assailant in the incident underlying the litigation. Ds have already disclosed that P's assailant, who was a remarkably common name, was homeless. Accordingly, the ordinary disclosure of names and addresses is unlikely to assist P in locating the witness. Ds are not required to provide the witness's social security number, however, as courts have recognized a heightened level of confidentiality with respect to an individual's social security number.

Pulgarin v. Richmond

219 AD3d 1356 (2d Dept. 2023)

In this MV accident case, Court held Ds' motion papers sufficiently demonstrated that the production of P's cell phone for the inspection and collection of geographical data recorded on the device on the date of the accident may result in the disclosure of relevant evidence and was reasonably calculated to lead to the discovery of information bearing on P's claim. The affidavit of Ds' forensic expert demonstrated, among other things, that P's cell phone would have recorded data regarding P's speed and location before and at the time of the accident, which, under the particular circumstances presented, was relevant to P's contention that D driver was negligent in the operation of his vehicle. However, Ds' inspection and collection of geographical data from P's cell phone were limited to such data recorded between 1:00 p.m. and 4:00 p.m. on the date of the accident.

Smartmatic USA Corp. v. Fox Corp.

2023 NY Slip Op. 30886(U) (Sup. Ct. NY Co.) (Cohen, J.)

P moved to modify a JHO report requiring disclosure of its litigation funding agreement (LFA). P argued LFAs are not discoverable under NY law. D argued that because it interposed an anti-SLAPP counterclaim, the existence of an LFA is relevant to determine the nonparty's identify for potential suit and to obtain evidence related to Ps' motivation to sue Ds for defamation. Court

agreed, find the source, amount and terms of any LFA may be material and necessary to Ds' counterclaim and thus discoverable.

Harms v. TLC Health Network

215 AD3d 1295 (4th Dept. 2023)

In this medical malpractice and wrongful death action, P sought to strike Ds' answer based on its failure to produce audit trails relating to Ds' care and treatment of P's decedent. The trial court denied the motion and Court affirmed. Court stated that the record contained no showing, beyond mere conjecture, that there is relevant information to be gleaned from audit trails which cannot be obtained from other sources of information that were already previously supplied to P by D. D had produced decedent's electronic medical records, which already displayed much of the information sought from the audit trails, *i.e.*, alterations made to the electronic medical records, and Ds otherwise provided reasonable explanations for why some of the requested information was no longer available. With respect to the remedy, Court reiterated the well-known standard that the striking of a pleading is appropriate only upon a clear showing that failure to comply with discovery demands is willful, contumacious, or in bad faith. P failed to meet that burden.

B. Social Media

Sereda v. A. J. Richard & Sons

219 AD3d 1458 (2d Dept. 2023)

In this Labor Law §240(1) action, Court held Supreme Court providently exercised its discretion in denying those branches of Ds' motion which sought authorizations to obtain records from the P's Facebook and other social media accounts beginning two years before the date of the accident, authorizations to obtain records from the E-Z Pass account of P's wife from the date of the accident, a copy of P's passport, and copies of all photographs taken by P with his cell phone since the date of the accident. Under the circumstances of this case, Ds failed to demonstrate that the discovery sought was reasonably likely to yield relevant evidence regarding the severity of the alleged injuries suffered by P.

C. Surveillance Tapes

Pizzo v. Lustig

216 AD3d 38 (2d Dept. 2023)

In this action for personal injuries D obtained multiple sets of video surveillance footage of P after completion of Ps deposition. Court in a thoughtful opinion by Justice Dillon held Supreme Court providently exercised its discretion in denying P's application to preclude the videos under CPLR 3126 (2). CPLR 3101 (i) requires the “full disclosure” of any “video tapes” and it contains no language prohibiting the acquisition of surveillance video of a party after that party has testified at a deposition, and provides no fixed deadline for the disclosure of post-deposition surveillance video footage. Court further noted that trial courts regulate issues of timing through their preliminary and compliance conference orders, subject to their authority and discretion to manage their calendars and determine whether to preclude evidence under CPLR 3126 (2). Here, D disclosed all successful and unsuccessful surveillance videos, as well as related surveillance reports, in a manner that fully satisfied the substantive disclosure requirements of CPLR 3101 (i). The surveillance disclosure was not significantly delayed from the last of the various secret activities which concluded the overall surveillance performed for D's insurance carrier. D's disclosure of the surveillance materials occurred prior to the filing of any NOI and certificate of readiness, at a time when the discovery phase of the litigation had not yet concluded notwithstanding P's filing of a motion for S/J on the issue of threshold injury. Finally,

P failed to establish prejudice from the timing of D's disclosure, as discovery in the action under a standard discovery track had not yet closed.

D. CPLR 3101(f) and CPLR 3122-b

By L. 2021, Ch. 832, effective December 31, 2021, subsequently amended by "Chapter Amendment" in L. 2022, Ch. 136, effective on February 24, 2022, CPLR 3101(f) was substantially revised, and a new section 3122-b was enacted, to compel, via the creation of an affirmative statutory upon insurers and defense alike, the certified disclosure of primary, excess, and umbrella coverage related to a claim of lawsuit, including not only the existence and amounts of such insurance coverage, but also complete copies of the actual policies (or Declarations Sheets under certain circumstances), and other information pertaining to the appropriate coverage.

E. Attorney-Client Privilege

People v. National Rifle Assoc.

__ AD3d __ (1st Dept. 2023)

In this action wherein Supreme Court granted P's motion to dismiss certain counterclaims, P sought disclosure of the "Frenkel Report," an internal investigation report prepared by NRA's outside counsel setting forth certain findings. Court held the attorney-client privilege was waived by disclosure of NRA's outside auditor. While the auditor may have been an agent of the NRA, giving rise to a reasonable expectation of confidentiality, its presence was not necessary to enable the attorney-client communication; indeed, the Frenkel Report was shared with the auditor after the fact to enable its own separate audit.

Dworkin Constr. v. Kelly's Sheet Metal

2022 NY Slip Op. 34406(U) (Sup. Ct. NY Co.) (Bluth, J.)

P's attorney sent an email to D's attorney and "blind copied" his client. Thereafter, P's president sent an email concerning the status of the litigation and a related proceeding to his attorney by hitting "reply all" to his attorney's email. As a result, a copy of P's president's email inadvertently was sent to D's attorney. Within 15 minutes, P's attorney called D's attorney asking him to delete it. D's attorney refused and stated that he was free to use it for any purpose, including the right to seek all other communications between P and its attorney. P then moved to claw back the inadvertently disclosed privileged material. In granting P's claw-back motion, Court criticized D's attorney's attempt to capitalize on such an obvious and innocuous mistake and ordered an in-person hearing to determine whether sanctions should be imposed against D's attorney.

F. Materials Prepared in Anticipation of Litigation

People v. National Rifle Assoc.

__ AD3d __ (1st Dept. 2023)

NRA raised trial preparation privilege (CPLR 3102[d][2]) in response to P's motion to compel the Frenkel Report and the certain documents from Aronson, its accounting firm. Court held the Aronson documents were not protected by either the work product or trial preparation privileges because they were not prepared in anticipation of litigation. The work product privilege did not apply to the Frenkel Report because it was not prepared in anticipation of litigation.

II. NON-PARTY

HAI-2, LLC V. Blackrock Fin. Mgt. Inc.
213 AD3d 527 (1st Dept. 2023)

In this commercial litigation, Supreme Court providently exercised its discretion to quash P's subpoena directed to nonparty served on the last day of discovery. P knew of existence of witness and relevance of witness's records and testimony for four years.

III. DISCOVERY PRACTICE

A. Good Faith Affirmation

Muchnik v. Mendez Trucking
212 AD3d 640 (2d Dept. 2023)

Court held the affirmation of good faith submitted by Ps' counsel in support of their motion to compel disclosure and for other related relief failed to provide any detail of their efforts to resolve the issues. Therefore, Ps' motion should have been denied.

Anuchina v. Marine Transp. Logistics, Inc.
216 AD3d 1126 (2d Dept. 2023)

P moved to compel Ds to produce certain documents, including emails. Supreme Court issued an order directing Ds to either produce all emails or to provide an affidavit attesting to their search effort. Ds produced an affidavit, but P objected to the affidavit as insufficient. Following a series of emails between the parties' attorneys, Ds' attorney agreed to his adversary's requests and indicated that Ds would search for additional emails. Ds' attorney subsequently asked P's attorney for an extension of approximately one month on the deadline. P's attorney rejected this request and moved for preclusion based on D's noncompliance with the court's prior order. The trial court denied the motion due to P's failure to comply with the good faith requirements of 22 NYCRR 202.7. It noted good faith requires diligent efforts and proof of the time, place and

nature of the consultations and the issues discussed and any resolution, or shall indicate good cause as to why conferral with counsel for opposing parties was not held.

Behar v. Wiblishauser
219 AD3d 793 (2d Dept. 2023)

Ps in this action in connection with the renewed branch of their motion which was to compel Ds to provide certain discovery, the only information Ps provided as to their efforts at resolving the alleged discovery issues was a series of dates (month and date only) on which their attorney claims to have made, or attempted to make, contact with Ds' attorney regarding discovery. Ps did not specify the manner in which the communications were made, by whom or to whom they were made, any details regarding the content of the communications, or even the year in which the communications were made. Under the circumstances, the renewed branch of Ps' motion which was to compel discovery was properly denied for failure to substantively comply with the requirements of 22 NYCRR 202.7.

B. Objections

August 2, 2023 AO

AO amended Rule 29 of §202.70(g) requiring counsel for all parties to make good faith effort prior to trial to resolve objections to the use of any video recording of deposition testimony.

IV. MEDICAL RECORDS

A. Physician-Patient Privilege and Waiver

Joseph v. Edun

212 AD3d 507 (1st Dept 2023)

Court held P voluntarily placed his physical and psychological condition in issue by alleging in the bill of particulars that the accident aggravated or exacerbated underlying conditions that were asymptomatic before the accident. Ds are therefore entitled to determine the extent, if any, that P's claimed injuries are attributable to accidents other than the one underlying this action.

Gooden v. New York City Health & Hosps. Corp.

216 AD3d 1143 (2d Dept. 2023)

P was assaulted by a patient while working (through a nonparty staffing agency) as a certified nursing assistant at a hospital operated by D hospital. D moved to compel P to provide certain discovery and P cross-moved for an *in camera* review of hospital records including the medical records of her assailant (who was a named D). In ordering an *in camera* review of the assailant's records, Court noted that while records related to the assailant's medical diagnosis and treatment are privileged and would not be discoverable, records concerning his prior aggressive or violent acts were not privileged and would be subject to discovery.

B. Brito

Hogdahl v. LCOR 55 Bank St.

219 AD3d 1317 (2d Dept. 2023)

In this construction accident action, Ds moved to compel P to complete answering questions that were posed to him during his deposition relating to his drug and alcohol use. Court held that a P asserted, *inter alia*, damages claims for future economic loss, including loss of future wages, pension, annuity, and health insurance coverage, based upon certain work-life and life

expectancy ages, these claims affirmatively placed at issue P's health and ability to work, and P's work-life expectancy. In making life expectancy determinations in the course of awarding damages for future lost earnings, juries are permitted to make life expectancy determinations based upon statistical life expectancy tables, together with their own experience and the evidence they have heard in determining what P's life and/or work-life expectancy is, based upon P's health, life habits, employment, and activities. Court thus upheld order to compel.

C. Authorizations

Winslow v. New York Presbyterian/Weill-Cornell Med. Ctr.

203 AD3d 533 (1st Dept. 2022)

Court holds Ds were entitled to authorizations from P to obtain medical records in anticipation of a collateral source hearing. Court rejected P's argument that a discovery demand for medical record authorizations is not legally authorized.

D. *Arons* Authorization

Yan v. Kalikow

217 AD3d 47 2d Dept. 2023)

The issue in this appeal is whether, under *Arons v. Jutkowitz* (9 NY3d 393 2007]) Ds were entitled to an authorization to conduct an informal, *ex parte* interview of a physician assistant who treated P. As noted by Justice Maltese in his scholarly opinion for the Court his case presented a matter of first impression, as Ds seek to interview the physician assistant about a statement P made regarding the cause of her accident, rather than about the diagnosis or treatment of the injury that allegedly resulted from the accident. The Court: "We hold that the Supreme Court properly denied that branch of Ds' motion which was for an *Arons* authorization, because compelling P to provide such an authorization would constitute an unwarranted extension of the Court of Appeals' holding in *Arons*."

V. DEPOSITIONS

A. Entity Representative

Baird v. Borin

2023 NY Misc. LEXIS 3065 (Sup. Ct. NY Co.) (Kelley, J.)

In this medical malpractice and strict products liability, P was allegedly injured during a ureteral endoscopy performed by the NYU Langone Health Ds to remove a kidney stone, a piece of an endoscope manufactured by KSE broke off in his ureter, causing him to sustain injuries. For his NYU Langone Health witness, P designated the GM and a person who had previously submitted a report to the FDA regarding the endoscope used during P's procedure. The CEO of NYU Langone and the GM of KSE each submitted affidavits generally attesting to their lack of personal involvement in relevant facts. Relying on 22 NYCRR 202.20-d(d) and CPLR 3106(d), the Court denied P's motion to compel and granted D's motion for a protective order. A corporate D is not obligated in the first instance to produce a witness of the P's choosing for depositions and can designate which of its employees will represent it for purposes of a pretrial deposition. Upon completion of deposition, however, P has the right to obtain additional depositions of witnesses upon a showing that (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the person sought for depositions possess information which is material and necessary to the prosecution of the case.

Uniform Rule 202.20-d(b)

Rule sets forth rules governing deposition of entity representative pursuant to CPLR 3106(d). New York practice now is essentially consistent with FRCP provisions.

B. Errata Sheet

Pham v. Lee

219 AD3d 601 (2d Dept. 2023)

In this MV accident case, Court held P failed to raise a triable issue of fact in response to D's S/J motion. It declined to consider P's errata sheet which materially altered her deposition testimony to assert D's headlights were not illuminated at time of accident.

Galeano v. Giambrone

218 AD3d 745 (2d Dept. 2023)

In this personal injury action, P disputed her own deposition testimony which was read into evidence during cross-examination. Court approved questioning of P when she asserted a translation error occurred during the deposition about her failure to complete an errata sheet.

VI. DISCOVERY AND INSPECTION

Harper v. Al-Shaby

218 AD3d 1163 (4th Dept. 2023)

In this slip and fall action, Ps argued Supreme Court erred in denying their posttrial motion insofar as it sought a new trial based on the preclusion of the testimony of their expert. Court agreed. It noted that in preparation for trial, Ps hired an expert to evaluate the condition of the entryway where the accident occurred. Ds moved, *inter alia*, to preclude the testimony of that expert on the ground that he inspected the accident site without Ps having provided notice pursuant to CPLR 3120(1)(ii). In opposition to the motion, Ps asserted that the expert merely drove by the area where the steps were located after repairs had been made and that no inspection took place. Supreme Court granted those parts of Ds' motions seeking preclusion and sanctioned Ps by precluding all testimony from that expert. Court reversed. Assuming, arguendo, that a failure by a party seeking discovery to provide an opposing party with a CPLR 3120 (1) (ii) notice could serve as the basis for a sanction, It concluded that Ps were not required to give Ds notice because the steps were observable by the expert in a public space. Moreover,

the record reflects that the expert did not perform an inspection or engage in other activities within the scope of CPLR 3120 (1) (ii).

VII. EXPERT DISCLOSURE

Almonte v. Consolidated Ed.

217 AD3d 402 (1st Dept. 2023)

In this personal injury action involving an alleged TBI, D argued that the testing performed by or relied upon by Ps' experts was not appropriate for initial imaging evaluation of acute head trauma. D demanded that P produce authorizations directing her designated experts to produce records regarding controls, standards and calibrations of these tests, for purposes of a *Frye* challenge. Supreme Court granted the relief and Court reversed, holding (1) D did not seek this information by way of third-party disclosure; (2) it is improper to request the facts and opinions upon which another party's expert is expected to testify; and (3) expert discovery beyond that set forth in CPLR 3101(d) requires a showing of special circumstances, something not demonstrated by D.

Giovinazzo-Varela v. Varela

219 AD3d 926 (2d Dept. 2023)

In this action, P moved to preclude D from offering the expert testimony of its expert and his report. Court denied the motion. It noted D served his expert notice prior to a trial date being set, and thus it was not untimely. Further, the notice was not deficient as it identified the expert witness, indicated that he was a vocational expert, and included the expert's qualifications. Although the notice did not include the expert's opinion and grounds for that opinion, that information was in the draft report that was received by P prior to the trial date being set. D also complied with the requirements set forth in 22 NYCRR 202.16(g) by disclosing his expert witness shortly after the expert had been retained, and serving the expert report more than 60 days before trial.

Tardi v. Casler-Bladek

216 AD3d 1267 (3d Dept. 2023)

In this medical malpractice action, Court observed that although a court has discretion to preclude expert testimony for failure to comply with this statute, the remedy of preclusion is drastic and is therefore reserved for those instances where the offending party's lack of cooperation with disclosure was willful, deliberate and contumacious.

VIII. MEDICAL EXAMINATION – CPLR 3121(a)

Pettinato v. EQR-Rivertower

213 AD3d 46 (1st Dept 2023)

In this action alleging serious and permanent injuries to P's genital and pelvic areas, Court held upon a comprehensive opinion authored by Justic Renwick that Supreme Court erred in limiting the scope of Ds' IME by denying Ds' request for a pelvic examination. Justice Renwick reasoned that because a comprehensive gynecological examination including a pelvic examination is a necessary and material routine procedure that has no harmful effect, and the benefit of such examination to pretrial disclosure more than outweighed the discomfort to P. She noted a P who puts her physical condition at issue, as here, may be required to submit to an IME by a physician retained by D for that purpose. In determining what kind of IME to authorize, a court must balance the desire for P to be examined safely and free from pain against the need for D to determine facts in the interest of truth. A showing of the medical importance and safety of the particular procedure is required, as well as an explanation of the relevance and the need for the information that a procedure will yield. Here, an affidavit by Ds' medical expert showed that a comprehensive gynecological examination with a pelvic examination met that standard, and P's medical expert did not materially controvert that opinion or provide any support for P's conclusory claim that a pelvic examination would be harmful. The only potential harm or threat to P's health indicated by her treating physician was that the pelvic examination could potentially trigger post-traumatic stress disorder, but that assertion lacked any probative value as it was not accompanied by any supporting evidence from a treating psychiatrist or any other mental health professional. Moreover, it was undisputed that a pelvic examination is a safe procedure; nothing in the record indicated that there were less intrusive means available to Ds' doctor that would reach the same results as a pelvic examination; and a pelvic examination had a legitimate discovery basis—to establish the extent of P's injuries and whether her conditions were attributable to such injuries.

Nikel v. 5287 Transit Rd.

215 AD3d 1230 (4th Dept. 2023)

P was injured on construction project, requiring spinal surgery. D waived its right to conduct an IME. Thereafter, P underwent a second spinal surgery and D sought an IME. P moved for a protective order limiting scope of D's IME of P's lumbar spine to P's second spinal surgery and whether that surgery was caused by the accident. Court upheld trial court's grant of P's motion. Because D knew P might undergo another surgery, the second surgery did not constitute an unusual or unanticipated circumstance that would justify setting aside D's waiver of the IME.

IX. POST-NOTE OF ISSUE

Flowers v. Cora Realty

212 AD3d 408 (1st Dept. 2023)

Court held Supreme Court providently exercised its broad discretion with respect to the requested further discovery. It noted P failed to cite any specific misconduct by Ds' counsel at the deposition of the building superintendent and our review of the transcript does not support the claim of a persistent pattern of frivolous, repetitive, or meritless conduct by Ds' counsel sufficient to support sanctions. Although some objections were not well founded, the witness was generally permitted to answer the questions. Moreover, many of the questions to which there were objections were vague or improper in other respects. Additionally, the relevancy of the pictures and video in the record on appeal is unclear since no foundation was provided. The apparent conflict between the affidavit of Chestnut's CEO and the testimony of the building superintendent does not warrant re-opening discovery, since P filed a NOI and certificate of readiness certifying that discovery was complete. In any event, P had the opportunity to question the superintendent regarding the existence of records concerning mopping activities and complaints of a wet condition on the stairs. P also failed to demonstrate that Ds' failure to produce agreements between them violated outstanding court orders in that there is no indication in the record that the agreements were the subject of discovery requests that were not complied with by Ds.

Partow v. Van Owners Purchasing Bureau

213 AD3d 578 (1st Dept. 2023)

Supreme Court denied Ds' motion seeking post-NOI discovery and to compel P to appear for a further medical examination by Ds' expert and Court affirmed. It held Supreme Court concluded that Ds waived the additional medical examination of P due to their dilatory conduct. It noted a lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-NOI discovery and that Ds did not explain why they failed to notice the medical examination within 21 days of the court's September 27, 2019 order or why they failed to take any action in the months prior to the March 2020 pandemic closures. They also failed to explain why they did not act when P did not appear for the examination in January 2021 and instead waited until March 2022 to seek to compel her appearance. Although Ds contend that the attorney handling the case suffered a protracted illness and died in February 2022, after a more than three-year battle with cancer, P asserts that Ds' law firm had more than 65 attorneys, a fact not denied by Ds. Having failed to sustain their burden of demonstrating unusual or unanticipated circumstances, the court was not required to address the issue of substantial prejudice.

Peterson v. City of New York

__ AD3d __ (1st Dept. 2023)

Court denied D's motion to vacate NOI and compel P to appear for an IME. It noted D was on notice of P's claimed injury claimed injury to her right shoulder years before the filing of the NOI and failed to appear at her deposition to question her about any of her injuries. D also failed to schedule a physical examination and did not claim a need for one until the parties appeared for a settlement conference, approximately six months after the filing of the NOI. A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances. Furthermore, D's failure to timely avail itself of the many opportunities offered to conduct P's physical examination waived any right it had to additional discovery, since the certificate of readiness correctly represented that all discovery was complete.

Peterson v. City of New York

__ AD3d __ (1st Dept. 2023)

Court held Supreme Court improvidently exercised its discretion in granting D's motion to vacate the NOI made more than 20 days after the NOI was filed, since it failed to show good

cause for the delay, or that P's physical examination was required to prevent substantial prejudice to D because unusual or unanticipated circumstances had developed subsequent to the filing of the NOI and certificate of readiness, requiring vacatur. D was on notice of P's claimed injury to her right shoulder years before the filing of the NOI and failed to appear at her deposition to question her about any of her injuries. D also failed to schedule a physical examination and did not claim a need for one until the parties appeared for a settlement conference, approximately six months after the filing of the NOI. A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances. Furthermore, D's failure to timely avail itself of the many opportunities offered to conduct P's physical examination waived any right it had to additional discovery, since the certificate of readiness correctly represented that all discovery was complete.

X. NOTICE TO ADMIT

American Builders & Contractors v. Vinyl Is Final

__ AD3d __ (2d Dept. 2023)

In this breach of contract action, the Lindon Ds thereafter moved to deem admitted by the Jahrnes Ds the facts stated in the notice to admit, and the Jahrnes Ds cross-moved, in effect, pursuant to CPLR 3103(a) for a protective order striking the notice to admit. Court denied the motion and granted the cross-motion. Here, as the Jahrnes Ds correctly contend, the notice to admit at issue sought concessions that go to the essence of the controversy between them and the Lindon Ds, to wit, whether the goods sold by P were purchased by and delivered to either Vinyl or Home Improvement. Thus, the Lindon Ds could not have reasonably believed that the admissions they sought were not in substantial dispute, and the notice to admit was palpably improper.

XI. CPLR 3126 AND SPOLIATION

A. CPLR 3126

Barlow v. Skroupa

__ AD3d __ (1st Dept. 2023)

In this commercial litigation, Court held Supreme Court providently exercised its discretion in denying Ps' motion to strike Ds' answer and to enter judgment against them. Although Ds were slow in producing documents, they have not engaged in the type of "extreme conduct" warranting the imposition of the "ultimate penalty" of striking their answer or rendering judgment against them. However, in addition to the measures that the court imposed, precluding Ds from presenting documents that they failed to timely produce during discovery and precluding them from offering evidence pertaining to interrogatories that they failed to answer. Ps are also entitled to an adverse inference charge, to be formulated by the trial judge. **COMMENT:** For a further discussion of the decision, *see* Flumenbaum and Iacono, "First Department Upholds Adverse Inference," NYLJ, 8/10/23, p. 3, col. 3.

DeJesus v. Lilly Trans. Corp.

212 AD3d 774 (2d Dept. 2023)

In this action, after Ds failed to appear for depositions on numerous occasions, P moved pursuant to CPLR 3126 to strike the answer, arguing that she was prejudiced by the delays in holding depositions. Supreme Court, *inter alia*, conditionally granted P's motion pursuant unless Ds appeared for depositions within 30 days. Court affirmed. It noted the striking of a pleading is an extreme sanction but may be warranted when there is a clear showing that the failure to comply with discovery demands or court-ordered discovery was the result of willful and contumacious conduct. The willful and 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 and the fact that a D has disappeared or made himself or herself unavailable is not a basis for denying a motion to strike his or her answer for failure to appear at a deposition. Here, Supreme Court providently exercised its discretion in conditionally granting P's motion pursuant to strike Ds' answer unless Ds appeared for depositions within 30 days.

Jurlina v. Town of Brookhaven

215 AD3d 936 (2d Sept. 2023)

Court held the record showed that P violated the so-ordered stipulation directing him to appear for the IME on May 29, 2019, and that he failed to appear for two prior scheduled IMEs. However, under the circumstances, Court held that the dismissal of the complaint was too drastic a remedy. Accordingly, D's motion should have been granted only to the extent of directing P to appear for the IME and directing P's counsel to personally pay the sum of $2,500 as a sanction to D.

Morales v. Valeo

218 AD3d 676 (2d Dept. 2023)

Court held Supreme Court improvidently exercised its discretion in denying that branch of Ds' unopposed motion to dismiss the complaint insofar as asserted against them by Morales. Court noted that pursuant to CPLR 3226, a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. Morales's willful and contumacious conduct can be inferred from her repeated failures over an extended period of time to comply with court-ordered discovery and the parties' discovery stipulation and to respond to Ds' demands for a verified bill of particulars and discovery without an adequate excuse. **COMMENT**: Court rejected Ds' argument to dismiss for failure to prosecute.

M.F. v. Albany Medical Center

217 AD3d 103 (3d Dept. 2023)

In this medical malpractice action, Supreme Court granted Ds' motion to preclude expert testimony pursuant to CPLE 3126 and then granted S/J dismissing the complaint. Court, in a thorough opinion authored by Justice Clark, reversed in a 4-1 decision. Supreme Court found that P's trial counsel engaged in willful and contumacious conduct which delayed resolution of this case, and the record supports such a finding; and Court agreed with Supreme Court that the conduct exhibited by P's trial counsel was willful and contumacious and that, upon such finding, the drastic sanction of preclusion was available. However, in its discretion, giving weight to the merits of P's action and the nature of the infant's injuries, Court vacated the order precluding expert testimony in its entirety. However, "the willful and contumacious misconduct by P's trial

counsel cannot be condoned, as disregard of court orders hinders the efficient resolution of cases. To dissuade this conduct from repeating, we impose a monetary sanction on P's trial counsel in the amount of $5,000**. DISCLAIMER**: I was appellate counsel for P on the appeal.

Harms v. TLC Health

215 AD3d 1295 (4th Dept. 2023)

In this medical malpractice action, Ps moved, *inter alia*, to strike the answer due to Ds' failure to produce electronic medical records audit trails relating to care and treatment of decedent. Court affirmed denial of motion. It noted record contains no showing, "beyond mere conjecture, that there is relevant information to be gleaned from . . . audit trails which cannot be obtained from other sources" of information that were already supplied by Ds. We further conclude that the court did not abuse its discretion in dismissing the motion on the ground that Ds substantially complied with the notice to produce insofar as it sought audit trail data; Ds disclosed decedent's electronic medical records, which already displayed much of the information sought from the audit trails—*i.e.*, alterations made to the electronic medical records—and Ds otherwise provided reasonable explanations for why some of the requested information was no longer available,"

B. Spoliation

Pegasus Aviation v. Varig Logistica

26 N.Y.3d 543 (2015)

Court held: "A party that seeks sanctions for spoliation of [electronic] 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." And "Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents 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 documents were relevant to the party's claim or defense. Majority held spoliation occurred as a result of negligence but Judge Stein in dissent concluded it was the result of gross negligence. Court then remitted for a determination as to the relevance issue. **COMMENT:** Court adopted

rule from pre-December 2015 Second Circuit precedent, including *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 [SD N.Y. 2003]), which had been rejected by amendments to FRCP, effective December 1, 2015.

Fadeau v. Corona Industries

217 AD3d 1 (2nd Dept. 2023)

In an opinion authored by Presiding Justice LaSalle, Court "joined the First Department in holding that a P's action in undergoing surgery without giving the Ds an opportunity to conduct a presurgical medical examination of P's body cannot be the basis of sanctions for spoliation of evidence.

Harry Winston, Inc. v. Eclipse Jewelry

215 AD3d 421 (1st Dept. 2023)

Court stated the spoliation rule as follows: "Supreme Court has broad discretion to determine a sanction for the spoliation of evidence. In order to obtain sanctions for spoliation, a party must establish that the nonmoving party had an obligation to preserve the item in question, that the item was destroyed with a "culpable state of mind," and that the destroyed item was relevant to the party's claim or defense. "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence". Even when a party is entitled to sanctions for spoliation, striking a pleading is a drastic sanction in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court should consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness. Where the moving party has not been deprived of the ability to establish its case or defense, a less severe sanction is appropriate."

Harry Winston, Inc. v. Eclipse Jewelry

215 AD3d 421 (1st Dept. 2023)

On the spoliation motion, Court ruled as follows: "Preliminarily, Supreme Court should not have stricken the answer based on D's failure to produce nonparties Keren Aghjayan and Derek Ruiz for depositions, since by the date set forth on the deposition notice and subpoena compelling their depositions, D was no longer in control of either witness. However, spoliation sanctions were warranted for evidence that was lost or destroyed. D should have reasonably anticipated litigation by June 23, 2017, at the latest. Therefore, when evidence was discarded or destroyed at the end of 2017 or the beginning of 2018, D already had an obligation to preserve it. Still, D failed to institute any litigation hold and failed to ensure that records on the cell phone belonging to Aghjayan, D's principal and a key player in the events underlying the litigation, were preserved. Nevertheless, the drastic remedy of striking the entire answer and all the counterclaims was not warranted. Here, P failed to establish that the unavailability of the lost and destroyed evidence prejudiced it and left it unable to prosecute its action. Indeed, P argued only that its ability to defend the counterclaims was compromised. Therefore, the appropriate sanction under the circumstances should have been directed solely to the counterclaims. P established that D's spoliation compromised its ability to defend portions of two counterclaims, and they therefore are stricken. For the third counterclaim (breach of contract), P is prejudiced by the missing records regarding the jewelry allegedly in the process of being completed when D received P's termination notice on May 19, 2017, as the absence of those records will render P unable to definitely disprove any evidence of D's actual costs in performing the work. For the eighth counterclaim (unjust enrichment), the items for which D seeks to recover damages are missing and have purportedly been discarded or destroyed, and as a result, P's expert can no longer give a proper estimate of their worth. Finally, because Aghjayan's selective preservation and concealment of a text from his old phone "evinces a higher degree of culpability than mere negligence." D is precluded from introducing the text in evidence.

Franco v. Half Moon River Club

214 AD3d 956 (2d Dept. 2023)

In this slip and fall action which arose when P was injured when she slipped and fell on liquid – a spilled drink – on the floor of the D's premises while dancing at a wedding reception. Supreme Court granted an adverse inference to be given at trial based upon the unavailability of surveillance footage. Court affirmed. It noted P demonstrated that Ds had an obligation to preserve video surveillance footage of the P's accident at the time of its destruction, but negligently failed to do so. Considering the nature of the P's injuries, the immediate

documentation and investigation into the cause of the accident by Ds' employees, as well as the P's request within a couple of days of the accident for Ds' insurance information, Ds were clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation.

XII. CONDITIONAL ORDERS

Kwiatkowski v. My Jamie Joseph Only, Inc.

216 AD3d 628 (2d Dept. 2023)

In this breach of contract action, Ds were precluded from presenting a case by a preclusion order pursuant to CPLR 3126. Court held Ds failed to demonstrate that Supreme Court improvidently exercised its discretion in issuing the conditional order and then prohibiting Ds from offering evidence at trial upon their failure to comply with the order. The willful and contumacious character of Ds' conduct can be inferred from their repeated failure to comply with court-ordered discovery, for which they did not offer adequate explanation. Moreover, the conditional order became absolute when Ds failed to comply with its terms, and Ds failed to demonstrate a reasonable excuse for their failure to comply with the order and a potential meritorious defense.

Part Ten
CHOICE OF LAW

I. CHOICE OF LAW CLAUSE

Matter of New York City Asbestos Litig.

217 AD3d 557 (1st Dept. 2023)

At issue was whether D conclusively refuted all potential bases for successor liability on its motion to dismiss pursuant to CLR 3211(a)(1). As the underlying corporate agreement contained a choice of law clause designating PA law, Court looked to PA law to determine if it could be liable as a successor corporation. Court held questions of fact existed.

American Food & Vending Corp. v. Amazon.com, Inc.

214 AD3d 1153 (3d Dept. 2023)

In this breach of contract action against D who assumed the rights and obligations under the agreement of a party to the agreement through its purchase of the initial party, the agreement contained a choice of law provision, PA substantive law governs. The Court held that despite the clause, NY procedural rules governed, including NY rules governing burdens on S/J motions.

Bankers Healthcare Group v. Pasumbal

210 AD3d 1385 (4th Dept. 2022)

P commenced this breach of contract action after Ds defaulted on a "financing agreement." Insofar as relevant to this appeal, the note provided that "[t]he terms of the [note] and all loan documents executed herewith shall be governed by and construed in accordance with the substantive and procedur[al] laws of the State of Florida, exclusive of the principals [sic] of conflict of laws." P then moved for S/J on the complaint. Supreme Court denied the motion. It stated in its decision that, "having elected to have the 'procedur[al] laws of the State of Florida' apply exclusively in this action, the [p]laintiff could not rely on any of the provisions of New York's Civil Practice Law and Rules in prosecuting this action." The court relied on CPLR 101, which the court quoted in its decision as providing, in pertinent part, that " '[t]he civil practice

law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute' " (emphasis added by the court). The court thus concluded that, due to the perceived conflict between the contractual choice-of-law provisions and CPLR 101, it could not grant the second motion. Court reversed. It held: "Contractual '[c]hoice of law provisions typically apply to only substantive issues' , although parties can agree otherwise. Here, the note provides that "[t]he terms" of the documents are to be governed by the substantive and procedural rules of Florida, but that does not establish that the rules of Florida were intended to govern the procedures of the New York State court system, which would effectively preclude any action on the note in NY. Indeed, the note itself provides that venue for any action related to the note may be in either "Onondaga County, New York or Broward County, Florida." Thus, the parties anticipated that New York courts could and would be able to handle a judicial action related to the note."

II. CONTRACTS

MLRN LLC v. US Bank, NA

217 AD3d 576 (1st Dept. 2023)

In this commercial litigation, Court held P has not established, as a matter of law, standing to pursue claims on all 122 certificates at issue. Although we have stated that matters of procedure are governed by the law of the forum state and that standing is a procedural matter, that rule is not applicable here as the relevant issue is not procedural. Rather, the substantive issue here is which law applies to P's ownership of the certificates and associated claims. This issue may not be properly resolved by applying the forum law. Instead, the issue is properly resolved by applying NY's choice-of-law rules, which for contractual choice-of-law disputes applies a "center of gravity" or "grouping of contacts" approach that determines the state with the most significant relationship to the relevant contract. Court rejected D's argument that the record demonstrates that the relevant contracts were made in Texas and under Texas contract law. The record evidence is not conclusive as to the place of contracting and center of gravity with respect to the 122 certificates. Thus, it is premature to rule on S/J with respect to P's ownership of the claims and the related standing to assert them.

Samson Lending LLC v. Greenfield

80 Misc3d 1023 (Sup. Ct. Ontario Co. 2023) (Doyle, J.)

In this breach of loan agreement action, Court held the application of VA usury law to allow a NY business to charge interest would be usurious under NY law would be offensive to fundamental public policy. Accordingly, VA choice-of-law provision and the agreement itself were declared void, resulting in dismissal of the complaint. Court noted under NY law, the defense of usury is available to corporations in civil actions if the interest rate charged for the loan exceeds the criminal usury rate of 25% and the loan amount is less than $2.5 million. The application of VA law, which would allow a 34% interest rate, would be so violative of NY's deep-rooted public policy against usury that the parties' choice-of-law provision was invalid. As the agreement was for a loan less than $2.5 million and had a stated interest rate significantly higher than the maximum interest rate allowable in NY, the agreement was usurious on its face and therefore void under NY law. **COMMENT:** Judge Doyle's decision contains a thoughtful discussion of NY's "public policy" rule as it pertains to conflict of laws issues.

III. TORTIOUS CONDUCT

Eccles v. Shamrock Capital

209 AD3d 486 (1st Dept. 2022), *lv. granted*, 39 NY3d 916 (2023)

Court held breach of fiduciary duty cause of action against directors and officers of a Scottish company, incorporated in Scotland, was governed by Scots law, and under the internal affairs doctrine, relationships between a company and its directors and shareholders are governed by the substantive law of the jurisdiction of Scotland. NY law did not apply despite the numerous connections with NY concerning the underlying agreement.

Republic of Kazakhstan v. Chapman

217 AD3d 515 (1st Dept. 2023)

P alleged a claim under English law for unlawful means conspiracy. Court noted the claim conflicts with NY law, in that it allows for a conspiracy claim without the commission of an underlying tort. Court noted that as the conflict pertains to a conduct-regulating rule, the law of the place where the tort occurs will generally apply because that jurisdiction will almost always have the greatest interests in regulating conduct within its borders. Here, the vast conspiracy alleged did not occur in England. Thus, NY law applied.

Salinas v. World Houseware

217 AD3d 518 (1st Dept. 2023)

In this products liability action seeking damages for personal injuries when a potholder P was using caught fire, Court held the substantive issues involved were governed by Texas law as P is a Texas resident, injured in Texas by a product purchased in Texas, and the only connection to NY is D's place of business.

Part Eleven

JUDGMENTS

I. DEFAULT JUDGMENT

A. Application

CPLR 3215 (j)

Subdivision (j) was added by L. 2021, ch. 593, §11, eff, May 22, 2022. It provides: (j) Affidavit**.** A request for a default judgment entered by the clerk, must be accompanied by an affidavit by P or P's attorney stating that after reasonable inquiry, he or she has reason to believe that the SOL has not expired. The chief administrative judge shall issue form affidavits to satisfy the requirements of this subdivision for consumer credit transactions.

Citibank, NA v. Kerszko

203 AD3d 42 (2d Dept. 2023)

In this action to foreclose on a mortgage, P lenders presented to Supreme Court a proposed *ex parte* order of reference within one year of D's default but court rejected it as defective. At issue was whether the presentment established P's intent to proceed toward the entry of judgment and qualified as a taking of proceedings pursuant to CPLR 3215 (c) which prevented dismissal of the action. In a thoughtful opinion authored by Justice Dillon, Court held the presentment qualified as the "taking of a proceeding" to avoid dismissal. Court noted "take proceedings" is a broader and more encompassing concept than a more tightly defined "filing" or "service" of a motion for leave to enter a default judgment or other type of motion. A P has taken proceedings if, within one year after D's default, P has manifested an intent not to abandon the case, but to take steps to seek a judgment. It is not necessary for a P to actually obtain a judgment so long as proceedings were undertaken to do so during the initial year after D's default. The relevant inquiry is not the form that an application takes when presented to the court or its result, but the intent that can be inferred from an application presented to the court seeking to have the action "proceed," inconsistent with that of an abandonment. Here, because P presented a proposed *ex parte* order of reference within the one-year statutory period, Supreme Court should not have

sua sponte directed dismissal of the complaint pursuant to CPLR 3215(c) since that statute did not apply under the facts and circumstances of the case.

Badesch v. Fort 710 Associates

78 Misc.3d 1143 (Sup. Ct. NY County 2023) (Schumacher, J.)

Court held D's CPLR 3211 motion to dismiss, followed up with a CPLR 2221 motion to renew and reargue, constituted a responsive pleading, such that D waived its right to move for dismissal of P's complaint as abandoned under CPLR 3215 (c) for P's failure to seek entry of judgment within one year after D's default. A D may waive the right to seek dismissal pursuant to CPLR 3215 (c) by serving an answer or taking any other steps that may be viewed as a formal or informal appearance. While a D does not waive its CPLR 3215 (c) argument by simply filing a notice of appearance without more, such as a responsive pleading, a motion to dismiss is a responsive pleading.

FRIENDLY REMINDER

HSBC Bank v. Ranasinghe

199 AD3d 993 (2d Dept. 2021)

Court held D waived the right to seek dismissal pursuant to CPLR 3215(c) by cross-moving for a declaration that she was not in default and for leave to file a late answer, without seeing to dismiss the complaint pursuant to CPLR 3215(c) as abandoned at that time.

JP Morgan Bank v. Almazon

215 AD3d 933 (2d Dept. 2023)

Court affirmed denial of vacatur on the ground that the application was beyond the one-year deadline of CPLR 5015(a)(1). Court also noted, alternatively, that D had failed to establish a meritorious defense to the action.

Federal National Mortgage Assoc. v. Marty

219 AD3d 581 (2d Dept. 2023)

In this mortgage foreclosure action, Supreme Court granted P's motion for judgment of foreclosure. Court denied motion and granted D's cross-motion to dismiss the complaint. It noted D defaulted by failing to answer the complaint within the requisite time after service was complete, which would have been in December 2013, and the matter was released from the mandatory settlement conference part in April 2015. P offered no explanation for the delay in moving for leave to enter a default judgment against D until September 2017 other than stating that P was "dealing" with the borrower's answer. Court concluded P failed to demonstrate a reasonable excuse for its failure to timely seek a default judgment against D. Since P failed to set forth a reasonable excuse, it was not necessary to consider whether it demonstrated a potentially meritorious cause of action.

American Express National Bank v. Skyline Luxury Inc.

79 Misc3d 1203(A) (Sup. Ct. NY Co. 2023) (Lebautz, J.)

Court holds a D's excuse for failure to timely take proceedings within one year of D's default that D was engaged in settlement talks is insufficient.

B. Vacatur

Esgro Capital Mgt. v. Banks

__ AD3d __ (1st Dept. 2023)

Court reversed denial of D's motion to vacate a default judgment pursuant to CPLR 5015(a)(4) and remanded matter for further proceedings. It noted the proper approach for determining whether D has waived the CPLR 5015(a)(4) P/J defense involves the consideration of whether D's particular actions amount to "an intentional relinquishment of a known right," and results from the taking of some affirmative action evincing the intent to accept a judgment's validity, such as the making of voluntary payments to satisfy a default judgment prior to moving to vacate. The mere fact that D, like D here, was subject to payments pursuant to a wage garnishment order for more than one year without taking some action is not, without more, a proper basis for finding waiver of the ability to seek relief under CPLR 5015(a)(4).

Wilmington Savings Fund Soc. v. Zabrowsky

212 AD3d 866 (2d Dept. 2023)

P moved, *inter alia*, for an order of reference upon Ds' default and Ds opposed the motion and cross-moved, in effect, pursuant to CPLR 5015 (a) (4) to vacate their default in answering the complaint, and pursuant to CPLR 3012 (d) for leave to serve and file a late answer. Supreme Court granted motion. Addressing the procedural issue, Court noted that generally a D seeking to vacate a default in answering and to compel P to accept an untimely answer pursuant to CPLR 3012 (d) must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense. However, where, as here, a D seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to first resolve the jurisdictional question before considering whether it is appropriate to grant discretionary relief. Here, Supreme Court erred in denying Ds' cross motion, in effect, pursuant to CPLR 5015 (a) (4) to vacate their default in answering the complaint, and pursuant to CPLR 3012 (d) for leave to serve and file a late answer on the ground that Ds had not offered a reasonable excuse for their delay in moving to serve a late answer, without first resolving the jurisdictional issue that was raised.

II. FOREIGN JUDGMENTS

A. Other States

PAC International Logistics v. Haber International Import

213 AD3d 945 (2d Dept. 2023)

In 2009, P obtained a judgment in California against Ds upon their default in answering or appearing in a California action. Ds moved in the California action to vacate the default judgment and for leave to file an answer on the ground, among others, that they had not been properly served with the summons and complaint in that action, which motion was denied. In 2018, P obtained a renewal of the default judgment, which extended its enforceability for 10 years. In January 2020, P commenced this action to enforce the default judgment by motion for S/J in lieu of complaint and Ds opposed the motion, arguing that the default judgment should not be given full faith and credit because the California courts had not obtained P/J over them.

Supreme Court granted S/J and Court affirmed. It noted P established its *prima facie* entitlement to judgment as a matter of law by submitting the default judgment and the order denying Ds' motion, *inter alia*, to vacate the default judgment, which obligated Ds to pay P certain amounts, and evidence that Ds had not paid the amounts awarded therein. While Ds argue that the California courts had no P/J over them, Ds appeared in the California action and contested P/J. Since that jurisdictional issue was decided against them, the determination became res judicata and its re-litigation was foreclosed in the New York courts.

Obed v. Tirepool, LLC

215 AD3d 686 (2d Dept. 2023)

Ps contracted with D Tirepool, LLC for the purchase of a used car. The contract was negotiated by Ds Massicott and Wallace, the owners/managers of Tirepool. When Ds Ds breached the contract and retained Ps' down payment. Ps commenced an action against Ds in the Superior Court of New Jersey Ds failed to answer the complaint, and Ps obtained a default judgment against Ds in the principal sum of $26,548.32. Ps subsequently commenced this action to enforce the default judgment entered in the New Jersey action by motion for S/J in lieu of complaint. Ps served the motion on Wallace, who failed to answer, but did not serve Massicott and Tirepool with the motion. Supreme Court denied the motion based on Ps' failure to serve all of Ds. Court reversed and granted motion insofar as asserted against Wallace. It noted CPLR 1501 provides: "Where less than all of the named Ds in an action based upon a joint obligation, contract or liability are served with the summons, P may proceed against Ds served, unless the court otherwise directs, and if the judgment is for P, it may be taken against all Ds." Here, Ds are jointly and severally liable for the judgment in the New Jersey action and, therefore, Ps are permitted to proceed against Wallace without effectuating service on the other Ds.

B. Foreign Countries

PJSC National Bank Trust v. Pirogova

216 AD3d 476 (1st Dept. 2023)

Supreme Court granted P's motion for S/J in lieu of complaint for recognition pursuant to CPLR article 53 of 3 Russian judgment s entered in a Russian bankruptcy proceeding. Court affirmed P established its *prima facie* entitlement to S/J by submitting affirmations establishing that the

copies of the Russian judgments submitted on the motion were authentic, and D failed to raise an issue of material fact sufficient to defeat S/J, as she offered only conclusory allegations that the Russian judgments were fabricated. Court further held Supreme Court did not err in considering the substantive issues raised on the motion without taking testimony from Russian law experts, as the record was adequate to allow for construction of the applicable Russian law without a testimonial hearing. The court also properly determined that P established its entitlement to recognition of the Russian judgments under CPLR article 53 by showing that they were final, conclusive, and enforceable when rendered. Ds' argument that the judgments are being administered within a Russian bankruptcy proceeding against D and are therefore not now directly enforceable against her in the USA is misplaced in the context of this article 53 proceeding, which is limited to the ministerial function of recognizing the foreign country money judgments and converting them into NY judgments

Kingdom of Sweden v. Pashkovski

80 Misc3d 905 (Sup. Ct. Kings Co. 2023) (Maslow, J.)

In this action to domesticate a Swedish default judgment against D pursuant to CPL article 53 for unpaid student loans on behalf of the Swedish Board of Student Finance, Court held the judgment would not be recognized. D had purportedly signed an admission of service of process of a Swiss court proceeding which led to the judgment. Court held it would not recognize the judgment. The basis for its holding was that P did not provide a properly attested translation of a purported notice of the Swedish proceedings that was signed by D or the purported judgment. CPLR 2102(b) provides that each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Absent a properly attested translation of the documents, the Swedish Court lacked P.J over D, D did not receive notice in sufficient time to enable her to defend, the judgment was repugnant to NY State policy, and the judgment did not comport with NY's notions of due process.

III. PRE-JUDGMENT INTEREST

Sabine v. State

214 AD3d 1414 (4th Dept. 2023), **lv granted** 217 AD3d 1451 (4th Dept. 2023)

In this MV accident case, Court of Claims granted claimant partial S/J on liability and then after a bench trial it determined, *inter alia*, that claimant had established that he sustained a serious injury and awarded him $550,000.00 in damages. Claimant appealed from that part of a judgment that calculated the award of prejudgment interest from "the date of [the] decision establishing serious injury and damages ... instead of the date that common-law liability attached by S/J in [c]laimant's favor. Court affirmed with all five Justices agreeing in result. Majority held, reaffirming its own precedent, that as D's obligation to pay damages to claimant was not established "until the issue of causation with respect to [claimant's] injuries was resolved ... and '[claimant] prove[d] at trial that [claimant] sustained a serious injury' , Supreme Court properly calculated the award of prejudgment interest from the date of the decision determining, *inter alia*, that claimant sustained a serious injury. Dissenters were of the view that the issue had not been preserved for review. **COMMENT:** The three other departments hold that pre-judgment interest in a MV accident case starts to run upon determination of liability even when serious injury has not been determined.

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