New York Civil Practice & Procedure Update

Bridging the Gap | August 2015

New York State Bar Association Continuing Legal Education

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New York City

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Where: The Graduate Center | CUNY Auditorium
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DAVID L. FERSTENDIG BIO

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

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NEW YORK CIVIL PRACTICE & PROCEDURE UPDATE

By: David L. Ferstendig

CPLR 202 – Borrowing Statute – Borrow All of Foreign Statute, Including Tolls and Discovery Provisions

Grynberg v. Giffen, 119 A.D.3d 526, 989 N.Y.S.2d 103 (2d Dep't 2014): "In this case, the alleged unlawful bribery scheme occurred in the 1990s. Even assuming that the cause of action did not accrue until the plaintiffs 'knew or should have known about the violation' of their rights, as provided by article 180 (1) of the Civil Code of Kazakhstan, the defendants demonstrated that the plaintiffs knew or should have known of the alleged violation and harm in 2003, when the United States Government commenced a criminal action against the defendants based on their alleged involvement in the bribery scheme. Moreover, even if the indictment filed in the federal criminal proceeding was insufficient to put the plaintiffs on notice, the latest possible date that the plaintiffs were put on notice of the defendants' unlawful activities, based on the clear allegations advanced in the complaint, was July 31, 2007."

CPLR 203 – Three Prong Test Applied to "Parties United in Interest" Toll

Roseman v. Baranowski, 120 A.D.3d 482, 990 N.Y.S.2d 621 (2d Dep't 2014): "However, we disagree with the Supreme Court's conclusion that the plaintiff failed to satisfy the third prong of the test, which focuses, inter alia, on 'whether the defendant 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' (citation omitted). The decedent's medical records include several notes signed by Persky, and clearly reference him as the physician who discharged the decedent from the hospital on March 15, 2008. Given such facts, it was not reasonable for Persky to conclude that the plaintiff intended to proceed only against the defendants named in the original summons and complaint, especially since the decedent died soon after she was discharged from the hospital, and the complaint asserted specific allegations of negligence relating to the decedent's premature hospital discharge (citation omitted). In addition, contrary to the conclusion of the Supreme Court, the plaintiff demonstrated that the failure to originally name Persky as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable (citation omitted)."

CPLR 205(a) – Termination of Action and Six Month Toll – Out of State Action is Not "Prior Action"

Midwest Goldbuyers, Inc. v. Brink's Global Servs. USA, Inc., 120 A.D.3d 1150, 992 N.Y.S.2d 883 (1st Dep't 2014): "Plaintiff's claims arising from transactions that occurred more than one year before the filing of the instant suit in New York are time-barred under the one-year contractual limitations period. The IAS court correctly held that plaintiff's prior action in Illinois was not a 'prior action' for purposes of the six-month toll in CPLR 205(a) (citation omitted)."

Application of CPLR 205(a) (Digest – July 2015)

Application of CPLR 205(a)

When Does a Prior Action Dismissed for Failure to Perfect Appeal Terminate?

CPLR 205(a) permits a plaintiff to bring a second action within six months after the termination of a prior action even if the statute of limitations has run in the interim. In order to take advantage of CPLR 205(a), several requirements must be met. For example, the second action must be based on the "same transaction or occurrence or series of transactions or occurrences" as the prior action. Moreover, the first action cannot have been terminated in certain ways, including a voluntary discontinuance, failure to obtain personal jurisdiction, a dismissal for neglect to prosecute or a final judgment on the merits. And, the second action must be commenced and service effected within six months after *termination* of the prior action. One issue is determining when the first action terminates when an earlier dismissal order is appealed. In *Lehman Bros. v. Hughes Hubbard & Reed*, 92 N.Y.2d 1014, 1016–17 (1998), the N.Y. Court of Appeals held that the prior action terminates when an appeal taken as of right is exhausted. Thus, a second action brought within six months of the exhaustion of a discretionary appeal would be untimely. *Lehman Bros.* did not address, however, what would happen if a party pursues, but does not properly perfect, an appeal as of right, resulting in the appeal being dismissed.

In *Malay v. City of Syracuse*, 2015 N.Y. Slip Op. 04164 (May 14, 2015), the plaintiff's initial federal court action was terminated after her federal claims were dismissed and the court refused to exercise jurisdiction over her state law claims. After taking an appeal as of right to the Second Circuit, the plaintiff decided "strategically" not to pursue the appeal and commenced a state court action before her appeal was dismissed. The N.Y. Court of Appeals held that the prior federal action terminated, under CPLR 205(a), when the intermediate appellate court dismissed the appeal, not when the underlying order was entered. The Court reasoned that its decision comported "with the statute's remedial purpose of allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits." *Id.* at 4. The Court rejected the defendants' argument that the Court's interpretation would encourage plaintiffs to take frivolous appeals they do not intend to perfect. In fact, a plaintiff whose appeal was dismissed because of a failure to perfect would lose the right to appeal those same issues. The Court also rejected defendants' argument that the plaintiff could have protected herself by bringing another state court action within six months of the appeal of the underlying order while also pursuing the appeal. The Court noted that the second action would have been wasteful and subject to dismissal under CPLR 3211(a)(4) (prior action pending).

Interestingly, because not preserved for review, the Court did not address whether the dismissal of the appeal for failure to perfect would be a "voluntary discontinuance" or "neglect to prosecute," which would exclude the case from CPLR 205(a) treatment.

CPLR 208 – Definition of Insanity

Lynch v. Carlozzi, 2015 NY Slip Op 04893 (3d Dep't 2015): "[T]he toll for 'insanity' provided by CPLR 208 is narrowly interpreted, the concept of insanity is 'equated with unsoundness of mind' (citation omitted) and encompasses 'only those individuals who are unable to protect their legal rights because of an over-all inability to function in society' (citation omitted). The mental incapacity must exist at or be caused by the accident and continue during the relevant time (citations omitted)."

CPLR 213 – Accrual of Contract Statute of Limitations – for Breach of Representations and Warranties (Digest – August 2015)

ACE Sec. Corp. v DB Structured Prods., Inc., 2015 NY Slip Op 04873 (June 11, 2015): Cause of action for failure to repurchase loans that did not conform to representations and warranties accrued on execution of contract, and not each time defendant failed to timely cure or repurchase loan.

CPLR 213(8) – Forged Deed (Digest – July 2015)

No Bad Deed Goes Unpunished

Majority of Court Finds Claim Based on Forged Deed Not Subject to Statute of Limitations Defense

In *Faison v. Lewis*, 25 N.Y.3d 220, 10 N.Y.S.3d 185, 32 N.E.3d 400 (2015), the plaintiff was seeking to set aside and cancel the defendant bank's mortgage interest in real property conveyed by an allegedly forged deed. A majority of the Court noted that a forged deed is void at its inception. *See Marden v. Dorthy*, 160 N.Y. 39, 47 (1899). As such, it is "a legal nullity at its creation . . . never entitled to legal effect." The Court distinguished a situation where the signature and authority for conveyance of a deed are acquired by fraudulent means, which merely renders the deed voidable. In the former instance, a forged deed is void initially and cannot convey good title. In the latter, the deed containing the title holder's actual signature is voidable and "has the effect of transferring the title to the fraudulent grantee" until set aside. Thus, the forged deed was never valid, and "a statute of limitations does not make an agreement that was void at its inception valid by the mere passage of time" (citing *Riverside Syndicate, Inc. v. Munroe*, 10 N.Y.3d 18, 24 (2008)).

The majority rejected the defendant's and dissent's argument that forgery is a category of fraud, subject to CPLR 213(8)'s limitation period. Moreover, it dismissed the dissent's concerns that, absent a statute of limitations, the mere passage of time will make it difficult to defend claims, noting that CPLR 213(8) contains a discovery provision which can result in the litigation of claims long after the relevant events. In addition, stale claims cut both ways, making them difficult to prove. Finally, the majority questioned why the desire for repose outweighed the "need to ferret out forged deeds and purge them from our real property system." *Faison*, 25 N.Y.3d at 230.

Attorneys who previously advised clients that their claims on a forged deed were untimely under CPLR 213(8) should contact those clients to review their rights with them.

CPLR 213-a (Digest – June 2015)

CPLR 213-a: Residential Rent Overcharge Action, When Is Too Late, Too Late?

What Four-Year Period Does CPLR 213-a Cover?

CPLR 213-a governs the statute of limitations for actions seeking recovery for a residential rent overcharge. On its face, the statute appears to be quite straightforward. It provides that

> [a]n action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

This appears to say that an action must be brought within four years of the first overcharge. Nevertheless, several Court of Appeals decisions have cast doubt on this

interpretation and most recently, a majority of the Court, over a rigorous dis-sent, appears to have rejected outright this reading.

In *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 6 N.Y.S.3d 206, 29 N.E.3d 215 (2015), the landlord argued that since the tenants' first overcharge occurred more than four years before the claim was interposed, the claim was barred by the statute as untimely. In other words, the claim accrued when the tenants first paid an allegedly unlawful rent. The tenants countered that CPLR 213-a did not bar their claim, but merely limited their recovery to rent overcharges occurring within four years of interposing the claim, even though the alleged (first) overcharge occurred before that period. The tenants maintained that the rent stabilization base rate date was inaccurate because it resulted from fraud.

The majority opinion, written by Judge Read, agreed with the tenants' position, finding that the Court's prior decisions in Thornton v. Baron, 5 N.Y.3d 175 (2005) and *Grimm v. State of N.Y. Div. of Hous. & Cmty. Renewal Off. of Rent Admin.*, 15 N.Y.3d 358 (2010) "dictate[d] the resolution" of the issue in *Conason*. In Thornton, the Court held that a lease provision which circumvented the rent stabilization laws was void as being in violation of New York public policy, and "because the rent it purported to establish was therefore illegal, the 1996 rent registration statement listing this illegal rent was also a nullity." Thornton, 5 N.Y.3d at 181. Significantly, the plaintiffs in Thornton did not sue the owner for more than seven years after having paid an allegedly unlawful rent. In *Grimm*, the Court of Appeals held that where there were sufficient allegations of fraud against the landlord, the Department of Housing and Community Renewal (DHCR) was obligated to determine whether the base date rent was lawful. The Court found that the DHCR should have examined the apartment's rental his-tory prior to the four-year period preceding the commencement of the action to ascertain whether the base date rent itself was an overcharge. Note that the action was brought well within the four-year limitation period. The Court concluded that the DHCR had acted arbitrarily and capriciously in disregarding the plaintiff's allegations and without ascertaining the legality of the base rent.

The majority in *Conason* concluded that the concerns expressed by the dissent were considered and rejected by the majority opinions in Thornton and *Grimm*. The dissent in *Conason*, written by Judge Pigott, asserted that neither the Thornton nor the *Grimm* decisions supported the majority's conclusions. Significantly, the dissent pointed out that neither case actually decided the statute of limitations issue. In fact, in *Grimm*, the plaintiff brought the action within four years of the overcharge. Moreover, in Thornton, the majority did not decide the statute of limitations issue, limiting itself to deciding how the legal regulated rent was to be established. The dissent argued that the majority in *Conason* rewrote CPLR 213-a, in essence deleting the first clause of the statute and removing the statute of limitations. In other words, the majority read CPLR 213-a as merely limiting a tenant to rent overcharges occurring during the four-year period prior to asserting the claim, regardless of when the first over-charge occurred. The dissent concluded that the majority decision would have serious and troublesome ramifications:

> Rent records will be subject to challenge indefinitely. Property owners and buyers will have no certainty as to the value of residential rental property. Landlords will have to keep evidence of rent charges indefinitely, in order to preserve their ability to defend against fraudulent rent overcharge claims. And endless litigation will ensue concerning whether ten-ants are making "a colorable claim of fraud within the meaning of *Grimm*," before any complaint challenging years-old rents can be dismissed.

Conason, 25 N.Y.3d at 21.

CPLR 214(6) Professional Malpractice – Continuous Representation Doctrine – Separate and Distinct Legal Proceeding?

Town of Amherst v. Weiss, 120 A.D.3d 1550, 993 N.Y.S.2d 396 (4th Dep't 2014): "Although defendants contended that their representation was not continuous, as evidenced by the fact that there were three separate and distinct actions by the Town to retain them and numerous gaps in their representation of the Town, we conclude that the Town nevertheless raised triable issues of fact concerning continuous representation. …Here, while there were three separate and distinct retainer agreements, we conclude that there are triable issues of fact whether defendants were retained for separate and distinct legal proceedings or, rather, 'ongoing and developing phases of the [same] litigation' (citation omitted). We cannot say as a matter of law that all of defendants' acts 'were not interrelated so that representation on [the second Section 75 hearing and the subsequent CPLR article 78 proceeding were] not part of a continuing, interconnected representation' to perform the specific task of terminating a Town employee (citation omitted). Inasmuch as '[a] question of fact exists on this issue, . . . summary judgment is inappropriate' (id.)."

CPLR 214(6) – Professional Malpractice – Continuous Representation Doctrine – Representation can be terminated prior to execution and filing of consent to change attorney.

Farage v. Ehrenberg, 124 A.D.3d 159, 996 N.Y.S.2d 646 (2d Dep't 2014): "Where a party discharges his or her counsel, the continuous representation toll can terminate prior to the execution and filing of a consent to change attorney. "This appeal presents the question of whether the attorney-client relationship, for purposes of measuring the continuing representation toll of the statute of limitations, should run to the filing of the Consent to Change Attorney form or from earlier factual events involving the attorney and the client. We hold that courts must examine the unique circumstances of each case and that where, as here, facts establish a client's discharge of counsel on a date preceding execution and filing of the Consent to Change Attorney form, the continuing representation toll of the statute of limitations for legal malpractice runs only to the date of the actual discharge and not to the date of the later Consent to Change Attorney."

CPLR 214(6) – Professional Malpractice – Three year limitation period

Farage v. Ehrenberg, 996 N.Y.S.2d 646 (2d Dep't 2014): "In addition, the complaint alleges causes of action sounding in deceit and collusion. While a recent case decided by the Court of Appeals holds that causes of action to recover damages for attorney deceit under common law or under Judiciary Law § 487 are governed by a six-year statute of limitations (see Melcher v Greenberg Traurig, LLP, 23 NY3d 10, 15), it does not affect the result here. The Melcher case involved an attorney plaintiff's claims of deceit and collusion under Judiciary Law § 487 against fellow attorneys of the same law firm, to which the Court of Appeals applied the six-year statute of limitations of CPLR 213(1). What distinguishes Melcher from the instant action is that Melcher did not involve any claim of legal malpractice. The Court of Appeals held in 1992 that in actions alleging professional malpractice (other than the medical, dental or podiatric varieties), where additional theories of recovery were asserted such as breach of contract, plaintiffs could prosecute cases governed by longer statutes of limitations based on the nature of the remedies sought (citations omitted). However, Santulli was abrogated by the legislature's 1996 amendment to CPLR 214(6) to provide, as it does today, that such professional malpractice actions are governed by a three-year statute of limitations 'regardless of whether the underlying theory is based in contract or tort' (citations omitted). It is for this reason that post-

1996 legal malpractice actions that also allege breach of contract, fraud, and other causes of action governed by lengthier statutes of limitations are dismissed as time-barred if not brought within three years of accrual, if the additional claims involve facts duplicating the legal malpractice claims and do not allege distinct damages (citations omitted). We see no reason not to apply those holdings to the plaintiff's remaining causes of action, including those sounding specifically in deceit. We do not construe Melcher as calling for any contrary result or interpreting CPLR 214(6) in any manner other than its plain language where a claim of legal malpractice has been asserted."

CPLR 214(6) – Professional Malpractice – Professional v. Nonprofessional Services

797 Broadway Group, LLC v. Stracher Roth Gilmore Architects, *1232 A.D.3d 12*50, 999 N.Y.S.2d 561 (3d Dep't 2014): "Moreover, a review of the scope of services in the parties' agreement indicates that plaintiff contracted with defendant solely for professional services relating to the design of the renovations to be performed on plaintiff's building. Indeed, plaintiff does not dispute that the duties set forth in the agreement were '[]consistent with an architect's ordinary professional obligations' (citation omitted), and the complaint characterizes the parties' agreement as one for 'professional services.' In contrast, the complaint describes plaintiff's separate agreement with BCI as one for nonprofessional construction administration and management services, including the provision of all labor, materials, equipment and services necessary to perform the redevelopment work. In light of the foregoing, we conclude that plaintiff's fourth and fifth causes of action -- alleging that defendant was negligent and breached the parties' contract by failing to use reasonable care in rendering its professional services -- essentially allege professional malpractice (citations omitted). Such claims '"come[] within the purview of CPLR 214 (6),'' which sets forth a three-year statute of limitations for nonmedical malpractice, ''regardless of whether the theory is based in tort or breach of contract"' (citations omitted)."

CPLR 214-a – Claim Against Lab for Services Performed at Doctor's Direction is One for Medical Malpractice

Annunziata v. Quest Diagnostics Inc., 127 A.D.3d 630, 8 N.Y.S.3d 168 (1st Dep't 2015): "The issue before us is whether any claim by plaintiffs against defendant Quest Diagnostics Incorporated is subject to the three-year limitations period governing ordinary negligence actions (CPLR 214) as opposed to the two and one-half year limitations period governing medical malpractice actions (CPLR 214-a). Plaintiffs' claims against Quest, a provider of clinical laboratory services, stem from its alleged misreading of a Pap smear tissue sample. The complaint alleges that Quest was negligent in misreading the tissue sample. It is settled that a negligent act or omission 'that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice' (citation omitted). Laboratory services, such as Quest's, performed at the direction of a physician are an integral part of the process of rendering medical treatment (citations omitted). Accordingly, a claim stemming from the rendition of such services is a medical malpractice claim (id.)."

CPLR 214-a – But Claim Arising Out of Chiropractic Services is Not

Andrews v. Renaissance Chiropractic, P.C., 128 A.D.3d 1517, 8 N.Y.S.3d 835 (4th Dep't 2015): "Contrary to defendants' contention, they are not entitled to invoke the benefit of the shortened limitations period applicable to medical, dental and podiatric malpractice, and they are subject to the three-year statute of limitations of CPLR 214 (6) (citations omitted). Here, plaintiff was not referred to Dr. Insinna by a licensed physician, and Dr. Insinna's chiropractic treatment was not an integral part of the process of rendering medical treatment to a patient or substantially

related to any medical treatment provided by a physician (citations omitted). We thus conclude that plaintiff's chiropractic malpractice action is governed by the three-year limitations period of CPLR 214 (6)."

CPLR 214-a – Continuous Treatment Doctrine in Medical Malpractice Actions – Gaps in Treatment

Devadas v. Niksarli, 120 A.D.3d 1000, 992 N.Y.S.2d 197 (1st Dep't 2014): "We must also address defendant's argument that because plaintiff pursued no treatment for over 30 months after May 2004, he is not entitled to a tolling based on his single visit in February 2007. This, again, ignores plaintiff's belief that he was under the active treatment of defendant at all times, so long as the Lasik surgery did not result in an appreciable improvement in his vision. In determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment (citation omitted). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (citation omitted). Plaintiff's testimony that he considered defendant to be his '[doctor] for life,' and that the efficacy of the Lasik was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed. … 'Assessed from plaintiff's point of view, the temporal gap between visits was not excessive. In her opposing affidavit, plaintiff averred that she continued to place her trust and confidence in [the defendant's] care, that she did not consult any other dentist, that her September 10, 1978 letter was not intended to terminate her relationship with [the defendant] and that she finally returned for treatment when the problem with my implant get [sic] progressively worse.' Given the history of dental treatment in this case, we find, at the very least, that a question of fact exists as to whether plaintiff's December 1980 return was timely' for purposes of establishing the required continuity' (citation omitted). Plaintiff's vision problems here are analogous to the plaintiff's 'denture problems' in *Edmonds*, and the jury did not act irrationally in finding that plaintiff continued to place trust and confidence in defendant's ability to correct his blurry vision. Further, even if we were to accept the proposition advanced by defendant, that the keratoconus was unrelated to the Lasik surgery, plaintiff had no reason to believe that to be the case when he returned to defendant in February 2007. Thus, in reasonably believing that his continued, and worsening, blurry vision was attributable to the Lasik surgery that defendant had guaranteed, plaintiff was genuinely 'confronted with the dilemma that led to the judicial adoption of the continuous treatment doctrine' (citation omitted)."

CPLR 214-a – Continuous Treatment Doctrine in Medical Malpractice Actions – Is it the same condition?

- Ceglio v. BAB Nuclear Radiology, P.C., 120 A.D.3d 1376, 992 N.Y.S.2d 580 (2d Dep't 2014) ("It is undisputed that the radiology defendants were monitoring the plaintiff Robert Ceglio (hereinafter Robert) for postsurgical changes after he had a pituitary tumor removed. The plaintiffs allege that Robert suffered injuries as a result of a colloid cyst, which the radiology defendants failed to notice on his MRI scans when they were monitoring him for postsurgical changes. However, the plaintiffs presented no evidence to suggest that the colloid cyst, which allegedly caused the injuries complained of, was in any way connected to the pituitary changes for which the radiology defendants were monitoring Robert. Consequently, the plaintiffs failed to raise a question of fact as to whether Robert received continuous treatment for the same condition underlying the claim of malpractice (citations omitted)").
- Devadas v. Niksarli, 120 A.D.3d 1000, 992 N.Y.S.2d 197 (1st Dep't 2014) ("Defendant

claims that the continuous treatment doctrine did not toll the statute of limitations because plaintiff's treatment with defendant concerning the Lasik surgery came to an end, at the latest, on May 19, 2004, and plaintiff's next visit, nearly three years later, was for an unrelated condition. Specifically, he argues that the reason for the surgery was garden-variety myopia, and the visits after the surgery, up to and including the May 2004 visit, were for routine follow-up exams that every Lasik patient has. Further, defendant asserts that the February 2007 visit arose not out of the myopia condition, but rather out of the keratoconus that plaintiff alleges was brought on by the surgery. Thus, he contends that the conditions were not the 'same' for purposes of CPLR 214-a. Defendant further notes that, after the May 2004 visit, plaintiff never scheduled another follow-up appointment and never even communicated with defendant, until he reappeared in 2007. Thus, he concludes, the original treatment had come to an end. Plaintiff, on the other hand, asserts that the 2007 visit satisfied CPLR 214-a, because it was for the 'same' condition as the 2004 visits, which was blurry vision in his left eye. He further argues that whether he and defendant agreed that he would seek further treatment after the May 2004 visit is irrelevant, because defendant 'guaranteed' that the Lasik procedure would correct the blurry condition, and stated that he was plaintiff's 'doctor for life' for that purpose. Although the CPLR defines 'continuous' treatment as treatment 'for the same illness, injury or condition' out of which the malpractice arose (CPLR 214-a [emphasis added]), the controlling case law holds only that the subsequent medical visits must 'relate' to the original condition (citations omitted). Here, plaintiff initially engaged defendant to correct his blurry vision, and the 2007 visit was motivated by continued blurriness in plaintiff's eye, thus making the two visits 'related' (id.)").

CPLR 214-a – Foreign Object Rule Applies to Catheter Intentionally Left in Body for Monitoring Purposes for a Few Days (Digest – August 2015)

Walton v. Strong Mem. Hosp., 2015 NY Slip Op 04786 (June 10, 2015): "We are 'present[ed with] yet another variation among a myriad of medical protocols, devices and procedures' (LaBarbera v New York Eye & Ear Infirmary, 91 NY2d 207, 212, 691 N.E.2d 617, 668 N.Y.S.2d 546 [1998]), and asked whether a fragment from a catheter that was placed in plaintiff Adam Walton's heart during surgery in 1986 is a foreign object for purposes of the discovery rule of CPLR 214-a. Considering the specific facts and circumstances alleged in this case in light of our precedents, we conclude that the fragment qualifies as a foreign object."

CPLR 214-c – Three Year Statute of Limitation Generally in Toxic Tort Actions-Discovery Statute

Suffolk County Water Auth. v. Dow Chem. Co., 121 A.D.3d 50, 991 N.Y.S.2d 613 (2d Dep't 2014): "In the instant case, the SCWA alleged damages of the same nature in wells where contamination was previously discovered, prior to July 12, 2007. The movants established, prima facie, that the damages sustained were an outgrowth, maturation, or complication of the original contamination, not a separate and distinct injury (citation omitted). Therefore, in the absence of any evidence raising an issue of fact was to whether the damages sustained during the period of limitations were separate and distinct, and 'qualitatively different from that sustained earlier' (citations omitted), the two-injury rule was not applicable. The Supreme Court considered not only whether there was an issue of fact as to multiple injuries, but also whether there was an issue of fact as to multiple distinct acts of tortious conduct (citation omitted). While the two-injury rule is based upon allegations of a second injury resulting from 'the continuing effects of earlier unlawful conduct' (citation omitted), additional wrongful conduct could give rise to

additional wrongful releases of contamination, resulting in new wrongs and the accrual of new causes of action (citation omitted). However, it was incumbent upon the SCWA to come forward with evidence in admissible form that there was new wrongful conduct, giving rise to new causes of action not barred by CPLR 214-c (citation omitted). The SCWA did not offer any evidence of any specific release of PCE by a dry cleaner. Further, its expert did not render an opinion with respect to whether the levels of contamination in those specific wells in fact fluctuated or whether such fluctuations were attributed to multiple releases of contaminants. Accordingly, the SWCA failed to raise a triable issue of fact on this issue."

CPLR 217 – Four Month Statute of Limitation – Notice

Matter of Benjamin v. New York City Dept. of Educ., 119 A.D.3d 440, 988 N.Y.S.2d 492 (1st Dep't 2014): "Supreme Court properly found that the proceeding is time-barred, since it was commenced more than four months after petitioner received notice of the DOE's determination (citations omitted). Petitioner is deemed to be on notice of the DOE Chancellor regulation regarding automatic ineligibility for reemployment upon termination (citation omitted), and therefore she was 'aggrieved' for the purposes of the running of the statute of limitations upon notice of her termination in April 2011 (citations omitted). Accordingly, her commencement of this CPLR article 78 proceeding on or about October 23, 2012 was untimely."

CPLR 217-a Uniform Notice of Claim Act (Digest – May 2015)

Beware of Conditions Precedent

But General Municipal Law § 50-e Notice of Claim

Requirements Do Not Apply to Human Rights Law Cause of Action

Practitioners engaged in tort practice or in actions against municipalities are well aware of notices of claim, a pre-action condition precedent. The classic notice of claim statute is General Municipal Law § 50-e, which deals with tort actions against a public corporation. With the enactment of the Uniform Notice of Claim Act and CPLR 217-a (eff. June 15, 2013), the GML § 50-e requirements for filing notices of claim prior to commencing an action against a municipality, public authority, or public benefit corporation, became the standard. For example, in a personal injury action, a notice of claim must be served within 90 days of the incident causing the injury and an action must be commenced within one year and 90 days of the incident. Moreover, as a condition precedent, compliance with the requirements of GML § 50-e must be pled and proven by the plaintiff. *See* GML § 50-i.

In *Margerum v. City of Buffalo*, 24 N.Y.3d 721 (2015), the N.Y. Court of Appeals was asked whether GML § 50-e applied to a Human Rights Law cause of action. The issue there was alleged discrimination as to civil service lists for Buffalo firefighters. The Court agreed with the Appellate Division Departments that have addressed the issue, holding that GML § 50-e did not apply. Thus, there is no requirement that plaintiff serve a notice of claim prior to commencement of such an action. The Court pointed out that claims under the Human Rights Law are not akin to tort actions or personal injury, wrongful death or property damage claims. A concurring opinion by Judge Read noted an apparent inconsistency with the Court's earlier decision in *Mills v. Cnty. of Monroe*, 59 N.Y.2d 307, 309 (1988), holding that a Human Rights Law employment discrimination claim against a county is subject to the notice of claim requirements of County Law § 52(1). Noting that the County Law provision was similar, but not identical, to GML § 50-i, Judge Read questioned whether the Legislature intended such a distinction and invited the Legislature to address the inconsistency:

> There are certainly reasons why the legislature might nonetheless choose to treat civil rights actions differently, as this opinion suggests; however, it is hard to believe that the

Legislature ever intended to create a situation where an action brought against the County of Erie alleging violations of the Human Rights Law would require a notice of claim as a condition precedent to suit, while the same type of action brought against the City of Buffalo would not.

CPLR 301 – Subject Matter Jurisdiction (Digest – May 2015)

BY THE WAY

Subject Matter Jurisdiction: Not Just for Federal Courts

Since our law school days, where that first-year course in Civ Pro frightened so many of us, we associated subject matter jurisdiction issues primarily with federal court. We knew that to get into federal court you needed to have a federal question or diversity of citizenship and a minimum amount in controversy. We also learned, however, that, at the end of the day, we could always turn to state court. In fact, when we expressed confusion by the title of our trial courts, the Supreme Court of the State of New York, we were told that it signified that the court was the supreme court of original, unlimited jurisdiction over all cases that could be brought in any New York state court.

Sure, suits against the State of New York had to be brought in the Court of Claims. Additionally, an administrative agency can have exclusive original jurisdiction; however, we could still resort to state court in a subsequent Article 78 proceeding, where review of the underlying determination was limited. But it is important to recognize that there are subject matter jurisdiction impediments to state court practice, in which any resort to state court is prohibited. One such bar is contained in a not-so-well-known provision, Business Corporation Law § 1314(b).

Briefly, BCL § 1314(b) limits the subject matter jurisdiction of New York state courts to hear actions between foreign corporations or by a nonresident against a foreign corporation. It provides certain exceptions, including, among others, establishing that defendant is "doing business" in the state (an iffy proposition after *Daimler A.G. v. Bauman*, 134 S. Ct. 746 (2014)), is authorized to do business in New York, or that there is long-arm jurisdiction under CPLR 302. Generally, BCL § 1314(b) will not present an obstacle where defendant is subject to personal jurisdiction in New York.

What happens, however, when the jurisdictional predicate is weak and the parties are relying only on a New York forum selection clause? It is fundamental that parties cannot confer subject matter jurisdiction on a court by agreement. Thus, a typical New York forum selection clause will generally not save the subject matter jurisdiction infirmity (unless the contract containing the clause satisfies General Obligations Law § 5-1402, that is, that it also has a New York choice of law provision and involves a transaction of not less than $1 million). *See Techno-TM, LLC v. Fireaway*, 123 A.D.3d 610 (1st Dep't 2014). *See also Calzaturificio Giuseppe Garbuio S. A. S. v. Dartmouth Outdoor Sports, Inc.*, 435 F. Supp. 1209 (S.D.N.Y. 1977) (providing that a contract, which was in fact made out of state, containing provision that it "shall be deemed to have been made in" New York does not satisfy the exception that the contract was made or was to be performed in New York. "Were we to give effect to the deemed made in New York provision, we would allow the parties by agreement to bring within the statute, and hence within our jurisdiction, a contract claim which would not otherwise be cognizable in this court.").

Back to law school: a subject matter jurisdiction objection cannot be waived. And a judgment obtained in an action lacking subject matter jurisdiction is void. So, do not be lulled

into a false sense of security if you have a New York forum selection clause. It may not be all it is cracked up to be.

CPLR 301 – Subject Matter Jurisdiction – Does Not Include Failure with Respect to Element of Cause of Action

Maspeth Fed. Sav. & Loan Assn. v. Sloup, 123 A.D.3d 672, 998 N.Y.S.2d 409 (2d Dep't 2014): "She claimed that that judgment should be vacated pursuant to CPLR 5015(a)(4), for lack of subject matter jurisdiction on the ground that the plaintiff failed to file a valid notice of pendency with respect to one of the lots at least 20 days before the judgment of foreclosure and sale was rendered (see RPAPL 1331). However, the notice of pendency requirement pursuant RPAPL 1331 was an 'element' of the plaintiff's cause of action, not a jurisdictional defect (citations omitted)." See also Lacks v. Lacks, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976) (requirements of DRL § 230 go to substance of divorce cause of action, not to jurisdictional issues)

CPLR 301 – Daimler/"Doing Business"/ Other Types of General Jurisdiction - Tagging

The United States Supreme Court 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), significantly changed the standards under which general jurisdiction could be upheld. Note that the decision concerned the "doing business" concept as applied to corporations, and the majority opinion did not cite to *Burnham* or discuss "tagging" jurisdiction. However, the concurring opinion of J. Sotomayor opined that the Court's decision in *Burnham*, permitting jurisdiction by tagging an individual in "a one time visit" appeared to be incongruous with the majority's approach in *Daimler*. Thus, while *Daimler* did not limit *Burnham*, the Court appears to be trending towards limiting general jurisdiction bases in favor of specific jurisdiction.

CPLR 301 – Individual Doing Business – Conflict between Departments

Pichardo v. Zayas, 122 A.D.3d 699, 996 N.Y.S.2d 176 (2d Dep't 2014): "In contrast to the common-law approach to corporations, the common law, as developed through case law predating the enactment of CPLR 301, did not include any recognition of general jurisdiction over an individual based upon that individual's cumulative business activities within the State (citations omitted). Since the enactment of CPLR 301 did not expand the scope of the existing jurisdictional authority of the courts of the State of New York, that section does not permit the application of the 'doing business' test to individual defendants (citations omitted)." But see ABKCO Industries, Inc. v. Lennon, 52 A.D.2d 435, 440, 384 N.Y.S.2d 781, 784 (1st Dep't 1976). See also Twine v. Levy, 746 F. Supp. 1202 (E.D.N.Y. 1990) (noting conflict in law in New York).

CPLR 301 – Forum Selection Clause "Unreasonable"

U.S. Mdse., Inc. v. L&R Distribs., Inc., 122 A.D.3d 613, 996 N.Y.S.2d 83 (2d Dep't 2014): "Here, the plaintiff has made the requisite strong showing that the forum selection clause in the nondisclosure agreement was 'unreasonable.' Specifically, the plaintiff has contended, without contradiction, that neither the parties nor the agreement has any connection to the State of Delaware: none of the parties is located in Delaware, the nondisclosure agreement was not executed in Delaware, and performance of the agreement was not to take place in Delaware (citations omitted). Accordingly, the prima facie enforceability and validity of the forum selection clause has been rebutted and, therefore, that clause does not 'conclusively establish[ ] a defense to the asserted claims as a matter of law' (citations omitted). Thus, the Supreme Court should have denied that branch of the defendants' motion which was to dismiss the amended complaint pursuant to CPLR 3211(a)(1)."

CPLR 301 – Consent and Forum Selection Clause

Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC, 123 A.D.3d 1101 (2d Dep't 2014) (where someone assumes the obligations of a party to an agreement containing a New York forum selection clause, he or she also consents to New York jurisdiction.).

CPLR 301 – Doing Business – Consent

The United States Supreme Court 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) significantly changed the standards under which general jurisdiction could be upheld. In significantly limiting the instances where the doing business bases for jurisdiction applies, the Court identified a domestic corporation or one whose principal place of business is in the forum state as being "at home," for "doing business" purpose. Thus, a foreign corporation which registers to do business in New York would appear not to be "doing business" post *Daimler*. However, it also appears that consent jurisdiction based on the designation of the Secretary of State as agent for service of process required by such registration survives *Daimler*. See e.g., Bailen v. Air & Liquid Sys. Corp., 2014 N.Y. Misc. LEXIS 3554, 2014 NY Slip Op 32079(U) (Sup. Ct. N.Y. Co., J Heitler August 5, 2014) ("Although Daimler clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent"); Beach v. Citigroup Alternative Invs. LLC, 12-CV-7717 (PKC), 2014 US Dist. LEXIS 30032, at *17-18 (SDNY Mar. 7, 2014) ("A nondomiciliary corporate defendant will only be deemed to be 'doing business' in a forum when its 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.' Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011). The locations where a corporation is 'at home' are, absent exceptional circumstances, limited to its principal place of business and place of incorporation. Daimler AG v. Bauman, 134 S. Ct. 746, 761, 187 L. Ed. 2d 624 & n.19 (2014). The ultimate determination as to where a corporation is 'at home' 'calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide.' Id. at 762 n.20. Notwithstanding these limitations, a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent (citations omitted)."). Similarly, it has been held that nothing in the Daimler decision questions the continued validity of contractual forum selection provisions. See e.g., Putnam Leasing Co., Inc. v. Pappas, 46 Misc. 3d 195, 995 N.Y.S.2d 457 (Dist. Ct. Nassau Co., J Ciaffa September 25, 2014) ("[T]his court sees nothing in Daimler which questions the general validity of contractual forum selection provisions, such as the one involved in this case.").

Note also Bill # S7078 seeking to amend BCL §1301 "to reinforce the continuing viability of consent as a basis for general (all-purpose) personal jurisdiction over foreign corporations authorized to do business in New York." (Sponsor's memorandum)

CPLR 302(a)(1) – Websites - Passive Website Alone is Not Enough

Paterno v. Laser Spine Institute, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.3d 988 (2014): "Court finds website to be passive and defendants' other contacts did not constitute purposeful activity. "Plaintiff argues, however, that LSI did more than just post an online

advertisement. He alleges that over months, there were several telephone calls and e-mail communications between plaintiff and LSI representatives, that he sent MRIs and blood work to LSI, and that LSI sent prescriptions to his New York-based pharmacies. To the extent plaintiff argues that by sheer volume of contacts, defendants are subject to personal jurisdiction in New York, we disagree. As we have stated it is not the quantity but the quality of the contacts that matters under our long-arm jurisdiction analysis (citations omitted). …Turning to the content and 'quality' of defendants' contacts with plaintiff, it is apparent that they were responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over these out-of-state defendants. After plaintiff initially sought out LSI, LSI responded with information designed to assist plaintiff in deciding whether to arrange for LSI medical services in Florida. For example, after plaintiff sent his MRI for evaluation, LSI sent him a letter setting forth a preliminary evaluation and treatment recommendations."

CPLR 302(a)(1) – Transaction of Business and "Unrelated" Tort

Where the underlying cause of action arises out of an out of state tort claim, but the jurisdictional predicate is a transaction of business in the state, there may be a problem in establishing a sufficient relationship between the cause of action and the transaction of business. See Pichardo v. Zayas, 122 A.D.3d 699, 996 N.Y.S.2d 176 (2d Dep't 2014): "Here, the relationship between the causes of action asserted in the complaint and the Zayases' activities within New York were too insubstantial to warrant a New York court's exercise of personal jurisdiction over them pursuant to CPLR 302(a)(1). Although the plaintiff established that the agreement to perform the subject work on the Zayases' property was reached in New York, the causes of action do not pertain to a breach of that agreement (citation omitted). Rather, the plaintiff asserts tort claims grounded in the Zayases' duty to maintain their New Jersey property in a reasonably safe condition. This duty was allegedly breached by the Zayases' provision of a defective saw, which caused the plaintiff to cut himself while at their New Jersey premises. Accordingly, the alleged duty owed by the Zayases to the plaintiff, the alleged breach of that duty, and the plaintiff's injury all arose or occurred in New Jersey (citation omitted). Since the plaintiff failed to demonstrate a sufficient relationship between the Zayases' activities in New York and the causes of action asserted in the complaint, the Supreme Court was not authorized to exercise personal jurisdiction over the Zayases pursuant to CPLR 302(a)(1) (citations omitted)."

CPLR 304 – New Rule, 22 NYCRR 202.5(e), Filing and Omission of Confidential Personal Information

A 2014 amendment added subsection (e) to Uniform Rule 202.5, 22 NYCRR § 202.5, entitled "Omission or redaction of confidential personal information." It provides that regardless of whether a sealing order was sought, parties are required to omit or redact "confidential personal information" (CPI) in any papers submitted for filing with the court. CPI is defined as including:

1. An individual's or an entity's taxpayer identification number, including social security number, employer identification number, and individual tax identification number, except the last four digits.
2. An individual's birth date, except the year.
3. The full name of a minor, except his or her initials.
4. A financial account number, including credit or debit card, bank account, investment account or insurance account number, except the last four digits or letters.

On motion by any person or the court sua sponte can order a party to remove or redact CPI from papers; resubmit papers with the information redacted; order the clerk to seal papers or

portions of papers containing CPI in accordance with the 22 NYCRR § 216.1 requirement that the sealing is not to be broader than what is necessary to protect the CPI; permit inclusion of CPI for good cause; order a party to file for in camera review an unredacted copy under seal; or determine that certain information in an action is not confidential. The court is to consider the pro se status of a party in granting such relief. (e)(2)

When a person believes in good faith that full CPI is "material and necessary" to the adjudication of the action, "he or she may apply to the court for leave to serve and file together with a paper in which such information has been set forth in abbreviated form a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears." (e)(3)

In a consumer credit action, the redaction requirement does not apply to the last four digits of the relevant account numbers. If the defendant denies responsibility for the account, the plaintiff can amend the filing without court leave to include the full account or CPI by either submitting the amended paper to the court in camera with written notice to the defendant or filing the full account or CPI under seal. (e)(4)

The amended rule expressly excludes matrimonial actions, surrogate's court proceedings, Mental Hygiene Law Article 81 proceedings, "or as otherwise provided by rule or law or court order."

The amendment was effective from January 1, 2015 but compliance was voluntary from January 1 to February 28, 2015.

CPLR 304/2001– Ministerial Filing Error Overlooked Under CPLR 2001

Matter of Conti v. Clyne, 120 A.D.3d 884, 991 N.Y.S.2d 663 (3d Dep't 2014): "Dealing first with the issue of subject matter jurisdiction, the record reflects that petitioner Christopher T. Higgins personally delivered the orders to show cause, petitions, and filing fees to the office of the Albany County Clerk. After paying the fees, Higgins took the papers to the Clerk of the Supreme and County Courts in order to have a judge assigned, to whom the papers were transmitted directly. While the papers were not physically placed in the County Clerk's case file, they were nevertheless deemed filed when Higgins delivered them to the County Clerk in the first instance, and Supreme Court correctly found petitioners to have complied with the filing requirements of CPLR 304 and 2102 (citations omitted). The County Clerk should have retained the papers and provided a date-stamped copy of them to Higgins when they were delivered (see CPLR 304 [c]), but the failure to do so constituted nothing more than a ministerial error in the method of filing that may be overlooked pursuant to CPLR 2001 (citation omitted)."

CPLR 304 – E- Filing Error Overlooked Under CPLR 2001

McCord v. Ghazal, 43 Misc. 3d 767, 984 N.Y.S.2d 572 (Sup. Ct. Kings County 2014): Plaintiffs commenced this action, by inadvertently e-filing as a "summons with notice," a summons and verified complaint drafted for a related, different action in the same court (Douek action), before the same judge (J. Demarest). Plaintiffs then effected service of the proper summons with notice on the defendant on November 12, 2013. The proper summons with notice was then filed thereafter on December 10, 2013. The court held that this was an e-filing error which could be corrected under CPLR 2001. "The only error in commencing this action was the selection of the wrong file on plaintiffs' counsel's computer when prompted by the e-filing

system to select the file to be uploaded. Accordingly, the plaintiffs' counsel's uploading of the Summons With Notice was performed in a mistaken manner and method and, pursuant to CPLR 2001, the court may correct the mistake (see Grskovic, 111 AD3d at 242)."

CPLR 306-b – Interest of Justice Extension

Pennington v. Da Nico Rest., 123 A.D.3d 627 (1st Dep't 2014): Appellate Division reverses lower court, finding that: "Plaintiff's cross motion for an extension of time to serve Da Nico with the summons and complaint, pursuant to CPLR 306—b, should be granted in the interest of justice (citation omitted). The absence of due diligence on plaintiff's part is mitigated by the facts that Da Nico had timely notice of the claim; Da Nico had been timely, albeit defectively, served; plaintiff had communicated with Da Nico's insurer and provided the insurer with copies of relevant medical records; there was no prejudice to Da Nico; and the statute of limitations had expired since the commencement of the action (citations omitted)."

CPLR 308(1) – Resisting Service – Leaving Copy in Vicinity

Where the defendant resists service, it can be effected by leaving a copy of the summons in the defendant's general vicinity, as long as defendant is advised accordingly. See Hall v. Wong, 119 A.D.3d 897, 990 N.Y.S.2d 579 (2d Dep't 2014). "If a defendant resists service of process, service may be effected pursuant to CPLR 308(1) by leaving a copy of the summons in the defendant's general vicinity, provided that the defendant is made aware that this is being done (citations omitted). Here, the plaintiffs' process server testified that after the defendant came to the front door and he explained that he wanted to give her legal papers, the defendant, speaking through the closed door, refused to open the door and told him to come back another time. The process server then placed the summons and complaint between the storm door and the interior brown door, and told the defendant what he was doing. The plaintiffs satisfied their burden of demonstrating that the defendant was properly served."

CPLR 308(2) – Security Guard as Person of Suitable Age and Discretion

Matter of MBNA Am. Bank, N.A. v. Novins, 123 A.D.3d 832 (2d Dep't 2014): "The appellant moved pursuant to CPLR 5015(a)(4) to vacate a judgment entered upon his failure to appear or answer, claiming that service of process upon him pursuant to CPLR 308(2) was defective because a copy of the notice of petition and petition was not delivered to his dwelling place when it was left with a security guard at a security booth in the townhouse complex where he lived. In view of the conflicting affidavits submitted with respect to this issue, the Supreme Court should have conducted a hearing to determine whether the security guard was a person of suitable age and discretion within the contemplation of CPLR 308(2), and if the outer bounds of the appellant's dwelling place extended to the security booth (citations omitted). Accordingly, we remit the matter to the Supreme Court, Suffolk County, for a hearing on the issue of whether the appellant was properly served with process (citations omitted), and a new determination of the motion thereafter."

CPLR 308(2), (4) – Failure to File Proof of Service is Not Jurisdictional Deficit

It has been held that the failure to file the proof of service is not a jurisdictional defect, but a procedural irregularity that can be cured on motion on by the court *sua* sponte. However, the court cannot grant retroactive relief to defendant's prejudice by placing that defendant in default as of a date prior to the order. See Khan v. Hernandez, 122 A.D.3d 802, 996 N.Y.S.2d 667 (2d Dep't 2014): "Here, in light of the plaintiff's prompt action in moving to correct the irregularity following the denial of his motion for leave to enter a default judgment and the lack of prejudice to Hernandez, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to deem the filing of proof of service on

Hernandez timely nunc pro tunc (citation omitted). However, contrary to the plaintiff's contention, a court may not grant such relief retroactive to Hernandez's prejudice by placing him in default as of a date prior to the order (citation omitted). In other words, service will not be deemed complete as of October 23, 2012, as the plaintiff argues (see CPLR 308[4]). Rather, Hernandez must be afforded an additional 30 days after service upon him of a copy of this decision and order to appear and answer (see CPLR 320[a]; Pipinias v J. Sackaris & Sons, Inc., 116 AD3d at 753)."

CPLR 308(4) – "Due Diligence" Standard Under CPLR 308(4) – Genuine Inquiries

To establish "due diligence," it must be shown "that the process server made genuine inquiries about the defendant's whereabouts and place of employment." Estate of Waterman v. Junes, 46 A.D.3d 63, 66, 843 N.Y.S.2d 462, 465 (2d Dep't 2007). See Cadlerock Joint Venture, L.P. v. Kierstedt, 119 A.D.3d 627, 990 N.Y.S.2d 522 (2d Dep't 2014): "The process server's testimony that he inquired as to the defendant's whereabouts from a neighbor was not credible, since he was unable to provide any description of the neighbor—even a description of the neighbor's sex. The affidavit of service referred to the 'person spoken to,' but provided no further description, although spaces were provided to insert the person's sex, skin color, hair color, approximate age, height, and weight."

CPLR 308(5) (Digest – July 2015)

Be Careful the Next Time You Say:

Facebook Me!

Service by Facebook – I'm Not a Friend

CPLR 308(5) provides that where personal delivery, leave and mail and "nail and mail" service on a natural person are impracticable, a plaintiff can move for an alternate type of service. With the rapid expansion of communication through electronic means, particularly email, we are seeing more cases permitting email service, although usually with a second backup means of service. *See, e.g.*, *Hollow v. Hollow*, 193 Misc. 2d 691 (Sup. Ct., Oswego Co. 2002) (email plus international registered air mail and international mail standard service on defendant employed by American engineering company in Saudi Arabia compound).

Recently, a Supreme Court Justice went further, permitting service exclusively by Facebook and without any additional service in a divorce action. In *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (Sup. Ct., N.Y. Co. 2015), Justice Matthew Cooper noted that the plaintiff easily demonstrated that she was unable to serve the defendant via personal service. Moreover, she established that Facebook service was reasonably calculated to apprise the defendant that he was being sued for divorce. The court acknowledged that "Facebook service" represented a radical departure from traditional notions of service of process. It pointed out that the few decisions addressing service via social media, mostly from federal district courts, were split on its propriety. Nevertheless, the court concluded that although Facebook service was novel and nontraditional, it should not be rejected for that reason alone. The determining factor was whether the service comported with the fundamentals of due process by being reasonably calculated to provide the defendant with notice of the divorce. In finding that the plaintiff had met that burden, the court noted that she had established that the Facebook account she identified actually belonged to the defendant; the defendant regularly logged onto his account; and the plaintiff had no other means of contacting or serving the defendant, thereby obviating the need for a second backup or supplemental service.

In this case, publication service was simply not reliable and "almost guaranteed not to provide a defendant with notice." *Id.* at 715. Thus, although publication is the method most used

in divorce actions where the defendant cannot be served by other means, the court refused to sanction it even as supplemental service, noting the substantial cost and that the chances of it being seen by the defendant were "infinitesimal." *See id.* at 716.

To assure the best opportunity at notice, the court specified the precise procedure to be followed, including a follow-up call and text message:

> [P]laintiff's attorney shall log into plaintiff's Facebook account and message the defendant by first identifying himself, and then including either a web address of the summons or attaching an image of the summons. This transmittal shall be repeated by plaintiff's attorney to defendant once a week for three consecutive weeks or until acknowledged by the defendant. Additionally, after the initial transmittal, plaintiff and her attorney are to call and text message defendant to inform him that the summons for divorce has been sent to him via Facebook.

Id.

CPLR 311(a)(1) – Service on Corporations

Matter of Jiggetts v. MTA Metro-N. R.R., 121 A.D.3d 414, 993 N.Y.S.2d 699 (1st Dep't 2014): "The proceeding was properly dismissed on the basis that no personal jurisdiction was acquired over respondents. Petitioner failed to comply with CPLR 311(a)(1), which requires that the process server tender process directly to an authorized corporate representative, rather than an unauthorized person who later hands the process to an officer or other qualified representative (citation omitted). Petitioner also failed to properly effectuate service of process by mail. Although he mailed the summons and petition to respondents, he did not include two copies of a 'statement of service by mail' and an 'acknowledgement of receipt' as required by CPLR 312-a (citation omitted). Petitioner's status as a pro se litigant does not excuse the defective service (citation omitted), and the fact that respondents received actual notice does not confer jurisdiction upon the court (id.)."

CPLR 311(a)(1) – Service of One Copy of Pleading on Person with Two Capacities

Matter of Stony Cr. Preserve, Inc., 995 N.Y.S.2d 346 (3d Dep't 2014): "We are also unpersuaded by respondents' contention that petitioner failed to obtain jurisdiction over the corporation. Under the circumstances here, personal service of a copy of the order to show cause upon Place was sufficient to effect service on both the corporation and Place, individually (citations omitted). Considering that petitioner and Place were apparently the only two officers of the corporation at the time, we find that service upon Place constituted 'notice "reasonably calculated, under all the circumstances, to apprise [Place and the corporation] of the pendency of the [proceeding] and afford them an opportunity to present their objections"' (citations omitted). No purpose would have been served by delivery of a separate copy of the order to show cause to Place for the corporation. Thus, service upon the corporation was effectuated pursuant to CPLR 311 (a) (1) and Business Corporation Law § 1106 and, inasmuch as jurisdiction was obtained over the corporation, the motion to dismiss was properly denied (citations omitted)."

CPLR 317/5015: Vacating Default – Service Issue

Professional Offshore Opportunity Fund, Ltd. v. Braider, 121 A.D.3d 766, 994 N.Y.S.2d 619 (2d Dep't 2014): "Subsequently, the appellant moved, inter alia, in effect, pursuant to CPLR 317 and CPLR 5015 (a) (1) and (4) to vacate both the order dated September 14, 2011, and the judgment of foreclosure and sale insofar as against her. The appellant submitted an affidavit in which she stated that her signature on the waiver of service acknowledgment form was forged, that she never received either the waiver of service acknowledgment form or a copy of the summons and complaint and that, therefore, the Supreme Court did not have jurisdiction to enter

either the order or the judgment against her. Although '[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature' (citation omitted), here, the appellant raised a question of fact as to whether she signed the waiver of service acknowledgment form by establishing that she was not involved with the husband's business, she had not participated in negotiations with either PROOF's attorneys or her husband's attorneys concerning the waiver of service upon her, her signature on the waiver of service acknowledgment form was not notarized, and she had never previously received correspondence at the husband's business email address. Under these circumstances, we cannot conclude that service upon the appellant by email was proper (citations omitted). Since the appellant rebutted the presumption of proper service, a hearing to determine the validity of service of process upon the appellant must be conducted (citation omitted), and, thereafter, a new determination must be made of that branch of her motion which was, in effect, pursuant to CPLR 5015 (a) (4)."

CPLR 320 – No Requirement to File Notice of Appearance/ Demand for Complaint

Tsionis v. Eriora Corp., 123 A.D.3d 694 (2d Dep't 2014): "Contrary to the plaintiffs' further contention, the appellant was not required to file his notice of appearance with the Supreme Court. There is no statutory or other requirement that a notice of appearance, timely served upon a plaintiff, must also be filed with the clerk of the relevant court in order for a defendant to appear in the action (citation omitted). Moreover, since the appellant did not have proper notice that this action was e-filed, it was appropriate for the appellant to serve the notice of appearance on the plaintiffs without e-filing it (citation omitted)."

CPLR 320/3012 – Notice of Appearance

A defendant who has been served with a summons and complaint, or summons and CPLR 305(b) notice, may wish to waive the right to defend but retain other rights such as the right to receive notice of subsequent proceedings. Such a defendant can do so by making an appearance by a notice of appearance alone. Moreover, where the complaint does not set forth any allegations against the defendant, that defendant can serve a notice of appearance to be kept apprised of developments in the action. See Tsionis v. Eriora Corp., 123 A.D.3d 694 (2d Dep't 2014): "Contrary to the plaintiffs' contention, the appellant was not required to serve an answer where the complaint did not set forth any allegations that the appellant was required to defend against (citations omitted). 'A defendant who has no defense, and therefore serves no pleading, might nevertheless serve a notice of appearance so as to be kept apprised of the progress of the proceeding' (citation omitted). Such was the situation here. The complaint contained no allegations about the appellant, except to state that he had a second mortgage on the property. Thus, the appellant properly proceeded by serving a notice of appearance only and was entitled to be kept apprised of the proceedings."

CPLR 327 – Forum Non Conveniens – No Substantial Nexus with New York

Bluewaters Communications Holdings, LLC v. Ecclestone, 122 A.D.3d 426, 996 N.Y.S.2d 232 (1st Dep't 2014): "The motion court properly dismissed this action on the ground of forum non conveniens (citation omitted). As indicated, this case stems from the failure of a Jersey company (with offices in Jersey and London) to acquire the shares of another Jersey company from a German bank, allegedly because an Englishman bribed a German. The cause of action 'lack[s] a substantial nexus with New York' (citation omitted). All the defendants are foreign (citations omitted). Germany has already tried and convicted Gribkowsky. Germany has an interest in how BLB — a German bank — was run (citations omitted). By contrast, New York's interest is minimal (citation omitted). Germany, England, and Jersey are all available alternative fora (citations omitted)."

CPLR 503 – Residency in Transitory Action for Venue Purposes

Deas v. Ahmed, 120 A.D.3d 750, 991 N.Y.S.2d 661 (2d Dep't 2014): While a plaintiff can base his or her choice of venue solely on a defendant's address contained in a police report, that report alone is insufficient evidence to establish that a plaintiff did not reside in another county where plaintiff elected to place venue at the time the action was commenced

CPLR 503(d) – Venue for Action v. Unincorporated Association, Partnership, or Individually - Owned Business

Young Sun Chung v. Kwah, 122 A.D.3d 729, 996 N.Y.S.2d 153 (2d Dep't 2014): "'In the context of determining the proper venue of an action, a party may have more than one residence' (citations omitted). Under CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business (citations omitted). Here, the plaintiff seeks to recover damages for medical malpractice allegedly committed by, among others, the defendant Jung Lack Lee in his capacity as a medical doctor. Accordingly, the county in which that defendant maintains his principal office is a proper venue in this case."

CPLR 504(3) – Venue for Action Against New York City

Ortiz v. Codella, 123 A.D.3d 453, 998 N.Y.S.2d 338 (1st Dep't 2014): "Plaintiff seeks to recover damages for malicious prosecution and violation of his civil rights under 42 USC § 1983, alleging that he was wrongfully convicted of a murder he did not commit based on serious misconduct by the individual defendants, then employed by the New York City Housing Authority and New York City Police Department. Plaintiff's conviction was vacated based on a showing of prosecutorial misconduct (citation omitted), after he had served nearly 20 years in prison. Since plaintiff's federal and state tort claims against the City all arose in New York County, where the alleged misconduct occurred and where he was arrested and prosecuted, the motion for a change of venue pursuant to CPLR 504(3) was properly granted, notwithstanding that he was held in Rikers Island in Bronx County for 20 months prior to and during the criminal trial (citations omitted)."

CPLR 506(b)(1) – Venue for Action Against Justices of the Supreme Court, Judges of the County Court

Matter of Tonawanda Seneca Nation v. Noonan, 122 A.D.3d 1334, 996 N.Y.S.2d 446 (4th Dep't 2014): "Petitioner commenced this CPLR article 78 proceeding in this Court purportedly pursuant to CPLR 506 (b) (1) seeking, inter alia, to prohibit respondent Hon. Robert C. Noonan (respondent) from exercising jurisdiction over any real property situated within the territory of the Tonawanda Seneca Nation. We conclude that the proceeding was improperly commenced in this Court and that, therefore, the amended petition must be dismissed. It is well settled that '[a] CPLR article 78 proceeding against a Judge of the Surrogate's Court should be commenced in Supreme Court and is not properly commenced in this Court' (citations omitted). CPLR 506 (b) (1) 'has been narrowly construed [as] depriving appellate jurisdiction to all such [CPLR article 78] proceedings [commenced in the Appellate Division] unless one of the specifically delineated Judges is a named respondent' (citations omitted). To the extent that CPLR 506 (b) concerns subject matter jurisdiction, its provisions cannot be waived (see Nolan, 61 NY2d at 790). Contrary to petitioner's contention, respondent is the duly elected Surrogate for Genesee County, a position not specifically delineated in CPLR 506 (b) (1) and, therefore, a proceeding against him must be commenced in Supreme Court. Even if we assume, arguendo, that respondent was elected as a County Court Judge and was thereafter assigned to 'be and serve as' a Surrogate (Judiciary Law § 184 [2]), petitioner is seeking to prohibit respondent from acting in the role of Surrogate. We thus conclude that jurisdiction remains in Supreme Court

(citations omitted)."

CPLR 510 – Venue Change and Improper Venue – Proper Venue for Motion to Change Venue!

King v. CSC Holdings, LLC, 123 A.D.3d 888 (2d Dep't 2014): "Here, in response to the defendants' demand to change venue, the plaintiff timely served an affidavit of her attorney containing factual averments that were prima facie sufficient to show that the county designated by her was proper (citations omitted). Accordingly, the defendants' motion pursuant to CPLR 510(1) should have been made in the Supreme Court, Kings County, where the action was pending, and the Supreme Court, Nassau County, erred in granting the motion (citation omitted). We do not reach the defendants' challenge to the form of the plaintiff's affidavit of proper county, as it is improperly raised for the first time on appeal (citation omitted)."

CPLR 510/511– Venue Change and Convenience of Witnesses (Digest – May 2015)

Properly Support Your Venue Motions

Mental Hygiene Law Article 10 Venue Requirements Found to Apply but Petitioner Fails to Establish Good Cause for Venue Change

While *Tyrone D. v. State of New York*, 24 N.Y.3d 661, 3 N.Y.S.3d 291, 26 N.E.3d 1146 (2015) involved the applicability of the Mental Hygiene Law, it highlights the importance of properly supporting any motion to change venue. Petitioner, an adjudicated dangerous sex offender in need of confinement, was committed to a psychiatric center in 2010. The Office of Mental Health (OMH) subsequently notified petitioner of his MHL § 10.09(a) annual right to petition for discharge. Petitioner indicated, on the form provided, his intent not to waive his right and brought an action in Oneida County seeking the discharge. Petitioner then moved pursuant to MHL § 10.08(e) and CPLR 510 to change venue for the annual review hearing to New York County. Petitioner's counsel submitted an affirmation alleging it would be "extremely inconvenient, burdensome and impossible" for petitioner's family to appear in Oneida County, citing limited resources and physical health issues; the fact that most of the potential witnesses resided in New York City; and that a New York County judge would be better suited to determine the petitioner's status. The State responded that MHL Article 10 did not permit a change of venue of the annual review hearing and, regardless, petitioner had not satisfied MHL § 10.08(e)'s good cause requirement. The lower court found that MHL § 10.08(e) did apply but counsel's conclusory affirmation did not establish good cause for the change of venue. On appeal, the Appellate Division ruled that MHL § 10.08 permitted a venue change only for *trials*, not hearings. The Court of Appeals disagreed, finding MHL Article 10 applied both to hearings and trials, as long as the petitioner demonstrated good cause. However, the Court affirmed the Appellate Division order, ruling that petitioner failed to meet the good cause requirement. The affidavit submitted in support of the motion spoke only *generally* of the inconvenience and burdens to family members and witnesses, and did not identify a single witness who would actually testify or provide a description of the proposed testimony or its relevance.

In any motion to change venue based on the convenience of witnesses, it is important to provide in detail the names, addresses and occupations of all witnesses, their expected testimony, the need for and relevance of their testimony and to affirmatively state that the witnesses actually would be inconvenienced. Some cases suggest that, if possible, affidavits from the actual witnesses are preferred. When this is not feasible, another option may be to have an investigator interview the witnesses and submit an affidavit recounting the witnesses' statements. If an attorney's affirmation is the only reasonable alternative, make sure it is as detailed as possible. Generalized statements will not suffice.

CPLR 510/511 – Venue Change and Convenience of Witnesses

Liere v. State of New York, 123 A.D.3d 1323 (3d Dep't 2014): "Beyond providing the names and addresses of certain nonparty witnesses, claimant provided no explanation as to how these individuals would be inconvenienced beyond stating that the witnesses, who reside and/or work in Suffolk County, would have to travel a distance to Albany County. Further, claimant's assertion that changing venue would serve the ends of justice in that he would not have to reimburse witnesses for their travel and lodging expenses or lost wages is unavailing. Finally, the timing of claimant's motion, made four years after commencement of the proceeding, was not reasonable (citations omitted). As such the Court of Claims did not abuse its discretion in denying claimant's motion."

CPLR 510/511 – Venue Change and Convenience of Witnesses

Ryan-Avizienis v. JBEW Bar Corp., 121 A.D.3d 579, 993 N.Y.S.2d 912 (1st Dep't 2014): "JBEW Bar met its initial burden in support of the motion by submitting the affirmation of its counsel, who had contacted two nonparty witnesses — a former employee who was working on the night of the accident and a Village of Patchogue inspector — and averred that they were both willing to testify, the nature of their proposed testimony, and the manner in which they would be inconvenienced if they were required to travel from Suffolk County, where they live and work, to Bronx County (citations omitted). The fact that plaintiff received medical treatment in Suffolk County after the accident also favors transfer of venue (citation omitted)."

CPLR 1021 - Substitution

Riedel v. Kapoor, 123 A.D.3d 996 (2d Dep't 2014): "The Supreme Court providently exercised its discretion in, upon renewal, granting those branches of the separate motions of the defendants Deepak A. Kapoor and Robert Fuentes (hereinafter together the respondents) which were pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against each of them. Those interested in the estate of Benedict Riedel (hereinafter the decedent) clearly were on notice of the need to substitute a legal representative for the decedent's estate, as the respondents had previously moved on at least two prior occasions pursuant to CPLR 1021 to dismiss the complaint. Yet, no reasonable excuse was proffered for the failure to substitute a legal representative for the estate of Benedict Riedel during the four-year period between the death of Catherine Riedel, executor of the decedent's estate, and the respondents' motion for leave to renew, which was filed in October 2012. Further, although the plaintiff's counsel was directed to apply for the appointment of a legal representative within 30 days, counsel failed to provide a reasonable excuse for his failure to file such an application. Additionally, in the absence of any affidavit of merit and the prejudice to the respondents, it was appropriate to grant dismissal of this action insofar as asserted against them (citations omitted)."

CPLR 2103 – Service by Party – Jurisdictional Defect or a Mere Irregularity

There is a conflict among the Appellate Division Departments as to whether service by a party is a jurisdictional defect or a mere irregularity. See Matter of Conti v. Clyne, 120 A.D.3d 884, 991 N.Y.S.2d 663 (3d Dep't 2014) (noting conflict among Appellate Division Departments on this issue and that Third Department has consistently held it to be a mere irregularity that does not vitiate service).

CPLR 2106 Amendment– Use of Affirmation in Place of Affidavit (Digest – May 2015)

CPLR 2106: It Is Now Easier to Obtain the Statement of a Person Abroad Than One in New Jersey

Modeled on the federal declaration procedure (28 U.S.C. § 1746), CPLR 2106 was amended (eff. Jan. 1, 2015) to permit the use of an affirmation instead of an affidavit by any person located outside of the United States, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to U.S. jurisdiction. The affirmation is to be substantially in the form provided by the amended statute, that is:

> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature)

This will greatly reduce the burden on attorneys seeking to use statements from persons located out of the country and will remove the issues involved in trying to comply with the notarial requirements of an affidavit abroad. This amendment adds a bit of irony to the current practice in New York. An affirmation from a person outside the country is permissible while an out-of-state resident, perhaps in New Jersey, needs to submit an affidavit and navigate the provisions of CPLR 2309 and certificates of conformity. *See Midfirst Bank v. Agho*, 121 A.D.3d 343, 344–45 (2d Dep't 2014):

> Our Court is observing a significant upswing in the number of appeals where the parties are contesting the admissibility of affidavits executed outside of the state, without CPLR 2309(c) certificates of conformity. The issue has arisen in varied summary judgment and default motion contexts, including motions in residential mortgage foreclosure actions reliant upon affidavits of out-of-state bank employees, motions in medical malpractice actions reliant upon out-of-state physician experts, motions in slip-and-fall actions reliant upon out-of-state witnesses, motions in actions brought pursuant to Insurance Law § 3420(a), motions in motor vehicle negligence actions reliant upon out-of-state experts, and motions in contract actions reliant upon out-of-state expert contractors. We use the instant appeal as an occasion to clarify the law relating to the conformity of out-of-state affidavits as required by CPLR 2309(c) (citations omitted).

CPLR 2214 – Amendment to CPLR 2214(c): Referring to Previously Filed Documents (Digest – May 2015)

CPLR 2214(c): Why "Attach" the Documents Again?

In Biscone v. JetBlue Airways Corp., 103 A.D.3d 158 (2d Dep't 2012), appeal dismissed, 20 N.Y.3d 1084 (2013), the Second Department held that in an electronically filed case, a motion for leave to renew or reargue cannot refer to previously filed documents by electronic document entry numbers, but must resubmit all relevant documents.

In response, CPLR 2214(c) was amended (eff. July 22, 2014) to provide that in an e-filed case, a motion can refer to previously e-filed documents by docket number (rather than "attaching" copies). This will be particularly useful in connection with motions for leave to renew or reargue under CPLR 2221, where reference to a prior motion and order is necessary. This seems to be a common-sense response to the adoption of electronically filed cases. Counsel should be aware, however, that this amendment applies only to e-filed cases. In addition, it would not impact a particular judge's requirement that courtesy print copies be provided.

CPLR 2214 (Digest – June 2015)

Adoption of Commercial Division Rule 34 and Staggered Court Appearances—Efficiency at Work!

To increase efficiency, Rule 34 provides for staggered set court appearances for the oral argument of motions. Each oral argument of a motion is assigned a time slot. The length of the time slot is in the court's discretion. All parties are to appear, even if they believe that they are not directly impacted by the motion, unless the court specifically excuses a party. This will permit the court to address all matters of concern and to avoid the appearance of holding ex parte communications. Pro se parties must attend all scheduled court appearances. Each attorney who is notified of an appearance date is required to notify all the other parties via email and parties are required to exchange and update their email addresses. Adjournment requests or requests to appear by telephone have to be e-filed and received by the court no later than 48 hours before the hearing. The Rule stresses the importance of the litigants' cooperation. This Rule should cut down on the wait time that accompanies the typical 9:30 a.m. "calendar call."

CPLR 3001, 213(1) – Which Statute of Limitations to Apply?

Bristol Homeowners Envtl. Preserv. Assocs., LLC v. Town of S. Bristol, 122 A.D.3d 1259, 996 N.Y.S.2d 813 (4th Dep't 2014): "We reject plaintiff's contention that the action was timely and properly brought as a declaratory judgment action pursuant to CPLR 3001. Although a six-year limitations period governs declaratory judgment actions (see CPLR 213 [1]), it is well settled that if such claim could have been brought in another form, then the shorter limitations period applies (citation omitted). Here, Town Law § 274-a (11) provides for a 30-day limitations period for challenging 'a decision of the [planning] board or any officer, department, board or bureau of the town' under CPLR article 78. Thus, plaintiff's challenge to the Town Code Enforcement Officer's determination of the meaning of 'significant work' under Code § 170-94 (J) could have been brought in a CPLR article 78 proceeding under Town Law § 274-a (11). Assuming arguendo, as plaintiff contends, that no administrative appeal from such determination was required or available, the action was not commenced within the 30-day limitations period set forth in section 274-a (11), and the court therefore properly granted defendants' motions to dismiss on that ground (citation omitted). Likewise, any challenge to the 2005, 2009 or 2012 Planning Board's actions could have been brought in a CPLR article 78 proceeding, and thus the instant action, even though denominated as one for a declaratory judgment, also was not timely commenced within the 30-day limitations period applicable to each such action of the Planning Board (citations omitted)."

CPLR 3014 Statements – Pleading Statute of Limitations Defense (Digest – July 2015)

And So You Thought You Knew How to Plead a Statute of Limitations Defense? First Department Casts Doubt on Common Practice

When asserting many affirmative defenses, most of us learned something perhaps alien to certain attorneys: brevity is a virtue. Thus, we were taught that a bare assertion of "the statutes of limitations" with no detail, such as the applicable limitation period, was a sufficiently pleaded defense. However, a majority of the First Department has recently questioned that basic premise and asked the Court of Appeals to revisit the issue. In *Scholastic Inc. v. Pace Plumbing Corp.*, 8 N.Y.S.3d 143 (1st Dep't 2015), the defendant's answer contained the following "boilerplate, catchall paragraph":

> That the answering defendant not being fully advised as to all the facts and circumstances surrounding the incident complained of hereby asserts and reserves onto [sic] itself the defenses of accord and satisfaction, arbitration and award, discharge of bankruptcy, duress,

> estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein.

The court was unanimous in finding that the defendant failed to separately state and number the statute of limitations defense, as required by CPLR 3014. In addition, there was agreement as to the remedy: not to deem the defense waived or to dismiss it but instead to permit the defendant to amend the answer to plead the defense properly and the plaintiff to conduct discovery on the statute of limitations issue.

Where the majority and concurrence disagreed, however, was in the detail necessary to assert the defense. The majority found a conflict between the Court of Appeals decision in *Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d 671 (1979), and Form 17 of the official forms promulgated by the state administrator, pursuant to CPLR 107. In *Immediate*, the Court permitted a conclusory statute of limitations defense. Thus, merely stating that, "this action is barred by the applicable statute of limitations" would be sufficient – precisely the type of language used by most practitioners. However, official Form 17, which according to CPLR 107, "shall be sufficient . . . and shall illustrate the simplicity and brevity of statement which the [CPLR] contemplate[s]," provides alternate language including the limitation period: "The cause of action set forth in the complaint did not accrue within six years next before the commencement of this action."

While the majority acknowledged that official Form 17 provides a "ceiling, not a floor" to what is required in pleading that defense, it also questioned whether *Immediate* intended "to entirely obviate the Official Form 17 standard." Apparently concerned about what it perceived as a lack of case law and "scant" secondary source analysis of this "problem," the majority suggested there might be an instance where a plaintiff would be prejudiced by a defendant's failure to plead the applicable limitation period. In conclusion, the majority asked the N.Y. Court of Appeals to give the issue a "second look."

The concurrence found there was no conflict between the *Immediate* decision and official Form 17. As the majority noted, Form 17 sets a ceiling, not a floor. Moreover, *Immediate* established that official Form 17 provides more information than necessary, expressly stating that there was no requirement to plead the limitation period. The concurrence did not see how requiring the defense to plead factual particulars would help the plaintiff frame discovery requests or inform the plaintiff as to when the cause of action accrued. It also noted that the "scant analysis" the majority found on this issue was instead indicative of the unity of belief that a conclusory assertion of the statute of limitations defense was sufficient. Finally, the concurrence questioned why a defendant, through its answer, is required to educate the plaintiff on the length of the limitation period or when the cause of action accrued. Most problematic are the possible repercussions caused by the majority's opinion:

> [I]ts decision will inevitably lead to the proliferation of motion practice and appeals on the issue of the sufficiency of the pleading of the statute of limitations defense. In the face of the majority's call for the Court of Appeals to "revisit" *Immediate*, counsel for plaintiffs may be expected routinely to move to strike the statute of limitations defense, not only for failure to plead a period of limitation, but also for arguably pleading the wrong period, in the hope of preserving the issue for the reconsideration of the Court of Appeals to which the majority looks forward. I fail to see how this development will enhance either the efficiency or the fairness of our civil justice system.

Scholastic, 8 N.Y.S.3d at 160.

Practitioners are left to ponder what to do next. Should defendants include the limitation period in their statute of limitations defenses? And if the plaintiff's claims were barred by a different limitation period, not the one enumerated by the defendant, would the defense be waived? Will plaintiff's counsel seek such information in a bill of particulars or otherwise or leave the defense as is, hoping to find a court to go one step further and find the defense waived? Could a court find that other particulars are necessary in this or other common defenses?

One can only hope that the Court of Appeals will put this issue to rest. Based on the procedural status of Scholastic, however, it appears that this will not be the case to resolve the issue.

CPLR 3014 – Statements

Each paragraph should be limited, as far as practicable to a single allegation. CPLR 3014. See *Forty Cent. Park S., Inc. v. Anza*, 117 A.D.3d 523, 985 N.Y.S.2d 543 (1st Dep't 2014) ("Plaintiffs' failure to limit each paragraph in the complaint to a single allegation (see CPLR 3014) does not mandate dismissal since the purport of the complaint is plain, and defendant will have no difficulty answering the allegations (citation omitted)."). Prior statements may be incorporated by reference.

CPLR 3101 – Non-Party Disclosure

Ferolito v. Arizona Beverages USA, LLC, 119 A.D.3d 642, 990 N.Y.S.2d 218 (2d Dep't 2014): "In the instant case, the subpoena duces tecum served upon nonparty Morgan Stanley plainly satisfied the notice requirement. The subpoena duces tecum detailed the relationship between Morgan Stanley and the parties, and provided Morgan Stanley with ample information to challenge the subpoena duces tecum (citations omitted). Once Ferolito met that minimal obligation, the burden shifted to Morgan Stanley to establish that the requested documents were either 'utterly irrelevant' to the action, or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' (citation omitted). Here, Morgan Stanley failed to meet that burden. The record reveals that the requested documents were highly relevant to the valuation of the subject corporation, the central issue in the underlying proceedings, and Morgan Stanley did not dispute that it possessed those documents. Accordingly, Ferolito met his burden of establishing that the information sought was material and necessary (citation omitted)."

CPLR 3101 – Disclosure of IQ Tests (Andon)

Perez v. Fleischer, 122 A.D.3d 1157 (3d Dep't 2014): "Regarding the mother's and siblings' academic records, defendants have submitted an expert affidavit, as noted above, indicating that those records are relevant and necessary to determine whether other factors caused plaintiff's injuries (citation omitted). Considering that these records are private but not privileged, Supreme Court reasonably balanced defendants' need for them and their possible relevance against the burden to these nonparties from disclosure, requiring that the siblings' records be produced to the court for an in camera review (citations omitted). The mother's academic records should similarly be submitted to the court for review and redaction of any privileged material. Defendants have submitted some proof that the mother's IQ may be relevant to plaintiff's diminished mental capacity. Defendants' need for her IQ test results, however, are not outweighed by the burden on her to undergo such a test, as well as the potential for extending this litigation by focusing on information extraneous to plaintiff's condition, such as all of the factors contributing to the mother's IQ (citation omitted). Considering the private and personal nature of the information sought and the potential delay due to myriad collateral issues, defendants should not be able to compel plaintiff's mother, a nonparty, to undergo an IQ test

(citation omitted)."

CPLR 3101(d) – Expert Disclosure

Rivera v. Albany Med. Ctr. Hosp., 119 A.D.3d 1135, 990 N.Y.S.2d 310 (3d Dep't 2014) "Among other submissions, defendants provided an affidavit from a medical expert whose identity was redacted and who opined on the appropriateness of plaintiff's medical care and the adequacy of the warnings given to plaintiff. Defendants also submitted an unredacted version of the affidavit for Supreme Court's in camera review. Because defendants were the movants for summary judgment, their submission of an anonymous expert affidavit was incompetent evidence not proper for consideration upon the motion (citations omitted). While the Legislature has allowed for some protection from disclosure of the identities of medical experts during '[t]rial preparation' (CPLR 3101 [d] [1] [i]), and, consistent with this intention, courts have found it appropriate to allow nonmovants in the summary judgment context to also withhold experts' identities from their adversaries upon the reasoning that such parties did not choose to abandon the disclosure protections provided during trial preparation (citations omitted), the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action. Further, we see no compelling reason to allow for such anonymity that would outweigh the benefit that accountability provides in promoting candor (citation omitted). Requiring a movant to reveal an expert's identity in such circumstances would allow a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion (citation omitted). Further, any expert who anticipates a future opportunity to espouse a contradictory opinion would be on notice that public record could be used to hold him or her to account for any unwarranted discrepancy between such opinions. For these reasons, we will not consider the incompetent affidavit of defendants' medical expert."

CPLR 3106 – Adoption of Rule 11-d in Commercial Division Regarding Number and Length of Depositions (Digest – June 2015)

Commercial Division Rule 11-d Depositions and the 10/7 Rule

This Rule limits the number of depositions taken by parties to 10 with a limit of seven hours per deponent. These limitations can be varied by the court on good cause shown. A CPLR 3106(d) designee deposition is to be treated as a single deposition, even if multiple persons are designated. However, the deposition of an entity's officer, principal or employee who is also a fact witness constitutes a separate deposition.

CPLR 3113(c) Amendment (Digest – May 2015)

Non-Parties (and Their Lawyers) Are People Too

The Fourth Department's decision in *Thompson v. Mather*, 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dep't 2010), reinforced in *Sciara v. Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dep't 2013), *appeal withdrawn*, 24 N.Y.3d 1095, 2 N.Y.S.3d 61, 25 N.E.3d 975 (2015) that non-party counsel was required to act like a "potted plant" at her client's deposition provoked much consternation. Apart from the fact that it was contrary to the widespread practice throughout the state, and courts had not previously expressed a similar reservation about the existing practice, attorneys were placed in an uncomfortable position with respect to their ethical duties. There may have been differing opinions as to whether non-party's counsel rights should be as expansive as that of a party's counsel. However, the overwhelming consensus among attorneys appeared to be that while owning plants might be

enjoyable, being a potted one was not what they signed up for, and was inconsistent with their professional and ethical duties to their clients. Responding to this conundrum, CPLR 3113(c) was amended (eff. Sept. 23, 2014) to take the most liberal position, that is, that non-party counsel can participate in his or her client's deposition and make objections in the same manner as for a party. While horticulturalists may be dismayed, attorneys should be pleased to leave the plant world behind.

See David Ferstendig & Oscar Chase, Should Counsel for a Non-Party Deponent be a "Potted Plant"?, 2014 N.Y.U. J. Legis. Pub. Pol'y Quorum 52 for background on the issues raised by *Thompson* and the amendment.

CPLR 3122 (Digest – June 2015)

Adoption of Commercial Division Rule 11-b and Privilege Logs

If a responding party withholds documents based on an assertion of privilege, counsel should provide a log of those documents with the information required under CPLR 3122(b). Recognizing an era of significant email and electronic transmissions, Rule 11-b expresses a preference for parties to use "categorical designations" in privilege logs. The use of categories serves to reduce the overwhelming labor of a document-by-document logging process. The parties are required to meet and confer at the beginning of the action and

> from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues . . . including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

The log must include a certification, pursuant to 22 N.Y.C.R.R. § 130-1.1a, identifying the facts supporting each claim of privilege. If a party chooses a "document-by-document" description, each uninterrupted email chain is to be considered a single entry. The producing party can then apply for an allocation of fees and costs, upon good cause shown. The parties are encouraged to retain a Special Master in complex matters. The attorney responsible for supervising the privilege review is to be actively involved to ensure that responsive, non-privileged documents are provided in a timely fashion. The parties should memorialize all agreements and protocols in a court order.

CPLR 3122 (Digest – June 2015)

Adoption of Commercial Division Rule 11-c and Guidelines for Discovery of Electronically Stored Information From Nonparties

The stated purposes of the Commercial Division's Guidelines for Discovery of Electronically Stored Information (ESI) from Nonparties are to provide for efficient non-party ESI disclosure, to encourage the early assessment of the non-party's potential costs and burdens, to identify the ESI discovery costs that the requesting party will have to defray, and to encourage informal dispute resolution. The Guidelines are to be construed to be consistent with governing case law and applicable statutes, rules, and regulations. The party and nonparty should engage in discussions "as early as permissible" with respect to ESI, including any request that the nonparty implement a litigation hold. A party seeking non-party ESI discovery is to limit its requests, taking into consideration certain proportionality factors, including the importance of the issues at stake and the requested ESI, whether the ESI is available through other sources, the ESI's

"accessibility" (as defined by case law) and the nonparty's expected burden and costs. The requesting party and the nonparty should "meet and confer" to expedite the process and should discuss the proportionality factors. Discovery disputes should be resolved informally; motion practice is discouraged and only to be used as a last resort. The requesting party should defray the nonparty's reasonable production expenses.

CPLR 3122 (Digest – June 2015)

Adoption of Commercial Division Rule 11-e and Document Responses

With respect to each document request, a CPLR 3122 response must state either that production will be made or the grounds for any objection, with reasonable particularity. To the extent such an objection is made, the response must state whether the objection is limited to only part of or to the entire request, whether documents will be withheld and the basis for the applicable objection, and the manner in which the document production will be limited. Document production should be completed by a date no later than the commencement of depositions or at a date set by the court. Moreover, no later than a month before the end of fact discovery, or at a date set by the court, the responding party must confirm with respect to each request that document production is complete or that there are no responsive documents in its possession, custody or control. The Rule is not intended to conflict with a party's obligations to supplement its discovery under CPLR 3101(h).

CPLR 3122-a Amendment (Digest – May 2015)

CPLR 3122-a(d): A Non-Party Can Certify Business Records Produced Without Subpoena

CPLR 3122-a was added by 2002 N.Y. Laws ch. 575 (eff. Sept. 1, 2003). Its purpose was to provide a process by which documents produced pursuant to a CPLR 3120 request could be certified as business records, thereby simplifying admissibility issues under CPLR 4518(c). What it did not seem to cover were documents voluntarily produced by a non-party without having been served with a subpoena. Thus, via an amendment effective August 11, 2014, subdivision (d) was added to CPLR 3122-a permitting such a certification, provided that the custodian or other qualified witness makes the necessary attestations required under CPLR 3122-a(1), (2) and (4) (that is, that the person is an authorized custodian or qualified witness, that the documents are accurate versions of those sought, and that they are business records).

CPLR 3124, 3126 – Commercial Division Rules (22 NYCRR §202.70 (g)) (Digest – June 2015)

Commercial Division Rule 14, Discovery Disputes and the Preference for Letters and Court Conferences Over Formal Motions

Rule 14 is reminiscent of the federal practice of substituting letters for formal motion practice (at least in the first instance). Rule 14 only applies if a particular judge's part rules do not address discovery disputes. The Rule encourages the resolution of discovery disputes through court conferences. Before any dispute is presented to the court, counsel must consult in good faith to resolve the dispute, as has been required for many years under 22 N.Y.C.R.R. § 202.7. If the parties cannot resolve the dispute, the following procedure is to be followed:

- The moving counsel is to submit a letter not exceeding three single-spaced pages to the court. The letter is to outline the parameters of the dispute, request a telephone conference and attest to the good faith conference or indicate good cause why there was no such conference.
- Any affected opposing party or nonparty must submit a response not exceeding three single-spaced pages, no later than four business days after receiving the moving letter.
- The court will then schedule a telephone or in-court conference.

The preference is for the judge, or his or her law clerks, to address the issues in a telephone conference. An attorney's failure to comply with this Rule can result in the motion being held in abeyance. Where the parties need to make a record, they can submit a formal motion.

CPLR 3126 – Sufficiency of Affirmation of Good Faith

Grasso v. McCoy, 113 A.D.3d 1096, 977 N.Y.S.2d 648 (4th Dep't 2014); "Plaintiff commenced this action seeking, inter alia, imposition of a constructive trust on real property owned by defendant. Supreme Court erred in granting defendant's motion to strike the amended complaint pursuant to CPLR 3126 based upon plaintiff's failure to respond to discovery demands. The affirmation submitted by defendant's attorney in support of the motion failed to demonstrate that he 'ha[d] conferred with counsel for [plaintiff] in a good faith effort to resolve the issues raised by the motion' (citations omitted). The conclusory assertions in the affirmation do not refer to any specific efforts or communications with plaintiff's attorney 'that would evince a diligent effort by [defendant] to resolve the discovery dispute' (citations omitted), nor do those assertions support defendant's contention that he is excused from complying with the rule because 'any effort to resolve the present dispute non-judicially would have been "futile"' (citations omitted)."

CPLR 3126 – Preamble to Commercial Division Rules

Via a January 6, 2015 Administrative Order, effective April 1, 2015, a preamble to the Commercial Division Rules was adopted (22 NYCRR §202.70 (g)), advising of the Commercial Division's intention not to "tolerate" dilatory litigation practices. The preamble cautions that Commercial Division judges will impose sanctions and "other remedies" and directs litigants and counsel to review the various rules governing sanctions that can be assessed, including:

- Rule 12, regarding non- appearance at a conference;
- Rule 13(a), regarding adherence to discovery schedules;
- Rule 24(d), which cautions appearing counsel to be fully familiar with the case in connection with motion practice;
- CPLR 3126; and
- 22 NYCRR Part 130.

CPLR 3126 – Spoliation

Lentini v. Weschler, 120 A.D.3d 1200, 992 N.Y.S.2d 135 (2d Dep't 2014): "Here, the Supreme Court providently exercised its discretion in striking the defendant's answer and awarding the plaintiff summary judgment on the issue of liability since the defendant paved over the walkway after receiving notice that the plaintiff intended to inspect it and after his own expert was afforded an opportunity to inspect the walkway prior to it being covered in cement (citation omitted). Further, the plaintiff demonstrated that the condition of the ground which was underneath the bricks was central to the prosecution of her case and that its permanent change in character preventing inspection and analysis was prejudicial, since she would be unable to rely on other evidence to prove her claims (citations omitted)."

Biniachvili v. Yeshivat Shaare Torah, Inc., 120 A.D.3d 605, 990 N.Y.S.2d 891 (2d Dep't 2014): "Since the Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence (citations omitted), it may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation (citations omitted). Here, the Supreme Court providently exercised its discretion in striking the defendant's

answers and thereupon awarding the plaintiffs summary judgment on the issue of liability pursuant to CPLR 3126. The record demonstrates that the defendant disposed of the grate involved in the accident after having received a written demand from one of the infant plaintiff's attorneys that the grate be preserved for inspection by the plaintiffs and their experts. Moreover, the plaintiffs demonstrated that they were unduly prejudiced by the defendant's conduct in disposing of the grate."

CPLR 3126 – Striking Answer

Stone v. Zinoukhova, 119 A.D.3d 928, 990 N.Y.S.2d 567 (2d Dep't 2014): "Here, the plaintiff moved to strike the answer insofar as asserted by the defendant Roger Powell (hereinafter the defendant) almost three years after commencing this action. At that time, the defendant still had not appeared for a deposition, despite numerous 'so-ordered' extensions entered into between counsel for the parties, and in violation of a court order directing him to appear for such deposition. In opposition to the motion, defense counsel's investigator stated that he had been unable to locate the defendant. Under these circumstances, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was to strike the answer insofar as asserted by the defendant and to direct an inquest against him (citations omitted)".

CPLR 3132 (Digest – June 2015)

Adoption of Commercial Division Rule 11-a's 25 Limited Interrogatories

Unless otherwise specified in the preliminary conference order, only 25 interrogatories may be served in any action, including consolidated actions. Moreover, unless otherwise provided by court order, the interrogatories are to be limited to the identity of knowledgeable witnesses; the computation of categories of damages; the existence, custodian, location and general description of material and necessary documents, including insurance agreements; and other physical evidence. Further interrogatories can be served only upon consent of the parties or by court order, for good cause shown. Finally, contention interrogatories may be served at least 30 days before the discovery cutoff, at the conclusion of other discovery, unless the court orders otherwise.

CPLR 3211(a)(1) Documentary Evidence

Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc., 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep't 2014) (emails can qualify as documentary evidence if they meet the "essentially undeniable test"; majority finds that the email at issue failed test).

CPLR 3211(a)(7) – Post *Rovello* (Digest – May 2015)

Does the Plaintiff Fail to State a Cause of Action or Simply Have None? CPLR 3211(a)(7) Motion to Dismiss

OK, a confession. For some reason, this issue has gnawed at me for years. I have written about it repeatedly. I have never been totally satisfied that the judiciary has been consistent in interpreting the reach of a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action.

The recent Fourth Department decision in *Liberty Affordable Hous. Inc. v. Maple Ct. Apts.*, 125 A.D.3d 85, 998 N.Y.S.2d 543 (4th Dep't 2015), the third in a series of recent cases, provides us with little comfort that we have finally turned the corner on this issue. But the confusion started many years ago.

A CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action is generally thought of as a motion directed to the complaint. In other words, does the complaint *state* a cause of action? However, such a motion can conceivably be used, in very limited circumstances, to

dispose of the action. In these circumstances, the motion seeks to establish that the plaintiff has no cause of action. The seminal case in this area is *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976). Unfortunately, the decision, now almost 40 years old, continues to provoke confusion and uncertainty as to what effect is to be given to affidavits submitted on such a motion, when such a motion has *not* been converted on notice to a summary judgment motion pursuant to CPLR 3211(c).

Rovello begins by giving us a blanket statement, that

> affidavits received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading.

Fair enough. A CPLR 3211(a)(7) motion should be directed to the pleadings, and consideration of the merits via affidavits should not be permitted unless the motion is converted to one for summary judgment.

But the *Rovello* court did not stop there. It began to chip away at the rule. First, "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." This does not seem troubling because it still seems concerned with the pleading itself. What follows in *Rovello*, however, is what has caused confusion:

> Modern pleading rules are "designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one" (6 Carmody-Wait, 2d, NY Prac, § 38:19; *see Kelly v Bank of Buffalo*, 32 AD2d 875, *supra*). In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems that after the amendment of 1973 affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action.

A fair reading of these statements is that a court can consider affidavits on a CPLR 3211(a)(7) motion, even if it is not converted to a summary judgment motion, and dismiss the entire action if the affidavits "conclusively establish" that plaintiff has no cause of action. However, appellate decisions after *Rovello* have not agreed on the use of affidavits on a 3211(a)(7) motion. For example, in *Henbest & Morrisey Inc. v. W. H. Ins. Agency Inc.*, 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep't 1999), the Third Department held that where there has neither been a conversion nor have the parties deliberately charted a summary judgment course, the court must "ignore the affidavits submitted by defendants." Nevertheless, years later in *La Barbera v. Town of Woodstock*, 29 A.D.3d 1054, 814 N.Y.S.2d 376 (3d Dep't 2006), the Third Department appeared to switch course. It stated that when a CPLR 3211(a)(7) motion is supported by extrinsic evidence, "the inquiry becomes whether the petitioner indeed has a cause of action . . . and the petitioner no longer can rely only on the unsupported factual allegations of the pleading, but must submit evidence demonstrating the existence of a cause of action."

This brings us to the most recent issue –whether the N.Y. Court of Appeals decision in *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364 (2013) has somehow reversed *Rovello.* The "offending" paragraph from *Miglino* states:

> Here, the complaint asserts that Bally did not "employ or properly employ life-saving measures regarding [Miglino]" after he collapsed. Bally's motion is supported by affidavits that contradict this claim, by purporting to show that the minimal steps

adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident – i.e., calling 911, administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care – were, in fact, undertaken. But, as noted before, this matter comes to us on a motion to dismiss, not a motion for summary judgment. *As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and Miglino has at least pleaded a viable cause of action at common law* (emphasis added).

So far, the Fourth Department in *Liberty Affordable Hous., Inc.*, 125 A.D.3d 85 and the First Department in *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014) have concluded that *Miglino* did not overrule *Rovello* and courts are free to consider defendant's evidentiary submissions and to dismiss an action where the submissions "conclusively establish" that there is no cause of action. Instead "given its unqualified citation to *Rovello*, *Miglino* is properly understood as a straightforward application of *Rovello*'s longstanding framework. *Miglino* was 'not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits' (20 NY3d at 351) because the evidentiary submissions were insufficiently conclusive, not because they were categorically inadmissible in the context of a CPLR 3211 (a) (7) motion." *Liberty Affordable Hous., Inc.*, 125 A.D.3d at 91. *See also Rosin v. Weinberg*, 107 A.D.3d 682, 683–84, 966 N.Y.S.2d 209 (2d Dep't 2013) (does not address *Miglino* directly, but was decided after *Miglino*).

So where does this leave us? It is disturbing that we are still debating the impact and continuing vitality of *Rovello*. Nevertheless, it would appear that in a proper case, a defendant on a CPLR 3211(a)(7) motion should consider submitting affidavits. The court then has several options. It can disregard the affidavits, determine that they do not establish conclusively that there is no cause of action, convert the motion to dismiss to summary judgment under CPLR 3211(c), or dismiss the entire action.

A plaintiff confronted with a 3211(a)(7) motion and supporting evidentiary submissions would be wise not to rely on his or her complaint alone and submit evidentiary affidavits establishing that he or she has a cause of action. In addition, if applicable, the plaintiff should argue that facts essential to justify opposition are unavailable to him or her pursuant to CPLR 3211(d).

The CPLR 3211(a)(7) motion presents a unique opportunity to a defendant to dispose of an action before discovery, saving great expense and perhaps catching a plaintiff unprepared. Conversely, plaintiffs must be cognizant of these dangers and avoid merely resting on their laurels – or their pleadings!

CPLR 3211(a)(8) – Preserving Jurisdictional Defenses

Edwards, Angell, Palmer & Dodge, LLP v. Gerschman, 116 A.D.3d 824, 984 N.Y.S.2d 392 (2d Dep't 2014): "Further, to the extent that the Supreme Court denied the defendant's motion based on its conclusion that he waived his defense predicated on lack of personal jurisdiction, this was error. Since the defendant both asserted this affirmative defense in his answer and moved pursuant to CPLR 3211(a)(8) to dismiss the complaint on this ground, his participation in discovery did not result in the waiver of this defense (citations omitted)."

CPLR 3212 – Medical Provider's Burden of Proof in No-Fault Insurance Case (Digest – August 2015)

Viviane Etienne Med. Care v. Country-Wide Ins. Co., 2015 NY Slip Op 04787 (June 10, 2015): Majority holds that in no-fault insurance action, a medical provider sustains burden by establishing that payment of no-fault benefits was overdue and it mailed completed proof of

claim to insurer. Dissents maintained that plaintiff should have to establish that loss arose from car accident and expenses were medically necessary.

CPLR 3212 - Brill – Timeliness of Motion

Williams v. Wright, 119 A.D.3d 670, 990 N.Y.S.2d 60 (2d Dep't 2014): "The reason why an untimely motion for summary judgment may be considered if another party made a motion on nearly identical grounds is that, pursuant to CPLR 3212 (b), the court has the authority, on a motion for summary judgment, to search the record and award relief to a nonmoving party (citations omitted). In the instant case, the MTA defendants, the original movants, established as a matter of law that they were not at fault in the happening of the accident. However, the fact that the MTA defendants were not at fault in the happening of the accident did not mean that the LIPA defendants were at fault and, therefore, that the plaintiff was entitled to summary judgment against the LIPA defendants. Accordingly, the plaintiff's motion for summary judgment on the issue of liability against the LIPA defendants should have been denied as untimely."

CPLR 3212 - Brill – Timeliness of Motion

Freire-Crespo v. 345 Park Ave. L.P., 122 A.D.3d 501 (1st Dep't 2014): "The controlling preliminary conference order dictated the … 120-day time limit. The reassignment of the matter thereafter to a part whose rules provide for a standard 60-day time limit did not serve to eliminate that provision of that preliminary conference order, in the absence of a further order or directive explicitly providing for a reduced time limit, or some other means of directing that the time limits of the new part's rules would supersede the preliminary conference order. Fine v One Bryant Park, LLC (84 AD3d 436, 437 [1st Dept 2011]) does not hold to the contrary; it did not involve a reassignment after the issuance of a preliminary conference order."

CPLR 3212 – Failing to (Initially) Attach Pleadings to Motion

Vazquez v. Gun Hill Assoc., LLC, 122 A.D.3d 723, 996 N.Y.S.2d 645 (2d Dep't 2014): "The Supreme Court denied the defendant's motion for summary judgment on the basis that it had failed to submit a complete set of the pleadings with its motion, as required by CPLR 3212(b). The court reasoned that, since the defendant had included an amended complaint with its motion papers, it was required to include an amended answer. However, the defendant could not submit an amended answer because no such pleading existed. Accordingly, the Supreme Court should not have denied the motion on the basis of a purported failure to comply with CPLR 3212(b)."

Long Is. Pine Barrens Socy., Inc. v. County of Suffolk, 122 A.D.3d 688, 996 N.Y.S.2d 162 (2d Dep't 2014): "Although the Supreme Court denied the plaintiffs' motion for summary judgment on the ground that they failed to submit a copy of the pleadings with their motion papers, we nonetheless exercise our discretion to reach the merits. Notwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to 'disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced' (citations omitted). Although the plaintiffs failed to include a copy of the pleadings with their motion for summary

judgment, the defendants submitted a copy of the pleadings in connection with their opposition and cross motion for summary judgment. Under the particular circumstances presented here, we find that the record is sufficiently complete, and there is no proof that a substantial right of the defendants was impaired by the plaintiffs' failure to submit copies of the pleadings (citations omitted)."

CPRL 3213 – Collusion Defense Barred By Terms of Absolute and Unconditional Guaranty (Digest – August 2015)

Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro, 2015 NY Slip Op 04753 (June 9, 2015)

CPLR 3213 – Use of Summary Judgment in Lieu of Complaint

Bhatara v. Futterman, 122 A.D.3d 509 (1st Dep't 2014): "Plaintiff made a prima facie showing of his entitlement to summary judgment in lieu of complaint by producing the note executed by defendant for a $200,000 loan and proof of defendant's failure to pay in accordance with the note's terms (citation omitted). In opposition, defendant failed to raise a triable issue of fact. The court was not required to consider any extrinsic documents referenced in the note (citation omitted). That the note was secured by a combined 3% membership interest in a business owned by defendant does not 'alter its essential character as an instrument for the payment of money only, and accordingly, is immaterial to plaintiff's right to relief pursuant to CPLR 3213' (citation omitted). We note that in paragraph 14 of the note, defendant expressly agreed that his obligations to make payment under the note 'shall at all times continue to be absolute and unconditional in all respects, and shall at al[l] times be valid and enforceable irrespective of any other agreements . . . which might otherwise constitute a defense to th[e] [n]ote.' Further, defendant agreed in paragraph 9 of the note that no release of any security for the payment of the note shall affect his liability for payment under the note."

CPLR 3213 – Use of Summary Judgment in Lieu of Complaint – Defects in Notice of Motion

Segway of N.Y., Inc. v. Udit Group, Inc., 120 A.D.3d 789 (2d Dep't 2014): CPLR 3213 notice of motion set return date prior to expiration of 30 day period to appear and copies of notice of motion served on defendants contained misstatement of location at which motion would be heard. "As such, the motion for summary judgment in lieu of complaint was made returnable to a location in Mineola at which the Supreme Court was not located, and at which the motion could not have been opposed. These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the defendants (citations omitted). Accordingly, these defects constitute 'jurisdictional defect[s] that courts may not overlook' pursuant to CPLR 2001 (citations omitted). Since the Supreme Court failed to acquire personal jurisdiction, 'all subsequent proceedings are thereby rendered null and void' (citation omitted), and the default judgment entered against the defendants is 'a nullity' (citations omitted)."

CPLR 3215 – Default Judgment – Consumer Credit Transactions

There are special notice and proof of default rules in consumer credit transactions, which were promulgated September 15, 2014 and were effective October 1, 2014. See Matter of Pinpoint Tech., LLC, 17339/10, NYLJ 1202677620027, at *1 (Civ., RI, J. Straniere Decided November 18, 2014). New rules were promulgated September 15, 2014, effective October 1, 2014.

CPLR 3216 – Neglect to Prosecute – 90 Day Demand

Altman v. Donnenfeld, 119 A.D.3d 828, 990 N.Y.S.2d 542 (2d Dep't 2014): "Here, upon receipt of the appellants' 90-day notice, the respondents did not file a note of issue within the 90-day period. However, the appellants refused certain requests to schedule a continued deposition of the injured respondent and, after the 90-day notice was served, both parties demonstrated an intent to proceed with discovery. Further, there is no evidence that the appellants were prejudiced by the minimal delay involved in this case or that there was a pattern of persistent neglect and delay in prosecuting the action, or any intent to abandon the action. Under these circumstances, the Supreme Court providently exercised its discretion in excusing the respondents' failure to meet the deadline for filing the note of issue (citations omitted)."

Belson v. Dix Hills A.C., Inc., 119 A.D.3d 623, 990 N.Y.S.2d 49 (2d Dep't 2014): "In this case, the plaintiff demonstrated that he did not intend to abandon the action and that there were ongoing discovery proceedings conducted during the time period involved. Moreover, there was no evidence that the defendants were prejudiced by the plaintiff's failure to file a note of issue within the relevant 90-day period. Finally, the plaintiff demonstrated the potential merit of his case by submitting the transcripts of the depositions of the parties and a nonparty witness, as well as documentary evidence. Under these circumstances, it cannot be said that the Supreme Court improvidently exercised its discretion in denying the defendants' motion to dismiss the complaint for failure to prosecute the action."

CPLR 3216 - CPLR 3216 Amendment – Neglect to Prosecute (Digest – May 2015)

Court Demands Scrutinized

Cadichon v. Facelle, 18 N.Y.3d 230, 938 N.Y.S.2d 232 (2011) highlighted one of those disturbing non-sanctioned court practices. In *Cadichon*, a stipulation signed by the court and counsel for the parties provided for a deadline to file the note of issue. Additionally, plaintiff's counsel was served with and signed a demand for service and filing of the note of issue. Plaintiff did not file the note of issue by the deadline, and four days after the deadline, "unbeknownst to the parties," and without a motion or court order, the case was dismissed by the court. Ultimately, the Court of Appeals found that the "ministerial dismissal" without a motion as required by CPLR 3216(b)(3) could not serve as a basis for dismissal for want of prosecution. Responding at least in part to the *Cadichon* decision, CPLR 3216 was amended (eff. Jan. 1, 2015, to provide that a court dismissal under CPLR 3216 can be made only with "notice to the parties," and when the court serves a written demand, it is required to "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." In addition, prior to the amendment, one of the requirements under CPLR 3216 was that there could not be a dismissal until one year had elapsed since issue was joined. The amendment provides an alternative timing requirement where a preliminary conference (PC) order has been issued. That is, there can be no dismissal unless the greater of one year after joinder of issue or six months after the PC order has been issued, has elapsed.

Interestingly, while the *Cadichon* Court refused to permit a CPLR 3216 dismissal, it did not express discomfort with ministerial dismissals, which are neither sanctioned by statute nor rule. These types of hidden practices present dangerous stumbling blocks to practicing attorneys and should be eliminated. And while such dismissals might be ministerial to the court, they are anything but to the litigants.

CPLR 3408 – "Good Faith" Mandatory Settlement Conferences in Residential Mortgage Foreclosure Actions – Generates a lot of attention!

- CitiBank, N.A. v. Barclay, 124 A.D.3d 174, 999 N.Y.S.2d 375 (1st Dep't 2014) (Good faith is a two way street and the lender and borrower are obligated to cooperate with each other to enable the achievement of a reasonable resolution. Appellate Division reverses lower court sanction against lender barring it from collecting any interest from July 7, 2011 until the date of a final, supported determination on the homeowner's loan modification application and the release of the case from the settlement part. Court finds lower court ignored homeowner's actions that contributed to the delays. "Supreme Court gave no weight to Barclay's conduct, ignoring the reciprocal obligations imposed by CPLR 3408(f). While this Court is mindful of the remedial nature of CPLR 3408, the goals of the statute would not be served if we were to ignore the role that Barclay's own conduct played in delaying a resolution of this action. In light of the foregoing, we need not consider plaintiff's alternative arguments that even if the lack of good faith finding is supported by the record, the court lacked the statutory or regulatory authority to impose sanctions under CPLR 3408, and that in any event the sanctions imposed impermissibly rewrote the terms of the parties' loan agreement and were excessive.").
- U.S. Bank N.A. v. Smith, 123 A.D.3d 914 (2d Dep't 2014) ("Courts are authorized to impose sanctions for violations of CPLR 3408(f) (citation omitted). However, 'CPLR 3408(f) does not set forth any specific remedy for a party's failure to negotiate in good faith' (citation omitted). In such absence, 'courts have resorted to a variety of alternatives in an effort to enforce the statutory mandate to negotiate in good faith' (*id.*). The sanction imposed in this case, to-wit, barring the plaintiff from collecting interest on the mortgage loan for the period between October 5, 2012, and July 5, 2013, was a provident exercise of the Supreme Court's discretion (citation omitted).").
- Deutsche Bank Natl. Trust Co. v. Islar, 122 A.D.3d 566, 996 N.Y.S.2d 130 (2d Dep't 2014) ("Since Justice Arthur Schack continues to flagrantly ignore this Court's precedent, as articulated in Wells Fargo Bank Minn., N.A. v Mastropaolo (42 AD3d at 239), holding that the defense of lack of standing is waived if not raised by the defendant in an answer or pre-answer motion to dismiss (citations omitted), we deem it appropriate to remit the matter to the Supreme Court, Kings County, for further proceedings before a different Justice.");
- US Bank N.A. v. Williams, 121 A.D.3d 1098, 995 N.Y.S.2d 172 (2d Dep't 2014) ("Contrary to US Bank's contention, the Supreme Court providently exercised its discretion canceling certain interest accrued on the mortgage note after June 2010. 'In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party' (citations omitted). The record demonstrates that the foreclosing parties repeatedly represented to the referee and to Williams that they were considering Williams for HAMP loan modification and repeatedly demanded that Williams submit additional documentation in support of that application, notwithstanding the prohibition against such a modification in the PSA, which they did not disclose until approximately 13 months after negotiations began. Under these circumstances, the Supreme Court providently exercised its discretion in finding that US Bank was not entitled to collect interest accrued as a result of its wrongful conduct (citations omitted). However, the Supreme Court improvidently exercised its discretion in canceling interest

accrued between June 2010 and until such date as the parties agreed to loan modification, as the Supreme Court lacked authority to force US Bank to agree to modify the mortgage note (citations omitted). Rather, the court should have directed cancellation of interest accrued between June 2010 and the date on which settlement negotiations recommence (citations omitted). Further, the Supreme Court erred in barring US Bank from charging Williams an attorney's fee and costs incurred as a result of the action, as that provision of the order constituted an improper attempt to rewrite the mortgage note. Instead, upon its finding that the Referee's report was supported by the record, that sanctions were appropriate, and, in effect, that US Bank still was obligated pursuant to CPLR 3408 (f) to negotiate in good faith, the court should have barred US Bank from charging Williams an attorney's fee and costs incurred between the date of the initial settlement conference and the date on which settlement negotiations recommence (citations omitted).").

- See also HSBC Bank USA, N.A. v. Sene, 121 A.D.3d 755, 994 N.Y.S.2d 352 (2d Dep't 2014) (lower court improperly *sua sponte* stayed proceedings to clear up standing issue not raised by plaintiff in her answer or pre-answer motion to dismiss).
- US Bank N.A. v. Sarmiento, 121 A.D.3d 187, 991 N.Y.S.2d 68 (2d Dep't 2014) ("Although CPLR 3408 is silent as to the sanctions or remedies that may be employed for violation of the good faith negotiation requirement, '[i]n the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case' (Wells Fargo Bank, N.A. v. Meyers, 108 AD3d at 23). …We are cognizant that, in a foreclosure action, '[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert' (citations omitted). Thus, in fashioning a remedy for a violation of the good-faith negotiation requirement set forth in CPLR 3408(f), courts should be mindful not to rewrite the contract at issue or impose contractual terms which were not agreed to by the parties. As the nature of the sanction in this case is unchallenged, our determination herein should not be construed as a deviation from the above-stated principle.").
- When originally enacted, the statute only applied to foreclosure actions involving a high cost loan consummated between January 1, 2003 and September 1, 2008 or a subprime or nontraditional home loan. Federal Natl. Mtge. Assn. v. Anderson, 119 A.D.3d 892, 991 N.Y.S.2d 85 (2d Dep't 2014) ("In addition, although the current version of CPLR 3408 applies the settlement conference requirement to 'any residential foreclosure action involving a home loan . . . in which the defendant is a resident of the property' (CPLR 3408[a]), that version did not become effective until after this action was commenced (citations omitted). As the plaintiff correctly contends, the original version of CPLR 3408, enacted in 2008, was in effect at the time this action was commenced (citation omitted). Accordingly, the original version of the statute is applicable to this case (citation omitted). The original version of the statute 'applied only to foreclosure actions involving high-cost home loans or subprime or nontraditional home loans' (citations omitted). Since the loan at issue in this case did not constitute a high-cost home loan, a subprime home loan, or a nontraditional home loan, as those terms were defined in the original version of the statute, the plaintiff was not required to participate in a settlement conference at all (citation omitted).").

- Evans v. Argent Mtge. Co., LLC, 120 A.D.3d 618, 992 N.Y.S.2d 49 (2d Dep't 2014) ("The Supreme Court's determination that the mortgage was invalid prejudiced Citifinancial in that it was never afforded the opportunity to present evidence refuting the court's sua sponte determination that a prior power of attorney was not recorded, or that if such defect existed, it did not affect Citifinancial's rights (citations omitted). We note that the Supreme Court's determination, in effect, vitiated substantive rights of Citifinancial, which was no longer able to litigate its rights in the dismissed Action No. 2, without giving it the opportunity to be heard on the issue decided (citations omitted)…Accordingly, under the circumstances of this case, we deem it appropriate to remit the matter to the Supreme Court, Kings County, for further proceedings before a different Justice (citations omitted).").
- Bank of N.Y. v. Castillo, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dep't 2014) ("The Supreme Court also erred in, sua sponte, directing dismissal of the action in its entirety with prejudice (citations omitted). …Here, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint. Moreover, the plaintiff was not 'given fair warning that such a sanction was even under consideration,' as there is no indication that it was advised that the borrower's motion was being revived or that the court was independently considering dismissal based, apparently, on the plaintiff's conduct in the intervening two years (citations omitted). In addition, the Supreme Court's 'consideration of facts outside of the record, absent the parties' consent, constituted error' (citation omitted). In light of the Supreme Court's intemperate remarks, which exhibited bias against the plaintiff, and its improper reliance on its personal opinion of the federal bailout of mortgage lenders rather than on the evidence before it, we remit the matter to the Supreme Court, Orange County, for further proceedings before a different Justice (citations omitted).").
- Bank of N.Y. v. Cepeda, 120 A.D.3d 451, 989 N.Y.S.2d 910 (2d Dep't 2014) ("Moreover, the Supreme Court abused its discretion in, sua sponte, directing dismissal of the complaint and the cancellation of the notice of pendency filed against the subject property for lack of standing. …Here, the Supreme Court was not presented with extraordinary circumstances warranting sua sponte dismissal of the complaint and cancellation of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing (citations omitted). Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court (citations omitted). Under the circumstances of this case, and in light of our past admonition in HSBC Bank USA, N.A. v Taher (104 AD3d 815), we deem it appropriate to remit the matter to the Supreme Court, Kings County, for further proceedings before a different Justice.").
- Deutsche Bank Natl. Trust Co. v. Meah, 120 A.D.3d 465, 991 N.Y.S.2d 92 (2d Dep't 2014) ("In this mortgage foreclosure action, the Supreme Court, in an order dated June 19, 2009, directed a reference to 'ascertain and compute the amount due to the plaintiff.' That order was based, in part, on an affidavit submitted by the plaintiff that had been executed by one Keri Selman and had been sworn to on May 8, 2008. Counsel for the plaintiff, upon review of the documents that had previously been submitted, subsequently determined that the plaintiff was unable to confirm either the validity of the process by which the Selman affidavit had been notarized or that Selman had undertaken a 'proper

review of the records,' as required by Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge. The plaintiff then submitted the motion now under review, in which it sought, inter alia, a new order of reference to compute the amount owed to it based on new papers. The Supreme Court, inter alia, in effect, denied that branch of the motion which was for a new order of reference and, sua sponte, directed dismissal of the complaint and the cancellation of a certain notice of pendency. …The fact that the plaintiff's attorney attempted to comply, in good faith, with an Administrative Order of the Chief Administrative Judge that did not exist at the time that the action was commenced, or at the time of the plaintiff's prior motion for a reference, does not qualify as such an 'extraordinary circumstance.' Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff's attorney discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action (citation omitted). Accordingly, the plaintiff is entitled to the issuance of a new order of reference.").

- Bank of N.Y. v. Mulligan, 119 A.D.3d 716, 989 N.Y.S.2d 295 (2d Dep't 2014) ("The Supreme Court erred when it, sua sponte, directed the dismissal of the complaint and the cancellation of the notice of pendency filed against the subject property for lack of standing (citation omitted). …'[A] party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court' (citations omitted). Here, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint and cancellation of the notice of pendency.").
- *US Bank N.A. v. Sarmiento* 121 A.D.3d 187, 1991 N.Y.S.2d 68 (2d Dep't 2014) (the Second Department set forth the "proper standard" to determine if a party acted in good faith under CPLR 3408(f): "Therefore, we hold that the issue of whether a party failed to negotiate in 'good faith' within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution. We reject the plaintiff's contention that, in order to establish a party's lack of good faith pursuant to CPLR 3408(f), there must be a showing of gross disregard of, or conscious or knowing indifference to, another's rights. Such a determination would permit a party to obfuscate, delay, and prevent CPLR 3408 settlement negotiations by acting negligently, but just short of deliberately, e.g., by carelessly providing misinformation and contradictory responses to inquiries, and by losing documentation. Our determination is consistent with the purpose of the statute, which provides that parties must negotiate in 'good faith' in an effort to resolve the action, and that such resolution could include, 'if possible,' a loan modification (citations omitted). Where a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution.")

CPLR 4503 – Attorney- Client Privilege (Digest – May 2015)

Watch What You Say – and When You Say It!

Attorney Statements Made Prior to Commencement of Litigation Protected by Qualified Privilege if Pertinent to Good-Faith Anticipated Litigation

As lawyers know, material and pertinent statements made by an attorney in connection with an action are absolutely privileged and protected from liability for defamation. But how about statements made before there is a litigation? Are they protected? Resolving a conflict among the Departments of the Appellate Division, the N.Y. Court of Appeals held in *Front v. Khalil*, 24 N.Y.3d 713, 4 N.Y.S.3d 581, 28 N.E.3d 15 (2015), that statements made by attorneys prior to the commencement of litigation are protected by a qualified privilege if the statements are pertinent to good-faith anticipated litigation. Thus, a defamation cause of action based on those statements cannot lie.

The statements at issue in this action were made in an April 2011 letter sent by plaintiff Front's counsel to defendant Khalil. The letter accused Khalil, plaintiff's former director of engineering of some really bad things, including: attempting to steal plaintiff's confidential and proprietary information; engaging in an illegal competing side business, which diverted business opportunities from plaintiff; misappropriating trade secrets; and violating codes of conduct and the duty of loyalty. The cease and desist letter sought the return of proprietary information and demanded that Khalil not contact plaintiff's clients. A similar cease and desist letter was sent to Khalil's subsequent employer, one of plaintiff's competitors, enclosing the earlier letter to Khalil. Six months later, when neither Khalil nor his employer complied, plaintiff brought this action against Khalil and his employer. Khalil then brought a third-party action against Front's counsel, alleging defamation and other claims arising out of the offending correspondence.

The critical issue was whether the cease and desist letter was protected as privileged. The Supreme Court found the letter to be "absolutely" privileged, as it clearly related to litigation and ruled the six-month gap between sending the letter and commencing the action was of no consequence. The Appellate Division affirmed, concluding that the statements in the letter were "absolutely" privileged since they were made in the context of "prospective litigation."

While the N.Y. Court of Appeals affirmed, it found that a qualified, rather than an absolute privilege, applied to the statements because they were made prior to litigation.

Since its 1897 decision in *Youmans v. Smith*, 153 N.Y. 214 (1897), the Court has held that attorney statements made in the course of an action, which "are material and pertinent to the questions involved," are absolutely immune from defamation claims. What had not been directly addressed by the Court was whether a privilege applied to statements made in connection with *prospective* litigation. The Court noted that the Appellate Division Departments had split on this issue and concluded:

> The rationale supporting the application of privileged status to communication made by attorneys during the course of litigation is also relevant to pre-litigation communication. When litigation is anticipated, attorneys and parties should be free to communicate in order to reduce or avoid the need to actually commence litigation. Attorneys often send cease and desist letters to avoid litigation. Applying privilege to such preliminary communication encourages potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention. Communication during this pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit.

However, the Court was unwilling to extend an absolute privilege to such pre-action statements, instead opting for a qualified privilege, applying only to statements pertinent to a good-faith anticipated litigation:

> We recognize that extending privileged status to communication made prior to anticipated litigation has the potential to be abused. Thus, applying an absolute privilege to statements made during a phase prior to litigation would be problematic and unnecessary to advance the goals of encouraging communication prior to the commencement of litigation. To ensure that such communications are afforded sufficient protection the privilege should be qualified. Rather than applying the general malice standard to this pre-litigation stage, the privilege should only be applied to statements pertinent to a good-faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations. Therefore, we hold that statements made prior to the commencement of an anticipated litigation are privileged, and that the privilege is lost where a defendant proves that the statements were not pertinent to a good-faith anticipated litigation.

The Court concluded that at the time the letters were sent, Front's attorneys had a good-faith basis to anticipate litigation and the statements were pertinent to the anticipated litigation. Attorneys drafting such letters on behalf of their clients should be careful and prepared to establish that the statements made were pertinent to a good-faith anticipated litigation. Otherwise, those statements might not be protected and instead be viewed as actionable.

CPLR 4503 – Attorney-Client Privilege – New York Law Applies to Documents in Switzerland

Sebastian Holdings, Inc. v. Deutsche Bank AG, 123 A.D.3d 437 | 998 N.Y.S.2d 326 (1st Dep't 2014): Deutsche Bank withheld or redacted documents reflecting communications between employees and in house counsel of its private wealth management division, Deutsche Bank Suisse in Geneva Switzerland. Plaintiff moved to compel, arguing that Swiss law applied and it did not recognize attorney-client privilege with communications with in-house counsel. The Appellate Division agreed with the lower court that stipulated orders entered into by the parties initiating the Hague Convention process directed that discovery was to proceed under New York Civil Practice Law and Rules were dispositive on the issue of which law to apply. "We agree with the motion court that the stipulated orders, directing that discovery is to proceed under the CPLR, are dispositive. Indeed, the Request specifically states that Deutsche Bank would prepare a privilege log 'in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions.' We reject plaintiff's assertion that this language creates a reservation of rights on privilege challenges; on the contrary, the language merely allows plaintiff to challenge Deutsche Bank's privilege designation and redactions. Accordingly, the motion court properly concluded that privilege determinations are governed by New York law, as the parties stipulated."

CPLR 4503 – Attorney-Client Privilege – Common Interest Privilege

The traditional rule is that the presence of a third-party waives the attorney-client privilege. See People v. Harris, 57 N.Y.2d 335, 442 N.E.2d 1205, 456 N.Y.S.2d 694 (2d Dep't 1982); People v. Buchanan, 145 N.Y. 1, 39 N.E. 846 (1895); Hyatt v. State of Cal. Franchise Tax Bd., 105 A.D.3d 186, 205, 962 N.Y.S.2d 282 (2d Dep't 2013); HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64 (S.D.N.Y. 2009). The common-interest privilege is an exception to

that rule and provides that the privilege will not be destroyed even if a third party is present at the time of the communication between attorney and client "if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 124 A.D.3d 129, 998 N.Y.S.2d 329 (1st Dep't 2014). The doctrine requires that (1) the communication qualify for protection under the attorney-client privilege, and (2) the communication be made for the purpose of furthering a legal interest or strategy common to the parties. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 124 A.D.3d 129, 998 N.Y.S.2d 329 (1st Dep't 2014); U.S. Bank Natl. Assn. v. APP Intl. Fin. Co., 33 A.D.3d 430, 823 N.Y.S.2d 361 (1st Dep't 2006). There is a conflict, however, over whether there is a third requirement, that is, that the communication must be made in connection with a pending action or "in reasonable anticipation of litigation." The Second Department finds there is such a requirement. See e.g., Hyatt v. State of Cal. Franchise Tax Bd., 105 A.D.3d 186, 205, 962 N.Y.S.2d 282 (2d Dep't 2013). Recently, however, the First Department found to the contrary. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 124 A.D.3d 129, 998 N.Y.S.2d 329 (1st Dep't 2014).

CPLR 4504 - People v. Rivera, 2015 N.Y. Slip Op. 03764 (May 5, 2015) (Digest – July 2015)

Psychiatrist Reveals Defendant's Admission at Trial

Right or Obligation to Reveal Confidential Information Does Not Abrogate Privilege

In *People v. Rivera*, 2015 N.Y. Slip Op. 03764 (May 5, 2015), a child, in her mother's presence, told the pediatrician that she had been sexually abused by the defendant. The pediatrician then reported the accusation to the Administration for Children's Services (ACS). The child's mother informed the defendant's mother of the accusation, who then relayed that information to the defendant. The defendant was subsequently admitted to Columbia Presbyterian Hospital's psychiatric emergency room, complaining of depression and suicidal thoughts. There, the defendant told his treating psychiatrist that he had sexually abused the child.

After the People moved to subpoena the defendant's psychological records, including any admissions of guilt, the lower court reviewed the records in-camera and ruled that although the defendant's admission was privileged, it was admissible at trial because the psychiatrist had disclosed the abuse to ACS. After the child testified to the abuse at trial, the People called the defendant's psychiatrist who testified that the defendant had admitted to sexually abusing the child. Despite the defendant's denial of any wrongdoing, he was convicted and sentenced to 13 years to life.

The Appellate Division unanimously reversed the judgment and remanded the case for a new trial, finding that the trial court erred in permitting the psychiatrist to testify about the defendant's admission.

The Court of Appeals affirmed, holding that the trial court ruling violated the physician-patient privilege. The People argued that since the legislature established several exceptions to the privilege, the defendant could not have reasonably expected his statements to remain confidential. The Court rejected this argument, finding that even if a doctor may or must by law report instances of abuse or threatened future harm to authorities, including confidential information, the evidentiary privilege under CPLR 4504(a) is not abrogated. The Court noted that while confidentiality is an ethical requirement essential to treatment, privilege is a rule of evidence protecting communications and medical records. Moreover, the Court maintained that if the legislature wished to carve out another exception it would have done so; in fact, CPLR 4504 requires certain physicians and other professionals to disclose information under certain circumstances. The Court stressed that the physician-patient privilege should be

afforded a "broad and liberal construction"; there is a difference between admitting a statement in a child protection proceeding and introducing a statement at the defendant's criminal trial; and there is no express exception applicable here. Thus, the Court held that the admission of the psychiatrist's testimony violated CPLR 4504(a), it would not curtail the privilege here as the People requested, and the error was not harmless.

CPLR 5015, 317 – Vacating Default

Avila v. Distinctive Dev. Co., LLC, 120 A.D.3d 449, 991 N.Y.S.2d 89 (2d Dep't 2014): "The Supreme Court determined that Distinctive deliberately attempted to avoid notice of the summons, based upon the fact that the New York Secretary of State mailed a copy of the summons and complaint to Distinctive by certified mail, in time for it to defend the action, and that this mailing was returned 'unclaimed.' However, the Supreme Court should not have made this determination without conducting a hearing as to whether Distinctive received notice of the dispatch or delivery of the certified mail from the Secretary of State (citations omitted). Accordingly, we remit the matter to the Supreme Court, Queens County, for a hearing on the issue of whether Distinctive received notice of the certified mail sent to it by the Secretary of State, and for a new determination thereafter on that branch of the defendants' motion which was pursuant to CPLR 317 to vacate of much of the order entered April 10, 2012, as granted that branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against Distinctive."

Bennett v. Patel Catskills, LLC, 120 A.D.3d 458, 990 N.Y.S.2d 594 (2d Dep't 2014): "The process server's affidavit of service created a rebuttable presumption that the plaintiffs served the defendant by delivering a copy of the summons and complaint to the Secretary of State (citations omitted). In opposition, the defendant denied receipt of the summons and complaint. The fact that the summons and complaint, which had been sent by certified mail, return receipt requested, to the address on file with the New York Secretary of State, had been returned to the Secretary of State as 'unclaimed,' raised a triable issue of fact as to whether the defendant received notice of the certified mail sent to it by the Secretary of State, and the matter must be remitted for a hearing and new determination of that issue and of the motion and cross motion (citations omitted)."

CPLR 5015, 317 – Vacating Default

Note that a court can consider CPLR 317 as a basis to vacate a default even though the defendant did not cite to that section. See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138, 501 N.Y.S.2d 8, 492 N.E.2d 116 (1986); Gershman v. Midtown Moving & Storrage, Inc., 123 A.D.3d 974 (2d Dep't 2014) ("Although the defendant did not cite to CPLR 317 in opposition to the plaintiffs' motion, under the circumstances of this case, this Court may consider CPLR 317 as a basis for vacating the default (citations omitted)… Here, the record reveals that neither the defendant nor its agent received actual notice of the summons, which was delivered to the Secretary of State, in time to defend itself against this action (citations omitted). There is no basis in the record upon which to conclude that the defendant was deliberately attempting to avoid service of process, especially since the plaintiffs had knowledge of the defendant's actual business address (citations omitted). In addition, the defendant met its burden of demonstrating the existence of a potentially meritorious defense (citation omitted). Accordingly, the Supreme Court properly denied the plaintiffs' motion for leave to enter a default judgment against the defendant.").

CPLR 5222/5225 – Separate Entity Rule

In *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014), the New York State Court of Appeals ruled that the separate entity rule is alive and well. Specifically, it was asked by the United States Court of Appeals for the Second Circuit to answer a certified question as to "whether the 'separate entity' rule prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor's assets held in foreign branches."

The *Motorola* case arose out of two judgments entered in plaintiff's favor, one for $2.1 billion in compensatory charges, the other for an additional $1 billion in punitive damages against the Uzan family in connection with a loan it made to the Uzans. The Uzans went to great lengths to avoid satisfying the judgments, and thus Motorola pursued collection through efforts to attach the Uzans' assets held by third parties. The Southern District of New York issued an order restraining the Uzans and third parties with notice from transferring the Uzans' property. Motorola served the restraining order on the defendant Standard Chartered Bank's (SCB) New York branch. SCB is a U.K. incorporated and headquartered foreign bank, which had no connection to the loan or the underlying litigation. After locating none of the Uzans' property in its New York branch, SCB located the Uzans' assets approximating $30 million in its United Arab Emirates (U.A.E) branches and SCB froze those assets. However, the U.A.E and Jordan bank regulators intervened, with the U.A.E Central Bank unilaterally debiting $30 million from SCB's account with the bank. SCB then sought relief from the restraining order in the district court claiming that the restraint violated U.A.E law and subjected SCB to double liability. Relying on the separate entity rule, SCB also asserted that service of the restraining order on SCB's New York branch was ineffective against assets located in the branch's foreign branches. Motorola argued in opposition that the separate entity rule had been abrogated by the *Koehler* decision. The district court agreed with SCB that the separate entity rule precluded reaching the foreign assets but stayed the release of the restraint until the Second Circuit ruled on Motorola's appeal. The Second Circuit then certified the question referred to above.

In answering the certified question in the affirmative, a majority of the Court reviewed the three basic rationale for the separate entity rule:

> First, courts applying the rule have emphasized the importance of international comity and the fact that "any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations" (citations omitted). Second, it was viewed as necessary to protect banks from being "subject . . . to competing claims" and the possibility of double liability (citations omitted), a concern strenuously voiced by the amici in this case. And third, the rule has been justified based on the "intolerable burden" that would otherwise be placed on banks to monitor and ascertain the status of bank accounts in numerous other branches (citations omitted).

The majority noted that the separate entity rule has been part of the common law since 1916. It emphasized that its decision in *Koehler v. Bank of Bermuda Ltd*., 12 N.Y.3d 533, 883 N.Y.S.2d, 763, 911 N.E.2d 825 (2009) did not discuss or decide the continued validity of the rule because in that case the foreign bank did not raise the issue and the case did not involve bank branches or bank account assets. The majority rejected the dissent's and Motorola's argument that because nothing in CPLR 5222 embodies the separate entity rule, it is incompatible with the CPLR. The Court stressed that the rule was a common law principle predating the CPLR. Finally, notwithstanding Motorola's "invitation," the Court refused to cast aside the separate

entity rule, citing the facts that the rule had been part of the common law for nearly a century, international banks have taken the rule into account when deciding to open New York branches, and the underlying reasons for adoption of the rule-- such as the risk of competing claims and the possibility of double liability, promoting international comity and avoiding conflicts among competing legal systems – are still true today.

The dissent criticized the majority for adopting expressly "for the first time" the separate entity rule, which "has no statutory basis and was initially formulated by the lower courts nearly a century ago based on a rationale that has no application to these modern times. In choosing this outmoded rule, the majority has engaged in improper judicial legislation, avoided the clear import of our recent decision in Koehler v. Bank of Bermuda (12 NY3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 [2009]) and given short shrift to the compelling public policy reasons to reject such a rule."

The dissent was particularly concerned that the majority's decision permitted the judgment debtors to evade enforcement proceedings and will permit banks doing business in New York to shield customer account held in branches located outside of the United States. The dissent stressed that CPLR Article 52 neither expressly nor impliedly incorporates the separate entity rule, the rule is obsolete and runs counter to public policy, the majority's position cannot be reconciled with its decision in *Koehler*, and regardless, while the common law is important, the Court should be flexible when the world has changed or evolved. For a more complete discussion, see Weinstein, Korn & Miller 5225.16.

CPLR 5511 – Aggrieved Party

Matter of Agam B. (Janna W.), 121 A.D.3d 1109, 996 N.Y.S.2d 632 (2d Dep't 2014): "In a child neglect proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Richroath, J.), dated August 27, 2013, which granted the motion of the attorney for the child to appoint a guardian ad litem for the child pursuant to CPLR 1201 and 1202 during the pendency of the proceeding beyond his 18th birthday. Ordered that the appeal from the order is dismissed, without costs or disbursements, as the mother is not aggrieved thereby. A person is aggrieved within the meaning of CPLR 5511 'when he or she asks for relief but that relief is denied in whole or in part,' or, when someone 'asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part' (citations omitted). Here, the mother did not 'ask[ ] for relief,' and no party 'ask[ed] for relief' against her (citations omitted). Moreover, when the subject child reached the age of majority, the mother lost the legal right to make decisions on the child's behalf, especially medical decisions, unless she obtained some form of court-authorized guardianship (citations omitted), and here, she did not do so. Accordingly, the mother was not aggrieved by the order appealed from."

CPLR 5522/ 3001 (Digest – May 2015)

An Expired Order Lives On

The Appeal of a Protection Order Does Not Become Moot Merely Because It Expired While the Appeal Was Pending

A court can rule only when there is an actual controversy among the parties to a litigation. Thus, courts cannot decide moot, hypothetical or academic questions. So what happens if an appellate court is asked to review an order that has expired while an appeal is pending? In

Veronica P. v. Radcliff A., 24 N.Y.3d 668, 3 N.Y.S.3d 288, 26 N.E.3d 1143 (2015), petitioner filed a petition charging that her nephew, the respondent, who regularly stayed with her, assaulted and harassed her. The Family Court granted a temporary order of protection and after a hearing found respondent guilty of a family offense and issued a two year order of protection against him. While the appeal was pending, however, the order of protection expired. The question was whether the expiration of the protection order rendered the appeal moot.

Generally, "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (citing *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980)). However,

> even where the resolution of an appeal may not immediately relieve a party from a currently ongoing court-ordered penalty or obligation to pay a judgment, the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal (citations omitted).

The Court held here that the appeal was not moot. A court in a future criminal case or Family Court proceeding could enhance a sentence or adverse civil adjudication against respondent, relying on the protection order. A court could increase the severity of a criminal sentence or civil judgment against the respondent. In addition, the Court found that the protection order had other potential legal consequences, including impeaching respondent's credibility in the future, and respondent could face additional law enforcement scrutiny and an increased likelihood that he would be arrested in the future (by being in the police computer database). In sum, while the order may have expired, its ramifications lived on, giving life to the appeal, neither mooting nor muting it.

CPLR 5701 – Supreme Court Bound to Apply Precedent in Another Department Until its Department or Court of Appeals Rules

D'Alessandro v. Carro, 123 A.D.3d 1, 992 N.Y.S.2d 520 (1st Dep't 2014): "While defendants have denominated their motion as one seeking renewal, they identify no change in law warranting reexamination of their arguments. It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (citation omitted), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals (citations omitted). Thus, a particular Appellate Division will require the lower courts within its Department to follow its rulings, despite contrary authority from another Department, until the Court of Appeals makes a dispositive ruling on the issue (citation omitted)."

CPLR 6501 – Purpose of Notice of Pendency

Mortgage Elec. Registration Sys., Inc. v. Pagan, 119 A.D.3d 749, 991 N.Y.S.2d 51 (2d Dep't 2014): "'[T]o cut off a prior lien, such as a mortgage, the purchaser must have no knowledge of the outstanding lien and win the race to the recording office' (citation omitted). When a notice of pendency is filed, a purchaser is charged with constructive notice of litigation if he or she fails to record the deed prior to the filing of the notice of pendency (see id. at 102). 'A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party' (CPLR 6501). Here, inasmuch as Deutsche Bank's predecessor, nonparty Fremont Investment & Loan,

failed to record its mortgage prior to the recording of Full Spectrum's mortgage, and prior to the filing of the notice of pendency indexed against, among others, the mortgagor, Kenneth Pagan, Deutsche Bank is bound by all proceedings taken in the instant action (citation omitted), including the order vacating the deed from Kenneth to Mendez (citations omitted)."

CPLR 7501 – Federal Arbitration Act Applicability

The practitioner must be aware of the interplay of the Federal Arbitration Act (9 USCS § 1, et seq.) applicable to contracts involving interstate and maritime commerce. See Cusimano v. Schnurr, 120 A.D.3d 142, 991 N.Y.S.2d 400 (1st Dep't 2014), leave to appeal granted, 2014 NY Slip Op 90711 (November 24, 2014) ("The FAA governs agreements which 'evidenc[e] a transaction involving commerce' (9 USC § 2). In determining if the FAA applies to a contract, the central question is whether the 'agreement is a contract evidencing a transaction involving commerce within the meaning of the [FAA]' (citation omitted). Courts have interpreted the term 'involving commerce' broadly (citation omitted). In Allied-Bruce, the United States Supreme Court concluded that the purpose of the FAA — to reduce the amount of litigation through the enforcement of arbitration agreements — supports a broad interpretation of the term 'involving commerce' (citation omitted). The Court declined to restrict transactions involving commerce only to those 'activities within the flow of commerce' (citation omitted). Rather, it found the phrase 'involving commerce' to be the equivalent of 'affecting commerce,' a term associated with the broad application of Congress's power under the Commerce Clause (citations omitted). The Supreme Court reaffirmed this interpretation of 'involving commerce' in Citizens Bank, stating that 'it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce, that is, within the flow of interstate commerce' (citation omitted). Further, the Court held that individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply (id.). Rather, as long as there is economic activity that constitutes a general practice 'bear[ing] on interstate commerce in a substantial way,' the FAA is applicable (citations omitted).").

CPLR 7501 – Punitive Damages Claims

Matter of Flintlock Constr. Servs., LLC v. Weiss, 991 N.Y.S.2d 408 (1st Dep't 2014): Majority of the court held that subject provision did not unequivocally exclude punitive damage claims. "Merely stating, without further elaboration, that an agreement is to be construed and enforced in accordance with the law of New York does not suffice to invoke the Garrity rule. The Supreme Court has made clear that in order to remove the issue of punitive damages from the arbitrators, the agreement must 'unequivocal[ly] exclu[de]' the claim (id. at 60). The agreement in this case, which provided only that it was to be 'construed and enforced' in accordance with the law of New York, did not unequivocally exclude claims for punitive damages from the consideration of the arbitrators (citations omitted). A New York choice-of-law provision does not constitute a manifestation of unequivocal intent sufficient to invoke the Garrity rule. We cannot agree with the dissent's conclusion that the parties' choice-of-law provision evinces 'unequivocally' with the requisite specificity demanded by the United States Supreme Court that the parties intended to incorporate the Garrity rule disallowing punitive damages in an arbitration. Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp. (4 NY3d 247 [2005]), upon whose dicta the dissent relies, involved application of the statute of limitations and does not speak to the issue sub judice. We are aware of no instance in which the language that an agreement is to be 'construed and enforced' in accordance with New York law has been held to displace Mastrobuono. Indeed, case law is to the contrary, consistent with the Supreme Court's admonition that the relevant agreement must 'specifically exclude' the

issue of punitive damages from the purview of the arbitrator in order to be enforceable (citation omitted)."

CPLR 7801 – Prohibition

Matter of Gentil v. Margulis, 120 A.D.3d 1414, 993 N.Y.S.2d 115 (2d Dep't 2014): "The defendant commenced this proceeding pursuant to CPLR article 78 seeking relief in the nature of prohibition to prohibit the respondents from retrying him on counts two and three of the indictment on the ground that to do so would subject him to double jeopardy. In reviewing an application for prohibition, the first question is whether the issue presented is the type for which the remedy of prohibition lies (citations omitted). If prohibition lies, then this Court must consider whether to exercise its discretion to grant that remedy (citation omitted). Prohibition is the traditional remedy where a defendant seeks protection against double jeopardy (citations omitted), and the writ lies in this case."

CPLR 7804 – Submission of Complete Certified Transcript

Matter of Smith v. Quinn, 120 A.D.3d 1509, 992 N.Y.S.2d 457 (3d Dep't 2014): "Although the Attorney General did not submit a complete certified hearing transcript with the answer (see CPLR 7804 [e]), he has subsequently done so. Petitioner has since reviewed the complete certified transcript and alleges no prejudice. Accordingly, we will disregard any procedural defect (citations omitted)."

CPLR 8601 – Actions v. State: New York State Equal Access to Justice Act

Thomas v. Coughlin, 194 A.D.2d 281, 606 N.Y.S.2d 378 (3d Dep't 1993) (prevailing party may recover under CPLR 8601 even though legal services were provided to him without charge; the trial court must specify the basis for its fee, which may be based upon reconstructed time records where necessary).

CPLR 8601 – Actions v. State: NYS Equal Access to Justice Act (Digest – June 2015)

CPLR Article 86: To Prevail or Not to Prevail, That Is the Catalyst Question
New York State Court of Appeals Punts on
Whether Catalyst Theory Applies

CPLR Article 86 is the New York State Equal Access to Justice Act (EAJA). It is based on the Federal Equal Access to Justice Act, 28 U.S.C. § 2412(d), which is expressly referenced in CPLR 8600. The intent of the Act is to establish a mechanism authorizing the recovery of attorney fees and other expenses in certain actions against the state. Specifically, CPLR 8601 provides that a "prevailing party" is entitled to recover counsel fees and expenses in certain actions against New York State "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." The "catalyst theory" provides that even if the government moots an action voluntarily by granting the relief the plaintiff sought, the plaintiff can nevertheless recover attorney fees on the theory that the claim was a catalyst for favorable governmental action. That theory was accepted by the federal courts in interpreting the federal EAJA in 1989, the year CPLR Article 86 was enacted. In 2001, however, in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), the U.S. Supreme Court rejected the catalyst theory in the context of the fee-shifting provisions of the Fair Housing Authority Act of 1988 and the Americans With Disabilities Act of 1990. The Court held that in order to recover fees as a "prevailing party," one needs to obtain "some [type of] relief." In 2001 the First Department, relying on *Buckhannon*, similarly rejected the catalyst theory as applied to Article 86. *See Auguste v. Hammons*, 285 A.D.2d 417 (1st Dep't 2001).

The First Department revisited the issue in *Solla v. Berlin*, 106 A.D.3d 80 (1st Dep't 2013), rejecting its earlier holding in *Auguste* and formally recognizing the catalyst theory. The court reasoned that *Buckhannon* was not dealing with the state or the federal EAJA, that New York courts should interpret Article 86 in accordance with the federal courts' understanding of the EAJA in 1989, when the state statute was enacted, and that there "is no evidence to suggest that the New York State Legislature, in enacting the State EAJA, ever intended to eliminate attorneys' fee awards under the catalyst theory." *Id.* at 82.

The issue was then presented to the N.Y. Court of Appeals which punted, stating that it took no position on whether the catalyst theory applies to CPLR Article 86. Instead, the Court held that even if the catalyst theory applied, the petitioner was not entitled to recover:

> Under the pre-*Buckhannon* federal precedent that petitioner would have us apply, a fee claimant recovers attorneys' fees only if his or her lawsuit prompted a change in position by the party from which claimant seeks reimbursement (citations omitted) . . .
>
> Here, petitioner seeks payment of attorneys' fees from the State of New York. But the State has consistently sided with petitioner regarding HRA's reduction of her shelter allowance. The City altered its position following petitioner's commencement of this proceeding, but the State did not. Consequently, petitioner could not recover attorneys' fees under CPLR article 86 even if the catalyst theory were New York law. Therefore, the Appellate Division erred in granting petitioner's application.

Solla v. Berlin, 24 N.Y.3d 1192, 3 N.Y.S.3d 748, 27 N.E.3d 462 (2015).

The catalyst theory lives for another day and the Court of Appeals' decision is a catalyst for confusion!

CPLR 8602 – Action v. State: NYS Equal Access to Justice Act

Reasonable attorneys' fees may include fees for paralegal or law student services performed "under the supervision of an attorney incurred in connection with an administrative proceeding and judicial action." (CPLR 8602(b)) However, where petitioner represented himself and was not under an attorney's supervision, even though he was a qualified paralegal, he did not incur reimbursable fees or expenses under the statute. Matter of Mingo v. Chappius, 123 A.D.3d 1347 (3d Dep't 2014) ("We affirm. EAJA provides for an award, in limited circumstances, of 'fees and other expenses' to a prevailing party in civil actions against the state (CPLR 8601 [a]; see CPLR 8600). The statute permits an award of counsel fees but, inasmuch as such an award is in derogation of the common law, those provisions are strictly construed (citations omitted). 'Fees and other expenses' are defined in relevant part as 'reasonable attorney fees, including fees for work performed by law students or paralegals under the supervision of an attorney incurred in connection with an administrative proceeding and judicial action' (CPLR 8602 [b] [emphasis added]; see CPLR 8601 [a]). Petitioner represented himself and was not under the supervision of an attorney even if he is, in fact, qualified as a paralegal. Thus, he has not incurred any reimbursable fees or expenses, and Supreme Court properly denied his motion (citations omitted).").