2017 C.P.L.R. Update

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by David Paul Horowitz

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"You will need to know much more than the piffle-paffle of procedure."

Chief Judge Benjamin N. Cardozo[1]

[1] Then Chief Judge of the New York Court of Appeals, in his 1928 commencement address to the first graduating class of St. John's University School of Law. Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 241 (1939).

Author Biography

DAVID PAUL HOROWITZ (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over twenty-eight years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), the most recent supplement to *Fisch on New York Evidence* (Lond Publications), and since 2004 has authored the monthly column *Burden of Proof* in the NYSBA *Journal*. Mr. Horowitz teaches New York Practice at Columbia Law School and lectures on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam, serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He has previously taught evidence, professional responsibility, and electronic evidence and disclosure at Brooklyn, St. John's, and New York Law Schools. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

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I. Statutory Amendments

a. 2016 CPLR Amendments

1. Amendment to C.P.L.R. 214-f, Effective July 21, 2016

> § 214-f. Action to recover damages for personal injury caused by contact with or exposure to any substance or combination of substances found within an area designated as a superfund site
>
> Notwithstanding any provision of law to the contrary, an action to recover personal damages for injury caused by contact with or exposure to any substance or combination of substances contained within an area designated as a superfund site pursuant to either Chapter 103 of Section 42 of the United States Code and/or section 27-1303 of the environmental conservation law, may be commenced by the plaintiff within the period allowed pursuant to section two hundred fourteen-c of this article or within three years of such designation of such an area as a superfund site, whichever is latest.

The legislature responds to Hoosick Falls (and Flint, Michigan) water contamination scandal by affording individuals exposed to toxic substances on "superfund" sites more time to sue.

CPLR 214-c(2) provides for a three-year statute of limitations for personal injury and property damage claims arising from the latent effects of exposure to a toxic substance. The three-year period runs from the date of discovery of the injury by the plaintiff or from the date when the plaintiff in the exercise of reasonable diligence, should have discovered the injury, whichever is earlier. (CPLR 214-c[4] provides for a special one-year statute of limitations in toxic tort actions where the plaintiff learned of the injury but had difficulty discovering the cause of the injury.) The Hoosick Falls and Flint, Michigan water contamination fiascos caused

our Legislature to review our laws relating to toxic tort actions. Under CPLR 214-c, many potential causes of action of those injured is a result of ingesting poisoned water would be time-barred -- many of the injured residents of Hoosick Falls had no idea they had been exposed to any hazardous substances until years after they had become sick.

Recognizing that CPLR 214-c would deny recourse to many Hoosick Falls plaintiffs, the Legislature adds a new CPLR 214-f. This provision gives an individual seeking damages for personal injuries caused by contact with or exposure to a substance within an area designated as a "superfund" site by the federal or State government the greater of the following periods: the limitations period of CPLR 214-c or within three years of the designation of the area as a "superfund" site. The effective date of CPLR 214-f is July 21, 2016.

2. Amendment to C.P.L.R. 2103(b)(2), Effective January 1, 2016

R 2103. Service of papers

(a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:

1. by delivering the paper to the attorney personally; or

2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period ***if the mailing is made within***

the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States; . . .

3. Amendment to C.P.L.R. 214-f, Effective December 20, 2016

R 3408. Mandatory settlement conference in residential foreclosure actions [Effective until December 20, 2016]

> **(a)** In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

R 3408. Mandatory settlement conference in residential foreclosure actions [Effective December 20, 2016]

> **(a)** [Until February 13, 2020] In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: 1. determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation

option; or 2. whatever other purposes the court deems appropriate.

(a) [Eff February 13, 2020] In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: 1. determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed toincluding, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or 2. whatever other purposes the court deems appropriate.

b. 2015 CPLR Amendment

Amendment to C.P.L.R. 3212(b), Effective December 11, 2015

LAWS OF NEW YORK, CHAPTER 529

AN ACT to amend the civil practice law and rules, in relation to the use in motions of expert affidavits in summary judgment

Became a law December 11, 2015, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

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

Section 1. Subdivision (b) of rule 3212 of the civil practice law and rules, as amended by charter 651 of the laws of 1973, is amended to read as follows:

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts;

> and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. ***Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.*** The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

§ 2. This act shall take effect immediately and shall apply to all pending cases for which a summary judgment motion is made on or after the date on which it shall have become law and all cases filed on or after such effective date.

II. Spoliation

a. Fed.R.Civ.P. 37 Amendment Effective December 1, 2015

Significant amendments to the Federal Rules of Civil Procedure took effect on December 1, 2015. Relevant to ESI and spoliation are the change to Rule 37:

> **Rule 37.** Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
> …
> **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> **(A)** presume that the lost information was unfavorable to the party;
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> **(C)** dismiss the action or enter a default judgment.

The 2015 amendment to FRCP 37(e) expressly rejects the Second Circuit approach: "This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as ***Residential Funding Corp. v. DeGeorge Financial Corp.***, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." (Advisory Comments).

b. Court of Appeals Endorses the First Department's Adoption of *Zubulake*

Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 N.Y.3d 543 (2015)

In *Pegasus*, the Court of Appeals addressed a number of issues involving the spoliation of ESI. While the spoliated matter was electronic, the Court's holdings are not limited to ESI, and apply to all matter.

Three entities, collectively "Pegasus," were plaintiffs that leased cargo aircraft to a Brazilian company, Varig Logistica, S.A., referred to as "VariLog." VariLog went bankrupt, and was purchased out of bankruptcy by defendant MP, and operated for a time as a subsidiary of MP. Shockingly, at some point ESI in the possession of VariLog went missing, and plaintiff moved for contempt against VariLog and for an adverse inference against MP:

> Supreme Court granted Pegasus's motion, holding that VarigLog's failure to issue a "litigation hold" amounted to gross negligence as a matter of law, such that the relevance of the missing ESI was presumed. Supreme Court also found that the MP defendants, having been charged by the Brazilian court with the duty to "manage" and "administer" VarigLog, were in "control" of VarigLog for purposes of putting a "litigation hold" into place to preserve the ESI, and their failure to do so amounted to gross negligence. The court therefore struck the answer of VarigLog and imposed a trial adverse inference sanction against the MP defendants with regard to ESI and paper records relevant to the action and within the MP defendants' control.

MP appealed, and a majority[2] of the First Department reversed, holding that, while Pegasus had established that MP had sufficient control over VariLog to trigger a duty to preserve, the failure to do so was not gross negligence, the failure to institute a litigation hold was not *per se* gross negligence, and "because Pegasus failed to prove that the lost ESI would

[2] Justices Friedman, Sweeny, and Saxe.

have supported Pegasus's claims, a trial adverse inference sanction could not stand (citation omitted).” One justice dissented in part and would have held that “the matter should have been remanded to Supreme Court ‘for a determination of the extent to which [Pegasus has] been prejudiced by the loss of the evidence, and the sanction, if any, that should be imposed’ (citation omitted).” The fifth justice agreed with the motion court that the failure to take any steps to preserve constituted gross negligence, and would have affirmed the adverse inference.

The First Department granted Pegasus’s motion for leave to appeal to the Court of Appeals.

As it so often does, the Court, in a majority opinion[3] by Judge Pigott, opens with a succinct overview of the law, followed by an equally unencumbered recital of the issue presented and the resolution of that issue:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (citations omitted). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (citation omitted). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (citation omitted).
>
> On this appeal, we are asked to decide whether the Appellate Division erred in reversing an order of Supreme Court that imposed a spoliation sanction on the defendants. We hold that it did, and remand the matter to the trial court for a determination as to whether the evidence, which the Appellate Division found to be negligently destroyed, was relevant to the claims asserted against defendants

[3] Judge Stein wrote a dissenting opinion in which Judge Rivera joined.

> and for the imposition of an appropriate sanction, should the trial court deem, in its discretion, that a sanction is warranted.

For the three elements required to prove spoliation, *to wit*, that the party had control over the evidence, that the evidence was destroyed with a "culpable state of mind," and that the destroyed evidence was relevant to, and would support, the opposing party's claim or defense, the Court cited both the First Department's 2012 decision in *Voom* (93 A.D.3d 33 [1st Dep't 2012]) and Southern District Judge Sheindlin's 2003 *Zubulake IV* (220 F.R.D. 212 [SDNY 2003]) decision. Those courts had held that the "culpable state of mind" element includes ordinary negligence (*Voom* at 46, citing *Zubulake*).

When it came to establishing relevance where spoliation had been established, the Court of Appeals cited only to *Zubulake IV* as a source for its holding. However, the First Department in *Voom* "adopted" the standards set forth in *Zubulake IV* citing, however, a subsequent decision by Judge Scheindlin in *Pension Comm. Of Univ. Of Montreal Pension Plan,* 685 F. Supp 2d 456 at 467-468 (SDNY 2010).

> The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (citation omitted).

Again quoting *Pension Plan*, the First Department in *Voom* noted that the presumption was rebuttable:

> When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party

> had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required (citation omitted).

Thus, the Court of Appeals has adopted, *in toto*, *Voom*. *Voom*, of course, similarly adopted *Zubulake IV*. And for a time, lawyers shuttling between state and federal court in New York were working from the same playbook when it came to spoliation of ESI. More on that later.

After reciting the broad discretion possessed by trial courts to provide relief to a party for lost or destroyed evidence, the Court of Appeals explained its role in *Pegasus* based upon the record in the case:

> Here, the order of the Appellate Division reversed the order of Supreme Court "on the law and facts" (citation omitted). In its certified question to this Court, the Appellate Division certified that the "determination was made as a matter of law and not in the exercise of discretion." However, we are not bound by the Appellate Division's characterization in its certification order, and instead "look to see whether the Appellate Division's decision, regardless of the characterization, nonetheless reflects a discretionary balancing of interests" (citation omitted).

After reciting the different factual conclusions reached by each of the Justices below, the Court concluded "[t]hus, whether the MP defendants '"culpable mental state" rose to the level of gross negligence, as opposed to ordinary negligence, constituted differing factual determinations by the trial court and the Appellate Division."

When confronted with differing factual determinations, "'the scope of [the Court's] review is limited to determining whether the evidence of record . . . more nearly comports with the trial court's findings or with those of the Appellate Division' (citation omitted)." In *Pegasus*,

the Court of Appeals held that "the record evidence comports more with the Appellate Division majority's findings."

The Court held that the failure to institute a litigation hold did not amount to gross negligence, instead it was but one of several factors for a court to consider in determining culpable state of mind, and noted that the First Department had considered a number of relevant factors in reaching its "ultimate conclusion that, at most, the MP defendants' failures amounted to 'a finding of simple negligence' (citation omitted)."

There were two linked findings that all six justices on the trial and appellate court agreed upon, and the Court of Appeals agreed: "[W]e see no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over VarigLog to trigger a duty on its part to preserve the ESI. Nor is there any basis to disturb the findings of fact by the Appellate Division that the MP defendants were negligent in failing to discharge that duty."

However, there were two errors the Court of Appeals identified in the First Department's decision. First, it erred in determining that Pegasus had failed to make any arguments related to relevance, leading it to conduct its own inquiry:

> [A]lthough the Appellate Division possesses the authority to make findings of fact that are as broad as the trial court, in this instance, where it all but ignored Pegasus's arguments concerning the relevance of the documents, we conclude that the prudent course of action is to remit the matter to Supreme Court for a determination as to whether the negligently destroyed ESI was relevant to Pegasus's claims against the MP defendants and, if so, what sanction, if any, is warranted.

Second, the Court held that it was error to conclude that granting an adverse inference in an "alter ego" case was tantamount to a grant of summary judgment:

> Contrary to the Appellate Division majority's contention, a trial adverse inference sanction would not be akin to granting summary judgment to Pegasus on its alter ego claim, since such a charge is permissive and can be appropriately tailored by the trial court (citations omitted).

As *Pegasus* takes flight, a number of important issues concerning the preservation of ESI have been clarified, and clarity in New York Practice is helpful to practitioners. However, the time when lawyers in state and federal courts in New York could use the same playbook for spoliation of ESI ended two weeks before the Court of Appeals issued its decision in *Pegasus*. Effective December 1, 2015, there were a number of significant changes to the Federal Rules of Civil Procedure. Changes to Fed. R. Civ. P. 37 alter what had been, in many important ways, the *Zubulake* landscape in federal court, and the two court systems rules for spoliation of ESI are no longer congruent.

N.B.: The presumption of relevance of spoliated evidence that arises when a spoliator is grossly negligent may be rebutted (*see* ***AJ Holdings Group, LLC v IP Holdings, LLC***, 129 A.D.3d 504, 11 N.Y.S.3d 55 [1st Dep't 2015]).

N.B.: The ***Pegasus*** Court stressed that the spoliation sanction of an adverse inference instruction (*see* 1A NYPJI 1:77 [3d ed 2016]) is, in an appropriate case, a permissible sanction, and highlighted that such as instruction allows but does not require a fact-finder to draw a negative inference against the spoliator.

III. The Interplay Between CPLR 3216 & CPLR 3404

Second Department Holds That Where Prior Court Order "Was Effective To Return The Action To Pre-Note Status," CPLR 3404 Inapplicable & CPLR 3216 Demand Necessary To Obtain Dismissal

Florxile-Victor v. Douglas, 135 A.D.3d 903, 22 N.Y.S.3d 91 (2d Dep't 2016)

> Contrary to the hospital's contention, CPLR 3404 does not apply to this pre-note of issue (citations omitted). Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there any order directing the dismissal of the complaint pursuant to 22 NYCRR 202.27 (citations omitted).

Paradiso v. St. John's Episcopal Hosp., 134 A.D.3d 1002, 20 N.Y.S.2d 913 (2d Dep't 2015)

> The note of issue was vacated on April 29, 2013, and the plaintiff was not thereafter served with a 90-day demand pursuant to CPLR 3216. In June 2014, the defendant moved pursuant to CPLR 3404 to dismiss the complaint as abandoned . The plaintiff opposed the motion, asserting that CPLR 3404 was inapplicable. The Supreme Court granted the defendant's motion. We reverse.
>
> When the note of issue was vacated, the case reverted to its pre-note of issue status, and CPLR 3404 did not apply to this case (citations omitted). Accordingly, the defendant's motion pursuant to CPLR 3404 to dismiss the complaint should have been denied (citation omitted).
>
> Contrary to the defendant's contention raised for the first time on appeal, this action could not have properly been dismissed pursuant to CPLR 3126 based upon the plaintiff's failure to comply with court-ordered discovery, since there was no motion requesting this relief and the plaintiff was not afforded an opportunity to be heard on this issue (citations omitted).

Goodman v. Lempa, 124 A.D.3d 581, 997 N.Y.S.2d 912 (2d Dep't 2015)

> It is undisputed that when this action was "marked off" the calendar at a status conference in July 2013, the note of issue had not yet been filed. CPLR 3404 does not apply to this pre-note of issue case (citations omitted). Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there any motion pursuant to CPLR 3126 to dismiss the action based upon the plaintiff's failure to

comply with discovery (citations omitted). Accordingly, the plaintiff's motion to restore the action to the calendar should have been granted.

CPLR 3404: Third Department Diverges From First & Second Departments And Hold CPLR 3404 Applied Where A Note Of Issue Was Filed, The Action Was Placed On The Calendar, And The Note Was Subsequently Vacated

Hebert v Chaudrey, 119 A.D.3d 1170, 989 N.Y.S.2d 399 (3d Dep't 2014)

Plaintiffs commenced this action in 2003 seeking to recover damages for, among other things, the intentional infliction of emotional distress. After joinder of issue and limited discovery, they filed a trial note of issue in October 2009. Supreme Court then issued an order setting a day certain for trial and, soon thereafter, defendant moved to vacate the note of issue based on plaintiffs' failure to comply with outstanding discovery demands. In January 2010, Supreme Court issued a conditional order granting the motion. When plaintiffs failed to comply with the conditional order, defendant again moved for vacatur of the note of issue in July 2010. Supreme Court granted the motion, vacated the note of issue and struck the matter from the trial calendar in a September 2010 order. When plaintiffs filed a new note of issue almost two years later in August 2012, defendant moved to dismiss the complaint pursuant to CPLR 3404. Supreme Court denied the motion and defendant appeals.

This case was seven years old when Supreme Court struck it from the trial calendar in September 2010. We must agree with defendant that, as a result, when plaintiffs failed to restore the action within one year, the case was automatically dismissed pursuant to CPLR 3404. CPLR 3404 provides that "[a] case . . . marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute." Supreme Court's order striking the matter from the calendar places this case squarely within the plain language of the statute (citations omitted). While it has been held that vacating the note of issue alone is not enough to invoke the presumption of abandonment that arises pursuant to CPLR 3404, the statute clearly applies "when a case has been struck from the calendar or gone unanswered on a clerk's calendar call" (citations omitted). Inasmuch as plaintiffs did not restore the matter within one year, it is deemed abandoned and dismissed (citation omitted).

Gray v. Jim Cuttita Agency, Inc., 281 A.D.2d 785, 722 N.Y.S.2d 289 (3d Dep't 2001)

> Contrary to plaintiffs' contention, this case falls squarely within the ambit of CPLR 3404 (citations omitted). Where, as here, a case is actually placed on the trial calendar, (citations omitted), subsequently stricken therefrom by an order of the court (citation omitted) and then not restored within one year, it is deemed abandoned and dismissed pursuant to CPLR 3404 (citation omitted). The fact that the note of issue may have been stricken on consent is of no moment (citations omitted).
>
> Moreover, as noted by defendants, the dismissal is self-executing (citations omitted). While a court retains discretion to restore a dismissed case to the trial calendar upon a showing of a sufficient excuse for the delay, a lack of intent to abandon the case, a meritorious claim and the absence of prejudice to the nonmoving party (citations omitted), plaintiffs never specifically sought such relief in their motion, arguing instead that the statute simply did not apply and that defendants should be compelled to accept their bill of particulars. Further, when confronted with defendants' cross motion, they again failed in any way to address these factors (citations omitted). Under these circumstances, Supreme Court properly denied plaintiffs' motion.

CPLR 3402

> R 3402. Note of issue
>
> (a) Placing case on calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

On CPLR 3216 Motion, Where Defendant Contributed To Plaintiff's Inability To File The Note Of Issue, Plaintiff Was Excused From Demonstrating Meritorious Claim

Lee v. Rad, 132 A.D.3d 643, 17 N.Y.S.3d 489 (2d Dep't 2015)

> Here, although the plaintiff did not file a note of issue within the 90-day demand period, her conduct negated any inference that she intended to abandon the action (citation omitted). In opposition to the defendants' separate motions, the

plaintiff promptly cross-moved to strike the answer of the defendant Kayhan Sarab for his willful failure to appear for a court-ordered deposition. The plaintiff established that, due to an unresolved discovery dispute, she was unable to timely file a note of issue (citations omitted). Furthermore, since Sarab contributed to the plaintiff's inability to file a timely note of issue in the proper form, the plaintiff was not required to demonstrate a potentially meritorious cause of action (citations omitted). Accordingly, the defendants' separate motions to dismiss the complaint insofar as asserted against each of them should have been denied.

IV. Depositions

a. Deposition Rules

§ 221.1. Objections at depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2. Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question the examining party shall have the right to complete the remainder of the deposition .

§ 221.3. Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

b. CPLR 3116 Corrections

Once a deponent has given oral testimony at deposition, the deponent has the opportunity to review the transcript for accuracy and make changes. CPLR 3116(a) provides:

> R 3116. Signing deposition; physical preparation; copies
>
> (a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

Proposed Commercial Division Rule On Testimony By Affidavit
(Public Comment Period Over)

> The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering testimony.

The language of the rule is straightforward, "and any changes in form or substance which the witness desires." What is required when a witness makes changes is "a statement of the reasons given by the witness for making them."

The 1996 Recommendation of the Advisory Committee on Civil Practice stated:

> The Committee recommends the amendment of CPLR 3116(a) to require that a deponent make any changes he or she wishes to make to the transcript within sixty days from the date the deposition is submitted to the witness.

Changes that are substantive, even potentially outcome determinative, are permitted. In *Natale v. Woodcock*, 35 A.D.3d 1128, 830 N.Y.S.2d 785 (3d Dep't 2006), plaintiff contended the collision with defendant's vehicle, at night, occurred in part because defendant's vehicle's headlights were not on. Defendant made changes to the transcript of his deposition testimony:

> [D]efendant was asked two separate times whether his headlights were on and both times responded, "I don't believe so." Thereafter, he supplied an errata sheet in compliance with CPLR 3116 (a), correcting one of the responses to: "Yes, my headlights were on." The reason provided for the correction was that "[a]fter reading the statement, it came back to me."

The Third Department addressed these deposition changes in the context of a motion for summary judgment, made by defendant, and relying on the changed deposition testimony. Reversing the trial court's denial of defendant's motion, the appellate court held:

> Even overlooking the fact that defendant corrected only one of his statements from his deposition regarding his headlights, summary judgment should not have been granted. Where, as here, there is a significant conflict on a material issue between the original deposition testimony and the correction on the errata sheet a credibility issue is created that cannot be resolved by summary judgment (citations omitted). The explanation offered for the change was insufficient to extinguish the factual issue.

So, the takeaway from *Natale* is that significant changes to testimony are permitted, but the original answer remains as part of the record, thus creating a credibility issue between the original and changed testimony, the credibility issue must be resolve by the factfinder.

This was also the case in *Breco Envtl. Contrs. Inc. v. Town of Smithtown*, 31 A.D.3d 359, 818 N.Y.S.2d 2444 (2d Dep't 2006), where the Second Department held that defendant's motion for summary judgment was properly denied due to credibility issues arising from changes plaintiff made to his deposition transcript:

> [Plaintiff] testified at his deposition that although he signed the document he had no affirmative recollection of having ever reviewed the document or of personal knowledge of the basis for the claim. Shortly thereafter [plaintiff] furnished an errata sheet in accordance with CPLR 3116 (a), in which he corrected the substance of his deposition testimony, claiming that after refreshing his recollection about a meeting he attended before preparation of the notice of claim, he now recalled that he had adequate knowledge about the basis of the claim and had in fact reviewed the document before he signed it.

So, per *Breco*, a witness whose recollection is refreshed after the deposition may furnish changes to the testimony based upon that refreshed recollection.

The First Department in *Cillo v. Resjefal Corp.*, 295 A.D.2d 257, 743 N.Y.S.2d 860 (1st Dep't 2002), permitted "substantive" changes that were accompanied by a statement of the reason for the changes:

> Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor (citations omitted). Plaintiffs' amended errata sheets are accompanied by such a statement. The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial (citations omitted).

Cillo makes clear that resolving the credibility issue created by the deponents deposition transcript changes is for the finder of fact.

The right to make changes to deposition testimony was recognized before the enactment of CPLR 3116(a). In *Skeaney v.Silver Beach Realty Corp.*, 10 A.D.2d 587, 201 N.Y.S.2 163 (1st Dep't 1960), decided under the C.P.A., predecessor to the C.P.L.R., the First Department held:

> The right to make corrections or changes in the testimony is recognized by decision (citation omitted) and is implicit in the statute (citation omitted) by the requirement that

> "[the] deposition, when completed, must be read by, or carefully read to, the person examined and must be subscribed by him."

Although the C.P.A. did not explicitly permit changes to the deposition transcript by the deponent, the First Department in *Van Son v. Herbst*, 215 A.D. 563, 214 N.Y.S. 272 (1st Dep't 1926), that right was inherent in the requirement that the transcript be reviewed by the witness:

> That he must do so without making such changes in it as are properly to be made, in order to have it conform to his more deliberate recollection of the facts, is not directed by the rule. Otherwise there would be no need of having the transcribed testimony read before it is signed. It is read so that corrections may be made and we see no changes, such as plaintiff might not properly have caused to be made. Indeed the new matter would have to be very remarkable or quite unresponsive and unjustified by the questions to require its exclusion.

Where the deponent makes changes to the transcript but fails to give a reason for the changes, the changes will not be considered by the court:

> The IAS Court properly refused to consider plaintiff's correction sheet to her deposition testimony, in which she claimed that the hole over which she tripped was in the street and not, as she had testified, on the sidewalk in front of the house owned by defendants, on the ground that the correction sheet lacked a statement of the reasons for making the corrections (CPLR 3116 [a]). Nor are we persuaded by the reason that was offered in plaintiff's opposition to the motion, that she has difficulty communicating in English. The record shows that plaintiff testified through an interpreter whose adequacy was never challenged by her lawyer, acknowledged having fallen in the street more than on the single occasion that she wants to correct, and fully comprehended the questions posed to her.
>
> *Rodriguez v. Jones*, 227 A.D.2d 220, 642 N.YS.2d 267 (1st Dep't 1996)

In *Dima v. Morrow St. Assoc*, 31 A.D.3d 697, 818 N.Y.S.2d 474 (2d Dep't 2006), the Second Department held that "the Supreme Court properly declined to consider the plaintiff's correction sheet to her deposition testimony which lacked a statement of the reasons for making the corrections (citations omitted).

CPLR 3116(a) requires timely submission of deposition changes: "No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Quoting Professor Siegel, the First Department in *Zamir v. Hilton Hotels, Inc.*, 304 A.D.2d 493, 758 N.Y.S.2d 645 (1st Dep't 2003), discussed the reason for the sixty day requirement:

> As further noted in the Practice Commentary, "[a]ccording to the Advisory Committee, the statutory purpose of imposing the 60-day restriction in the first place is to enable other parties, including the party who took the deposition, 'to rely upon the deposition as final,' an aim that would be frustrated by '[l]ast-minute changes.'" (*citation omitted*) We agree that courts should be circumspect about extending the 60-day period inasmuch as "[a]n indication from the courts that an extension will be allowed without a strong showing of justification will quickly evolve a dilatory attitude that can undermine the purpose of CPLR 3116 (a)'s time limit altogether" (citations omitted).

The *Zamir* Court noted that an extension of the sixty day period would require a showing of good cause, which plaintiff failed to provide:

> the 60-day period, not being a rigid statute of limitations, is presumably extendable pursuant to CPLR 2004 (citations omitted). Nevertheless, CPLR 2004, while giving courts discretion to extend nearly all time limits in the CPLR for doing "any act," nevertheless premises such relief upon a showing of good cause.

A slight delay in furnishing a deposition errata sheet was excused by the First Department in *Binh v. Bagland USA, Inc,* 286 A.D.2d 613, 730 N.Y.S.2d 317 (1st Dep't 2001)*:*

> The motion court, stating its preference for disposing of cases on the merits, properly exercised its discretion in forgiving plaintiff's slight delay in furnishing the errata sheet (*see,* CPLR 3116 [a]; 2004), and correctly ruled that the conflict between the original deposition testimony and the errata sheet raised an issue of credibility inappropriate for summary judgment treatment. Upon this record, plaintiff's deposition correction does not appear to be patently untrue or tailored to avoid the consequences of his earlier testimony, made as it was before defendants moved for summary judgment (citation omitted).

The timing of the submission of depositions corrections, *vis a vis* the making of a motion for summary judgment by an adverse party, is a critical issue when the claim is that the errata sheet or an affidavit submitted in opposition is feigned or tailored.

CPLR 3116: No Corrections Due to Nervousness

Ashford v. Tannenhauser, 108 A.D.3d 735 (2d Dep't 2013)

> The plaintiff Kenneth Ashford (hereinafter the injured plaintiff), and his wife suing derivatively, commenced this action sounding in ordinary negligence to recover damages for injuries he sustained when he fell from a ladder while attempting to gain access to a shelf at the plumbing business where he worked. At his deposition, the injured plaintiff testified that he used a straight, 10–foot–tall aluminum ladder to gain access to the shelf, which was 12 to 15 feet above the ground. He further indicated that the feet of the ladder were equipped with rubber pads, and that there was no problem with either the feet or the pads. Before ascending the ladder, he made sure that the rubber pads were flat on the ground, and that the ladder was stable and safe. The injured plaintiff further testified that he climbed to the top of the ladder and that it "walked out [or] slid out from under [him]" as he prepared to place his left foot on the shelf. According to the injured plaintiff, his employer, North Shore Plumbing Supply, Inc. (hereinafter North Shore), was the owner of the ladder. The injured plaintiff had "no idea" why the ladder slid out from under him.
>
> In support of their motion for summary judgment dismissing the complaint, the defendants, all of whom were named herein in their capacities as cotrustees of a trust established for the benefit of Max Tannenhauser (hereinafter the trust), relied upon the foregoing deposition testimony of the injured plaintiff, as well as, inter alia, the affidavit of the defendant Robert Tannenhauser. That affidavit demonstrated that, at the time of the accident, the property at which the plumbing business was operated was owned by the trust as an out-of-possession landlord. The defendants also submitted a lease reflecting that the premises were occupied by North Shore, which was obligated, with certain exceptions not relevant herein, to perform all required repairs. Additionally, Robert Tannenhauser averred that the subject trust neither owned nor furnished any ladders at the premises, and did not maintain any of the flooring at the property.
>
> Based on the foregoing, the defendants made a prima facie showing of their entitlement to judgment as a matter of law on the ground that they did not own or

> control the ladder in question and had no duty to maintain the floor at the premises (citation omitted) and that, in any event, the injured plaintiff was unable to identify any defect that caused his fall (citations omitted).
>
> In his post-deposition errata sheet, the injured plaintiff radically changed much of his earlier testimony, with the vague explanation that he had been "nervous" during his deposition. CPLR 3116(a) provides that a "deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of reasons given by the witness for making them." Since the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall (citations omitted). In the absence of the proposed alterations, the injured plaintiff's deposition testimony was insufficient to raise a triable issue of fact with respect to the defectiveness or inadequacy of the ladder so as to warrant the denial of summary judgment. Likewise, in opposition to the defendants' prima facie showing that the trust was an out-of-possession landlord with no duty to repair or maintain the ladder or the floor, the plaintiffs failed to raise a triable issue of fact. Therefore, the Supreme Court erred in denying the defendants' motion for summary judgment dismissing the complaint.

Inadequate Reason & Material or Critical Changes to Testimony Grounds to Reject of *Errata* Sheet

Torres v Board of Education of City of New York, 137 A.D.3d 1256, 29 N.Y.S.3d 396 (2d Dep't 2016)

CPLR 3016(a) governs the signing of the deposition transcript. It provides, in pertinent part, that "[t]he deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." The statute does not purport to limit or restrict the nature of the changes a deponent may make by way of an errata sheet. In Torres, the Second Department sets forth a

limitation: "material or critical changes to [deposition] testimony through the use of an errata sheet is … prohibited." Also, the court stresses that any change reflected in the errata sheet must be accompanied by an adequate reason for the change; the more important the change, the more persuasive the reason for it must be:

> CPLR 3116(a) provides that a witness may make "changes in form or substance" to his or her deposition testimony as long as such changes are accompanied by "a statement of the reasons given by the witness for making them." A correction will be rejected where the proffered reason for the change is inadequate (citations omitted). Further, material or critical changes to testimony through the use of an errata sheet is also prohibited (citation omitted).
>
> Here, the defendants demonstrated that the plaintiff made numerous and significant corrections to his deposition testimony on his errata sheets. Such corrections sought to substantively change portions of the plaintiff's deposition testimony which would have been in conflict with his earlier testimony at his General Municipal Law § 50-h hearing on issues concerning the basis for the defendants' alleged negligence as alleged in the plaintiff's pleadings (citation omitted). Moreover, the plaintiff's stated reasons that he "mis-spoke" and that he was clarifying his testimony were inadequate to warrant the corrections (citations omitted).
>
> The plaintiff's contention that the defendants' motion should have been denied due to their failure to annex the errata sheets as exhibits to their initial moving papers is without merit, since the plaintiff submitted a copy of the errata sheets as an exhibit to his opposition papers (citation omitted) and, in any event, the defendants annexed a copy of the errata sheets as an exhibit to the reply affirmation of their counsel (citation omitted). Since no substantial right of the plaintiff was prejudiced thereby, it would have been an improvident exercise of the Supreme Court's discretion to not consider the defendants' motion on its merits on this ground (citation omitted).

CPLR 3116(a): Witness May Make Significant Changes To Deposition Transcript

Lieblich v Saint Peter's Hosp. of the City of New York, 112 A.D.3d 1202, 977 N.Y.S.2d 780 (3d Dep't 2013)

CPLR 3116(a) provides that a witness may make a change to the form or substance of his or her deposition testimony by noting the change at the end of the transcript and providing a statement of the reasons for making the change. Even significant changes are permitted so long as the witness provides a reason why the changes are necessary. The Court in *Lieblich* holds that a witness who makes significant changes to his or her deposition in the errata sheet of the transcript may be required to appear for a further deposition.

Changes to Deposition Testimony Due to Pre-EBT Review of Incorrect Photographs Not Permitted

Horn v. 197 5th Ave. Corp., 2014 NY Slip Op 08605 (2d Dep't 2014)

> The plaintiff commenced this action against the defendants to recover damages for injuries she sustained when she allegedly tripped and fell over a sidewalk cellar door adjacent to the defendants' property at 197 Fifth Avenue in Brooklyn. However, at her deposition, the plaintiff repeatedly testified in great detail that she tripped and fell at 140 Fifth Avenue, a location which was approximately two to three blocks away and on the other side of the street from the defendants' property. The plaintiff thoroughly described the route she took and the direction and distance she traveled that brought her to the site of her accident, as well as the name and address of the business at 140 Fifth Avenue where she fell. Moreover, she testified that she confirmed the address of the location by visiting the site of her accident a few days later, at which time she wrote down the address, and she circled on a photograph of the cellar door at 140 Fifth Avenue the spot on which she claimed to have tripped.
>
> Notwithstanding the detailed, consistent, and emphatic nature of the plaintiff's deposition testimony regarding the location of her accident, she subsequently executed an errata sheet containing numerous substantive "corrections" which conflicted with various portions of her testimony and which sought to establish that she actually fell at 197 Fifth Avenue, not 140 Fifth Avenue. The only reason

> proffered for these changes was that, prior to her deposition, she was shown photographs of 140 Fifth Avenue that mistakenly had been taken by an investigator hired by her attorney, and that she thereafter premised her testimony on her accident having occurred at the location depicted in those photographs. The defendants Li Xing Hellen Weng and Sun Luck Restaurant, Inc., moved, and the defendant 197 5th Avenue Corp. separately moved, to strike the errata sheet and for summary judgment dismissing the complaint insofar as asserted against each of them. The Supreme Court denied the motions. We reverse.
>
> Contrary to the determination of the Supreme Court, the plaintiff failed to provide an adequate reason for the numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony (citations omitted).

No Reason For Deposition Correction Precludes Consideration of Revised Testimony

Vazquez v Flesor, 128 A.D.3d 808, 9 N.Y.S.3d 150 (2d Dep't 2015)

> As to the merits, the defendant established his prima facie entitlement to judgment as a matter of law on the ground that the plaintiff was unable to identify the cause of his accident (citations omitted). In support of his motion, the defendant submitted, inter alia, a transcript of the deposition testimony of the plaintiff, who testified that he did not know why Lopez tripped. The defendant also submitted a transcript of the deposition testimony of Lopez, who similarly testified that he did not know what caused him to fall. Although Lopez later amended his testimony in a post-deposition errata sheet to reflect that he tripped over a garden hose, he failed to offer any reason for materially altering the substance of his deposition testimony. Therefore, the amended testimony could not properly be considered (citation omitted). Accordingly, contrary to the plaintiff's contention, Lopez's deposition testimony did not reveal a triable issue of fact as to whether the plaintiff was unable to identify the cause of his fall (citation omitted).

V. Expert Exchanges & Testimony

CPLR 3101(d)(1)(i)

CPLR 3101(d)(1)(i) provides in pertinent part:

However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph.

Commercial Division Expert Rule 13

(c) If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure — including the identification of experts, exchange of reports, and depositions of testifying experts — all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court. Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and the reasons for them;

(B) the data or other information considered by the witness in forming the opinion(s);

(C) any exhibits that will be used to summarize or support the opinion(s);

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and

(F) a statement of the compensation to be paid to the witness for the study and testimony in the case.

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

Proposed Amendment to Expert Rule 13
(Comment Period Ends December 20, 2016)

_ _ _ . Consultation Regarding Expert Testimony.

The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.

Failure To Specifically Object To & Reject Allegedly Defective Expert Exchange Waives Objection

Rivera v. Montefiore Med. Ctr., 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *affirmed* 2016 NY Slip Op 06854 (2016)

Just when to make a motion where an expert exchange is late, or inadequate, or both, is particularly vexing. There is no statute or rule that addresses the issue. Case law does not offer concrete guidance. And the vehicle to make an application to the court to preclude or limit an expert's testimony, the motion *in limine*, is one of the least understood tools in the lawyers toolbox, and with good reason. *Rivera v. Montefiore Med. Ctr.*, warrants the attention of any lawyer whose practice involves the use of experts.

At trial, plaintiff moved to preclude any testimony by defendant's medical expert "regarding any possible causes of the decedent's death as defendant's expert exchange did not comply with the requirements of CPLR § 3101(d), in that, it was not specific." At oral argument, "[d]efendant opposed the application as untimely because, plaintiff previously objected to the expert exchange as it did not contain information about the expert's residency (which the parties resolved), but failed to reject the expert exchange as not being specific." The

court denied plaintiff's motion, the defendant's expert testified about the cause of death, and a verdict was returned for the plaintiff.

Both sides made post-trial motions, and the trial court denied plaintiff's post-trial motion seeking, *inter alia*, an order "striking from the record all testimony that the decedent died from sudden cardiac arrest:"

> Admission of an expert's testimony is at the trial court's discretion. The facts upon which the expert's testimony is based must be established or "fairly inferable" from the evidence, rather than based on speculation or guessing. Here, plaintiff's motion to strike defendant's expert opinion regarding the cause of death as sudden cardiac arrest is denied as it was untimely made at the time of trial.
>
> *Rivera v. Montefiore Med. Ctr.*, 2012 N.Y. Slip Op. 33671(U), *1 (Sup. Ct., Bronx Co. 2012)

On appeal, the First Department affirmed:

> We reject plaintiff's challenge to the aspect of the order that declined to strike the testimony of defendant's expert, Dr. Marc Silberman, in which he asserted that the cause of the decedent's death was a sudden, unexpected cardiac arrhythmia. Plaintiff's in limine application during trial to preclude Dr. Silberman's testimony was properly denied as untimely. Plaintiff's argument at trial for precluding Dr. Silberman's testimony was based on the lack of specificity of defendant's CPLR 3101(d) statement. The statement recited, with regard to the causation of the decedent's death, that defendant's expert would "testify as to the possible causes of the decedent's injuries and contributing factors . . . [and] on the issue of proximate causation"; also included in its formulaic recitation was the assertion that "the grounds for the expert's opinion will be said expert's knowledge and experience . . . and [the] trial testimony."
>
> 123 A.D.3d 424, 425 (1st Dep't 2014)

After reciting the requirements for expert disclosure, the court stated "upon receipt of this 3101(d) statement, the only objection that plaintiff voiced was that the expert's

qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death." (*Id.* at 426).

The First Department concluded:

> Having failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence.
>
> *Id.*

The Court of Appeals framed, and answered, the question on appeal:

> The issue on this appeal is whether the trial court abused its discretion as a matter of law in denying as untimely plaintiff's motion to preclude the testimony of defendant's expert on the grounds that the CPLR 3101 (d) disclosure statement was deficient. We hold that it did not.
>
> *Rivera*, 2016 N.Y. Slip Op. 06854, *1–2.

After chronicling the prior decisions, the Court reviewed the broad discretion trial courts possess to supervise expert disclosure: "'A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with 3101(d) (1) (i) is left to the sound discretion of the court' (citations omitted)."

The Court concluded:

> Plaintiff made her motion mid-trial immediately prior to the expert's testimony. Plaintiff argues that at the time of the expert exchange, she had no reason to object to the disclosure statement because the statement gave no indication that defendant would challenge plaintiff's theory of decedent's cause of death. Assuming defendant's disclosure was deficient, such deficiency was readily

> apparent; the disclosure identified "causation" as a subject matter but did not provide any indication of a theory or basis for the expert's opinion. This is not analogous to a situation in which a party's disclosure was misleading or the trial testimony was inconsistent with the disclosure. Rather, the issue here was insufficiency.
>
> The trial court's ruling did not endorse the sufficiency of the statement but instead addressed the motion's timeliness. The lower courts were entitled to determine, based on the facts and circumstances of this particular case, that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised – and potentially cured – before trial. Accordingly, there was no abuse of discretion as a matter of law.
>
> *Id.* at 3.

Cases Citing *Rivera*

In *Dedona v. DiRaimo*, 137 A.D.3d 548 (1st Dep't 2016), a First Department decision following, and citing, the First Department decision in *Rivera*, a trial court precluded the plaintiff from presenting evidence, including expert testimony, against the defendant, based upon the defendant's *in limine* motion made after jury selection but before opening statements.

The First Department reversed, reinstated plaintiff's complaint, and ordered a new trial:

> The trial court improvidently exercised its discretion in granting the motion and in dismissing the complaint based on the preclusion of evidence. Defendants' argument that they had no notice of plaintiffs' theory and were unfairly surprised is unavailing. The theory concerning vascularization of decedent's left leg was adequately disclosed in plaintiff's original and supplemental bills of particulars. Further, while CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time, here plaintiff served the CPLR 3101(d) expert disclosure notice about eight months before trial, which was sufficient notice. Furthermore, during that period, defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice.
>
> *Id*. at *1–2 (citations omitted).

Rivera is cited for the final proposition, *to wit*, that there was a waiver by the defendant of an objection to the plaintiff's expert exchange, in part, because the defendant did not object at the pretrial conferences conducted in the case.

So, under *DeDona*, it appears incumbent upon counsel to now advise their adversaries, at pretrial conferences (where there is generally no record of the proceedings), of the assorted shortcomings in their case, or risk having waived the right to object when the evidence is ultimately offered at trial.

In *Fermas v. Ampco Sys. Parking*, 2016 N.Y. Slip Op. 32096(U) (Sup. Ct., Queens Co. 2016), defendant sought to amend its answer to assert an affirmative defense that plaintiff failed to use an available seatbelt. The trial court had initially denied the motion on procedural grounds, but on the second application, granted the motion:

> To that end, plaintiff can claim neither surprise nor prejudice. Plaintiff was aware of the existence of this defense as early as it was interposed by codefendants in January 2013. Moreover, moving defendants' expert witness disclosure clearly indicated that the expert was to be "expected to testify that plaintiff failed to mitigate all injuries she did or would have suffered by failing to make use of the seatbelts available to her in the vehicle in which she was traveling." It is of particular significance that plaintiff made no objection in response to this CPLR 3101 (d) exchange.

Id. at *5 (citing *Rivera*, 123 A.D.3d 424 (1st Dep't 2014).

In *Fermas*, the trial court uses *Rivera* to impose a burden on the plaintiff to object to defendant's expert disclosure because it advanced a defense theory not asserted in the defendant's answer. Plaintiff is penalized for not objecting to an expert disclosure for what is, in essence, a pleading defect.

Commercial Division Rule On Motions *In Limine*

There is no CPLR rule on motions *in limine*. There is no provision in the general provisions of the Uniform Rules for Trial Courts governing, or even discussing, motions *in limine*. In fact, the only Uniform Rule I am aware of discussing motions *in limine* appears in the Commercial Division Rules:

> Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.

So, had this motion *in limine* been made in a trial court in the Commercial Division at least ten days prior to the pre-trial conference, seeking to preclude an expert economist rather than an expert physician, would the motion have been untimely, even if a prior objection had been made to a different portion of the expert economist's CPLR 3101(d)(1)(i) exchange?