New York Practice and CPLR Update

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RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE & PROCEDURE

NYSBA Trial Lawyers Section

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I. General Municipal Law § 50-e. Notice of Claim.

Court Needs Record Evidence to Determine if Municipal Entity Will Be Substantially Prejudiced in Its Defense by Allowing Service of a Late Notice of Claim

In *Newcomb v. Middle Country Cent. School Dist.*, 28 N.Y.3d 455 (2016), the Court of Appeals focused on whether the defendant would be substantially prejudiced in defending a matter by permitting service of a late notice of claim. *See* General Municipal Law § 50–e (5). Examining this factor, the Court held "that it is an abuse of discretion as a matter of law when…a court determines, in the absence of any record evidence to support such determination, that a respondent will be substantially prejudiced in its defense by a late notice of claim." While the length of delay in serving the notice of claim and the lack of actual knowledge of the facts underlying the claim are relevant to whether the late notice substantially prejudiced the public corporation, such prejudice cannot simply be inferred from these facts.

Furthermore, the Court ruled that "the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation" by "present[ing] some evidence or plausible argument that supports a finding of no substantial prejudice." If petitioner satisfies this burden, the public corporation must then rebut that proof with "a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed."

Court of Appeals Holds That Hospital's Records Did Not Put Hospital on Notice of Medical Malpractice

In *Wally G. v. New York City Health and Hospitals Corp.*, 27 N.Y.3d 672, 677 (2016), the Court stressed that the "actual knowledge" factor in General Municipal Law section 50-e(5) "contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory." Nonetheless, a medical provider's possession or creation of medical records, standing alone, will not establish that it had actual knowledge of a potential injury where the records do not indicate that the provider's employees inflicted any injury on the plaintiff. The medical records must do more than "suggest" that an injury occurred as a result of malpractice.

The appellate division in *Wally G.* concluded that plaintiff failed to establish "that the medical records put [the hospital] on notice that the alleged malpractice would subsequently give rise to brain damage as a result of birth trauma and hypoxia or that he would subsequently develop other deficits, delays, and disorders" and affirmed supreme court's denial of the application to serve a late notice of claim. The Court of Appeals ruled that this did not constitute an abuse of discretion.

Notice of Claim Must Be Verified, but the Defect Can be Forgiven

In the McKinney's Practice Commentaries to CPLR 3020, we list the important initial pleadings needing verification. While it is not an initial pleading, General Municipal Law § 50–e (2) requires that a notice of claim be "sworn to by or on behalf of the claimant." Thankfully, General Municipal Law section 50–e (6) provides:

> a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

The courts have repeatedly relied on this provision in concluding that a lack of verification of the notice of claim may be excused or corrected. *See, e.g., Matter of Figgs v. County of Suffolk*, 54 A.D.3d 671, 863 N.Y.S.2d 258 (2d Dep't 2008); *Gass v. Hahn*, 98 A.D.2d 741, 469 N.Y.S.2d 445 (2d Dep't 1983); *Mahoney v. Town of Oyster Bay*, 71 A.D.2d 879, 419 N.Y.S.2d 652 (2d Dep't 1979). Forgiveness under General Municipal Law section 50–e (6) is, however, within the courts discretion. Therefore, it is always best to properly verify the notice of claim in the first instance.

II. CPLR 205(a). Six Month Extension.

CPLR 205(a) now provides:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

At first blush, the amendment to CPLR 205(a) might seem to be primarily a matter of concern for the plaintiff who is attempting to commence a new action within the six-month extension. However, it is actually the defendant moving to dismiss the earlier action for neglect to prosecute under one of these miscellaneous provisions who will want to ensure that the court sets forth the "specific conduct constituting the neglect" and the plaintiff's "general pattern of delay in proceeding with the litigation" so as to prevent the plaintiff from invoking CPLR 205(a) in a subsequent action.

While the new language added to CPLR 205(a) specifically refers to dismissals under CPLR 3216, which are usually based on a failure to timely serve and file a note of issue, it also applies to any dismissal "otherwise" granted for a "neglect to prosecute." Therefore, the new requirement applies to the full panoply of dismissals grounded upon a neglect to prosecute. *See* CPLR 3126 (dismissal for failure to provide disclosure); CPLR 3404 (failure to restore case to trial calendar within a year after being marked "off" constitutes a "neglect to prosecute"); CPLR 3012(b) (dismissal for failure to timely serve complaint in response to demand; caselaw holding that this dismissal is one for "neglect to prosecute"); Connors, McKinney's CPLR 3012 Practice Commentaries, C3012:13 ("Dismissal Is Neglect to Prosecute for Limitations' Purposes"); CPLR 3012-a (requiring filing of certificate of merit in medical malpractice cases); CPLR 3406 (requiring filing of notice of medical malpractice action; McKinney's Practice Commentary CPLR 3012-a, C3012-a:3 ("Commencing a New Action After Dismissal for Failure to Comply with CPLR 3012-a")).

Plaintiff in Mortgage Foreclosure Action Entitled to CPLR 205(a)'s Six Month Gift Where Prior Action, Brought by a Different Plaintiff, Was Dismissed Under CPLR 3215(c)

In *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), the court permitted a second mortgage foreclosure action to be commenced under CPLR 205(a) after first action was dismissed pursuant to CPLR 3215(c). The court determined that the requirements of CPLR 205(a) were met in that:

> (1) there is no dispute that this action would have been timely commenced when the prior action was commenced in 2005; (2) the moving defendant, Cohan, was served within the six-month period after the prior action was dismissed; and (3) this action is based on the same occurrence as the prior action, namely the default on the payment obligations under the note and mortgage. Further, it is undisputed that the dismissal of the prior action was not based upon a voluntary discontinuance, lack of personal jurisdiction, or a final judgment on the merits (see CPLR 205[a]).

The order dismissing the first action tracked the language in CPLR 3215(c) by simply stating that the plaintiff "failed to proceed to entry of judgment within one year of default," and that "[t]ime spent prior to discharge from a mandatory settlement conference [was not] computed in calculating the one year period." "The order did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding with the litigation'."

The Second Department also ruled "that a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note."

CPLR 205(a) Only Applies Where Action #1 Was Commenced in a Court in New York State

In *Guzy v. New York City*, 129 A.D.3d 614 (1st Dep't 2015), the plaintiff commenced Action #1 against the New York City Transit Authority in the

Superior Court of New Jersey in July 2013. That action was dismissed based on lack of personal jurisdiction.

Plaintiff commenced Action #2 in New York Supreme Court. The First Department ruled that plaintiff's New Jersey action was not timely commenced and was dismissed for lack of personal jurisdiction. Therefore, plaintiff could not invoke the six-month gift for Action #2. "Moreover," the court noted in dicta, "CPLR 205 [a] does not apply when the initial action was commenced in a state or federal court outside of New York (see Siegel, NY Prac § 52 at 75 [5th ed 2011]….)."

In *Deadco Petroleum v. Trafigura AG*, _ A.D.3d _, --- N.Y.S.3d ----, 2017 WL 2586950 (1st Dep't 2017), Action #1 in a California federal court was timely commenced, but was dismissed based on a forum selection clause designating the New York courts as the exclusive forum for any litigation. After Action #2 was commenced in New York, the First Department ruled that "the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a 'prior action' within the meaning of that provision."

III. CPLR 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions.

Is the Plaintiff in a Derivative Action Entitled to a Continuous Treatment Toll?

Recently, in addressing derivative actions commenced by parents who alleged that they sustained injuries due to medical malpractice arising from the treatment of their children, the First and Third Departments have concluded that the continuous treatment toll is personal to the patient and does not apply to the derivative claim. *See, e.g., Baer v. Law Offices of Moran & Gottlieb*, 139 A.D.3d 1232, 1234 (3d Dep't 2016) (legal malpractice action alleging that defendants negligently failed to assert plaintiffs' derivative claims before statute of limitations expired thereon); *Devadas v. Niksarli*, 120 A.D.3d 1000, 1008 (1st Dep't 2014) (derivative claim for loss of services).

The Second Department has recently concluded that "[t]he continuous treatment toll is personal to the child and is not available to extend the time by which the plaintiff was required to assert her derivative claim." *Reeder v. Health Ins. Plan of Greater New York*, 146 A.D.3d 996, 1000 (2d Dep't 2017).

The Fourth Department, citing to a prior Second Department decision, now stands alone by adhering to the rule that if the continuous treatment doctrine applies to toll the statute of limitations with respect to the main claim, it will similarly toll the statute of limitations on the derivative claim. *See Dolce v. Powalski*, 13 A.D.3d 1200 (4th Dep't 2004)

There is another related issue under CPLR 214-a that does not seem to receive the same attention in the caselaw: whether a derivative claim should receive the benefit of a medical patient's foreign object toll?

IV. CPLR 301. Jurisdiction over persons, property or status.

Court Holds Foreign Corporation with Principal Place of Business in Ohio to be "At Home" in New York

The standard used for decades to measure whether a corporate defendant is subject to general jurisdiction in New York, the famous "corporate presence" or "doing business" test, has been all but declared unconstitutional by the Supreme Court in its 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *See* Siegel, New York Practice § 82.

In *Aybar v. Aybar*, 2016 WL 3389889, at *1 (Sup. Ct., Queens County 2016), plaintiffs alleged that they were injured in an auto accident in Virginia while passengers in a car equipped with defendant Goodyear's defective tire. Although Goodyear is an Ohio corporation with its principal place of business in that state, it obviously has a substantial presence in New York. Plaintiff alleged, and Goodyear did not deny, that the tire company "owns and operates nearly one hundred storefront tire and auto service center stores located in every major city and throughout New York State, and it employs thousands of New York State residents at those stores," while distributing "its tires for sale at hundreds of additional locations throughout

New York State." *Id*. Goodyear moved to dismiss the action for lack of personal jurisdiction based on the Supreme Court's decision in *Daimler*.

The court initially ruled that CPLR 302, New York's longarm statute, could not provide a basis of personal jurisdiction over Goodyear because it manufactured and sold the tire out of state and the plaintiffs' injuries were sustained in Virginia.
Turning to general jurisdiction under CPLR 301, which was the stuff of the Supreme Court's 2014 decision in *Daimler*, the court relied on plaintiffs' unrefuted allegations that Goodyear had operated numerous stores in New York since approximately 1924 and employed thousands of workers who engaged in daily activities in those stores. Based on this conduct, the *Aybar* court held that Goodyear's activities within New York were "so continuous and systematic that the company is essentially at home here," and therefore subject to general jurisdiction. *Id*. at *3.

The court also found an additional basis for personal jurisdiction over Goodyear, deeming it to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process. *Aybar*, at *3; *see* Siegel, New York Practice § 95.

The *Aybar* court issued a separate decision denying co-defendant Ford's motion to dismiss for lack of personal jurisdiction, which was based on the same reasoning. *Aybar v. Aybar*, 2016 WL 3389890, at *1 (Sup. Ct., Queens County 2016).

Daimler **Holding Back Before SCOTUS in Two Cases Argued April 25, 2017**

In two cases argued before the United States Supreme Court on April 25, 2017 (*BNSF Ry. Co. v. Tyrrell, U.S.*, No. 16-405; *Bristol-Myers Squibb Co. v. Superior Court for the Cty. of San Francisco, U.S.*, No. 16-466), the interpretation of the Daimler holding was debated. Decisions in both cases are expected by the summer of 2017.

V. CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

Supreme Court Issues Decision on Longarm Jurisdiction That May Affect Application of CPLR 302(a)(3)

Walden v. Fiore, 571 U.S. ___, 134 S. Ct. 1115 (2014), involved the assertion of long-arm jurisdiction, commonly referred to today as "specific jurisdiction," to be distinguished from the "general or all-purpose jurisdiction" involved in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (SPR 265:1), *supra*. The statute at issue was a general long-arm statute, but the decision will most likely affect New York actions relying on CPLR 302(a)(3) for jurisdiction.

In *Walden*, plaintiffs were on route to Las Vegas, Nevada from a very profitable venture in Puerto Rico and were carrying their alleged gambling winnings of approximately $97,000 in cash. At a stopover in Georgia, their booty was seized by a Drug Enforcement Agency ("DEA") agent with the promise that it would be returned if plaintiffs could prove that the cash emanated from a legitimate source. The defendant DEA agent helped draft an allegedly false and misleading affidavit to establish probable cause for forfeiture of the funds and forwarded it to a United States Attorney's Office in Georgia. Ultimately, no forfeiture complaint was filed and the DEA returned the funds to plaintiffs seven months after their seizure. *Walden*, 134 S. Ct. at 1119–20.

Plaintiffs commenced an action against the defendant DEA agent in federal district court in Nevada alleging, among other things, that defendant violated their Fourth Amendment rights by seizing the cash without probable cause, retaining the money after concluding it did not come from drug-related activity, and drafting a false affidavit. The Nevada long-arm statute relied upon by plaintiffs to assert jurisdiction over the Georgia DEA agent was a general one, permitting its courts to exercise jurisdiction over persons "on any basis not inconsistent with . . . the Constitution of the United States." *Walden*, 134 S. Ct. at 1121; Nev. Rev. Stat. § 14.065 (2014).

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit and concluded that the Nevada district court lacked personal jurisdiction over defendant. The Court stressed that the central jurisdictional inquiry is the contacts that "defendant himself" creates with the forum state, and not

plaintiff's connection with same. *Walden*, 134 S. Ct. at 1122. Furthermore, the Court observed that "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* While the Court acknowledged that "physical presence in the forum is not a prerequisite to jurisdiction physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Id.* (citation omitted).

Applying these principles, the Court concluded that defendant's conduct toward plaintiffs, whom he knew had Nevada connections, and the fact that it was foreseeable that plaintiffs would suffer harm in Nevada were insufficient to establish minimum contacts with the forum state. *Id.* at 1124. The key jurisdictional inquiry "is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125. In this regard, it was "undisputed that no part of petitioner's course of conduct occurred in Nevada."

We wonder whether the decision that occasioned the adoption of CPLR 302(a)(3), *Feathers v. McLucas*, 15 N.Y.2d 443 (1965), would itself be a casualty of the tightened jurisdictional standards imposed by the Supreme Court in *Walden*. *See* January 2017 Supplement to Siegel, New York Practice, § 88 (Connors ed., January 2017 Supplement). The *Daimler* and *Walden* decisions are discussed in further detail in two articles appearing in the New York Law Journal: "Impact of Supreme Court Decisions on New York Practice [Part I]," 251 (no. 116) New York Law Journal (June 18, 2014) and "Impact of Recent U.S. Supreme Court Decisions on New York Practice [Part II]," 252 (no. 13) New York Law Journal (July 21, 2014).

VI. CPLR 304. Method of commencing action or special proceeding.

Second Department Rules That Plaintiff Who Obtains Index Number, But Fails to File Initiatory Papers, Cannot be Saved by CPLR 2001

Applying *Goldenberg v. Westchester County Health Care Corp*., 16 N.Y.3d 323 (2011), the Second Department dismissed an action in which the plaintiff had obtained an index number and made a motion by order to show

cause within the action, but somehow never filed a summons and complaint or summons and notice. *O'Brien v. Contreras*, 126 A.D.3d 958 (2d Dep't 2015). In no uncertain terms, the *O'Brien* court concluded that this omission was beyond the reach of CPLR 2001 and noted that "[t]he failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity." *See also Maddux v. Schur*, 139 A.D.3d 1281, 30 N.Y.S.3d 590 (3d Dep't 2016) ("although plaintiff purchased an index number and filed a complaint, she never filed a summons or summons with notice;" therefore, the action was a nullity beyond the reach of CPLR 2001); *Wesco Ins. Co. v. Vinson*, 137 A.D.3d 1114, 26 N.Y.S.3d 870 (2d Dep't 2016) (plaintiff's action dismissed as a nullity where it obtained an index number and moved by order to show cause to fix the amount of its workers' compensation lien, but did not file or serve a summons, complaint, or petition).

VII. Commercial Division of Supreme Court.

Amendments to Commercial Division Rules

Several amendments were made to the Rules of the Commercial Division, 22 NYCRR 202.70, which are tracked in Siegel, New York Practice § 12 (Connors ed., January 2017 Supplement). For example:

22 N.Y.C.R.R. § 202.70(g), Rule 3(b), Alternative Dispute Resolutions (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case (AO/121/16, May 26, 2016): Section (b) was added to Rule 3 to permit counsel at any point during the litigation to jointly request that an assigned justice grant permission for counsel to proceed with a settlement conference before another justice, called a "settlement judge." The assigned justice possesses discretion to grant the request if she determines that "such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice."

22 N.Y.C.R.R. § 202.70(g), Rule 14-a, Rulings at Disclosure Conferences (AO/128/16, June 2, 2016): This new Uniform Rule specifies the procedures governing disclosure conferences conducted by non-judicial personnel. Section (a) addresses the proper memorialization of resolutions reached at the conference, which are then submitted to the court. Section (b)

addresses the appropriate procedures to follow for memorialization of any resolutions reached during a disclosure conference conducted by telephone. Within one business day of the telephone conference, the parties should submit a stipulated proposed order to the court memorializing the resolution of the discovery dispute. If the parties are unable to agree on upon a proposed order, they must advise the court, which will then direct an alternative course of action.

22 N.Y.C.R.R. § 202.70(g), Rule 11-g, Proposed Form of Confidentiality Order (AO/131/16, June 16, 2016): This new Uniform Rule only applies "in those parts of the Commercial Division where the justice presiding so elects." It instructs parties in cases warranting the entry of a confidentiality order to submit to the court for signature a proposed stipulation and order that conforms to the form added as Appendix B to the rules. If the parties wish to deviate from the official form, they can instead submit a red-line of all proposed changes and a "written explanation of why the deviations are warranted in connection with the pending matter." Section (c) notes that "[n]othing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the [CPLR]."

New Model Preliminary Conference Order (AO/132/16, June 24, 2016): Rule 11, entitled "Discovery," provides that "[t]he preliminary conference will result in the issuance by the court of a preliminary conference order." Effective August 1, 2016, there is now a "New Model Preliminary Conference Order" form provided for optional use in the Commercial Division. All prior versions of the form are repealed.

22 N.Y.C.R.R. § 202.70(g), Rule 32-a. Direct Testimony by Affidavit (A0/190/16, September 20, 2016): This new uniform rule permits the court to require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing "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 partv offering testimony. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness."

New "Commercial Division Sample Choice of Forum Clause" as Appendix C to the Rules: The proposed model language would facilitate the goal of certainty in commercial litigation by providing contracting

parties "a convenient and streamlined tool to assist them in crafting appropriate party-specific language, in a pre-dispute context, in selecting the Commercial Division as their choice of forum." The recommended model language is as follows:

> THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.

Parties employing this or other forum selection language would still be required to meet the monetary and other threshold jurisdictional requirements for Assignment to the Commercial Division.

This measure was adopted on March 6, 2017, effective April 1, 2017, but on March 16, 2017, the effective date of the measure was delayed until further order.

VIII. Uniform Rule 202.5-bb. Electronic Filing in Supreme Court; Mandatory Program.

By Administrative Order AO/84/17 dated April 27, 2017, Chief Administrative Judge Lawrence K. Marks established or continued mandatory e-filing in certain actions in the supreme court in the following counties: Albany, Bronx, Broome, Dutchess, Erie, Essex, Kings, Nassau, New York, Niagara, Oneida, Onondaga, Queens, Richmond, Rockland, Suffolk, Westchester.

AO/84/17 also continued mandatory e-filing in Surrogate's Courts in Albany, Cayuga, Chautauqua, Erie, Livingston, Monroe, Oneida, Ontario, Seneca, Steuben, Wayne, and Yates Counties.

The Administrative Order also established or continued the consensual e-filing program in the following counties for various types of actions: Albany, Bronx, Broome, Cortland, Dutchess, Erie, Kings, Livingston,

Nassau, New York, Niagara, Oneida, Onondaga, Ontario, Orange, Putnam, Queens, Richmond, Rockland, Tompkins, and Westchester.

Effective January 27, 2017, e-filed documents in newly initiated cases in New York County will be available immediately for online public viewing through the New York State Courts Electronic Filing system ("NYSCEF"). Such filings will be available for immediate online public viewing PRIOR to any examination of the document or assignment of an index number to the matter by the Office of the New York County Clerk.

Documents available for online viewing at this early stage will contain the following annotation in the margin:

> *Header:*
>
> *CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)*
>
> *Footer:*
>
> *This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR § 202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk in the county of filing. Because court rules (22 NYCRR § 202.5[d]) authorize the County Clerk to reject filings and attempted filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.*

These marginal annotations will be removed when the documents have been reviewed and approved for filing by the County Clerk and an index number has been assigned to the matter pursuant to 22 NYCRR § 202.5-b(d)(3).

Because these documents are available for public view prior to examination by the County Clerk, filers are advised to take special care to assure that the filings comply with State law and court rules addressing confidentiality of personal information (see, e.g., Gen. Bus. L. § 399-ddd [confidentiality of social security account number]; 22 NYCRR § 202.5[e] [omission or redaction of confidential personal information]).

The status of e-filing, including the actions to which it applies and the pitfalls associated with it, are discussed in further detail in Siegel, New York Practice § 63 (Connors ed., January 2017 Supplement).

* * *

IX. CPLR 308. Personal service upon a natural person.

Supreme Court Grants Application to Serve Defendant Via Facebook

In *Baidoo v. Blood-Dzraku*, 48 Misc.3d 309, 5 N.Y.S.3d 709 (Sup. Ct., New York County 2015), the court permitted the plaintiff in a matrimonial action to serve the defendant via a private message through Facebook. "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." The court refused to order additional service by any other method, such as publication under CPLR 315, noting that "publication service is . . . almost guaranteed not to provide a defendant with notice of the action for divorce…."

Subsequent Action Untimely Where Prior Special Proceeding Dismissed for Lack of Proper Service

Service of process on a Saturday can be set aside if it is "maliciously procure[d]" to be served on one who "keeps Saturday as holy time." Gen. Bus. Law § 13; *see* Siegel, New York Practice § 63. In *Tenenbaum v Setton*, 49 Misc.3d 39, 18 N.Y.S.3d 498 (App. Term 2015), plaintiff commenced a timely special proceeding in the supreme court to confirm an arbitration award. That proceeding was dismissed on the ground that service of the notice of petition and petition violated General Business Law section 13. The Appellate Term noted that "[s]ervice in violation of General Business Law § 13 is void, and personal jurisdiction is not obtained over the party served. Therefore, the basis for the Supreme Court's dismissal of the proceeding before it was lack of personal jurisdiction over defendant." *Tenenbaum*, 49 Misc.3d at 41, 18 N.Y.S.3d at 499 (citations omitted).

Plaintiff then commenced a second action to recover for breach of contract. Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(5), arguing that the breach of contract cause of action was the subject of the prior special proceeding seeking to confirm the arbitration award and that the statute of limitations was a bar to the action. Plaintiff opposed the motion and cross-moved for leave to serve an "Amended Petition" seeking to confirm the arbitration award.

The Appellate Term concluded that plaintiff was not entitled to amend his pleading to seek to confirm the arbitration award because the instant action was commenced after the expiration of the one-year statute of limitations to confirm an arbitration award set forth in CPLR 7510. Furthermore, plaintiff was not entitled to the six-month extension provided by CPLR 205(a) because the original special proceeding was dismissed based on lack of personal jurisdiction. *See* Siegel, New York Practice § 52.

Time Limit for Service Upon a Defendant in Rule 4(m) Reduced to 90 Days

Effective December 1, 2015, Rule 4(m) was amended to reduce the presumptive time for serving a defendant in federal practice from 120 days to 90 days. *See* Siegel, New York Practice § 625 (Connors ed., January 2017 Supplement).

Supreme Court Grants Application to Serve Defendant Via Publication

The court may order service by publication under CPLR 308(5) in a personam action. *See* Siegel, New York Practice § 107. That's what occurred in *Fidelity National Title Insurance Co. v. Smith*, 2015 WL 9851735 (Sup. Ct., New York County 2015), where the court found that service via the methods set forth in CPLR 308(1) (personal service), CPLR 308(2) (deliver and mail service), and CPLR 308(4) (nail and mail service) were "impracticable." Therefore, the court ordered service of process by publication in accordance with CPLR 316. Furthermore, to afford plaintiff sufficient time to complete service by publication and file affidavits thereof, the court granted plaintiff's CPLR 306-b motion to extend the time within which to complete service.

X. Business Corporation Law § 304. Statutory designation of secretary of state as agent for service of process.

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus. Corp. Law § 304. In section 95 of the January 2017 Supplement to Siegel, New York Practice (5th ed.), we explore the issue of whether such designation constitutes the corporation's consent to personal jurisdiction in New York. The issue has become an important one in light of the Supreme Court's decision in *Daimler*. In *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the court examined "the applicable Connecticut law" and ruled "that by registering to transact business and appointing an agent under the Connecticut statutes—which do not speak clearly on this point—Lockheed did not consent to the state courts' exercise of general jurisdiction over it." The court also observed that New York's Business Corporation Law section 304 "has been definitively construed" to vest the New York courts with general jurisdiction over a corporation that designates the New York Secretary of State as its agent for service of process.

In *Famular v. Whirlpool Corp.*, 2017 WL 280821 (S.D.N.Y. 2017), nine different plaintiffs from nine different states brought suit in the Southern District of New York, alleging that the Whirlpool washing machines the plaintiffs had purchased were mislabeled. One plaintiff, Famular, was a resident of New York who bought the Whirlpool washing machine in New York. Whirlpool conceded that specific jurisdiction existed in reference to Famular, but moved to dismiss against the other eight plaintiffs due to a lack of general personal jurisdiction.

The plaintiffs argued that Whirlpool and the other defendants were "subject to general personal jurisdiction in New York on a theory of consent by registration with the State of New York." The defendants countered that "the consent-by-registration theory of general personal jurisdiction is no longer viable in light of *Daimler*." The *Famular* court held that "a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise." *But see Aybar v. Aybar*, 2016 WL 3389889, at *1 (Sup. Ct., Queens County 2016).

XI. CPLR 501. Contractual provisions fixing venue.

First and Second Departments Enforce Forum Selection Clauses in Resorts' Rental Agreements

In *Molino v. Sagamore*, 105 A.D.3d 922 (2d Dep't 2013), the Second Department reversed the trial court and granted the defendant's motion pursuant to CPLR 501 and 511 to change the venue of the action from Queens County to Warren County. Upon her arrival at the defendants' facility, the plaintiff signed a "Rental Agreement" which contained a provision stating that "if there is a claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County." The Second Department concluded that the supreme court erred in determining that the Rental Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (citation omitted) (internal quotation marks omitted).

Similarly, in *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D.3d 1015, 991 N.Y.S.2d 765 (1st Dep't 2014), the First Department affirmed supreme court's order granting defendants' motion to change the venue of the action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County. Citing to *Molino*, the court concluded that there was no basis for disregarding the venue agreement because "[p]laintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching." The action was actually "transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County"! *See also Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, 131 A.D.3d 1121 (2d Dep't 2015) (affirming order granting that branch of the defendant's motion which was

pursuant to CPLR 501 and 511 to change the venue of the action from Suffolk County to Greene County).

Second Department Enforces Forum Selection Clause in Residential Health Care Facility's "Admission Agreement"

In *Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 A.D.3d 651, 17 N.Y.S.3d 501 (2d Dep't 2015), plaintiff's decedent was a resident of a residential health care facility located in Brooklyn.

Upon the decedent's admission to the facility, her daughter, the plaintiff, signed an "Admission Agreement" that contained a forum selection clause stating that "[e]ach of the parties to this Agreement irrevocably (a) submits to the exclusive jurisdiction of the courts of the State of New York in the County of Suffolk ... for purposes of any judicial proceeding that may be instituted in connection with any matter arising under or relating to this Agreement." The Agreement also provided that "[i]n addition to the parties signing this Agreement, the Agreement shall be binding on the heirs, executors, administrators, distributors, successors, and assigns of the parties."

After the decedent died, the plaintiff, as the administrator of the decedent's estate, commenced a medical malpractice action against the operator of the facility in Supreme Court, Kings County. Defendant moved to change venue of the action from Kings County to Suffolk County based on the Agreement's forum selection clause.

The Second Department ruled that the defendant was not required to serve the plaintiff with a written demand to change venue pursuant to CPLR 511(a) before making its motion. Relying on its prior decisions, including *Molino*, the court ruled that "the plaintiff failed to show that enforcement of the forum selection clause would be unreasonable, unjust, or in contravention of public policy, or that the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching." Furthermore, "the plaintiff failed to demonstrate that a trial in Suffolk County would be so gravely difficult that, for all practical purposes, she would be deprived of her day in court." Therefore, the Second Department reversed the supreme court and granted the motion to change venue.

XII. CPLR 602. Consolidation.

Court of Claims Denies Motion to Stay Supreme Court Action or Consolidate Action with Parallel Court of Claims Action

In *Cocchi v. State*, 52 Misc.3d 561, 30 N.Y.S.3d 481 (Ct. Cl. 2016), plaintiff was in an accident on the Long Island Expressway and commenced two actions: one in the Court of Claims against the State (also naming the New York State Department of Transportation), and one in supreme court against several defendants. Two defendants in the supreme court action made a motion in the Court of Claims for an injunction staying plaintiff from proceeding in her supreme court action until the action in the Court of Claims was resolved. Alternatively, the defendants moved for consolidation of the two actions in the Court of Claims.

The court was sympathetic to defendants' plight under New York State's court system and provided two additional examples of the problems sometimes faced when a plaintiff is allegedly injured through the acts of the State and other tortfeasors. If a plaintiff suffers from medical malpractice arising at the State University Hospital in Brooklyn (Downstate), an action against the residents and other hospital staff is tried in the Court of Claims, but an action against the attending physicians must be prosecuted in supreme court. Furthermore, if an individual is injured working on a State construction project, he or she would need to bring a claim against the State in the Court of Claims, and sue the municipality and general contractor in supreme court.

Nonetheless, the court ruled that granting the relief sought would require an amendment to the State Constitution. CPLR 602(b) does not permit the supreme court to remove an action from the Court of Claims to it. *See* Siegel, New York Practice § 128. That step is prohibited by section 19(a) of Article 6 of the State Constitution. Additionally, the *Cocchi* court could find no authority that would permit the Court of Claims to transfer a case from supreme court to it, or to stay a supreme court action. As to the latter point, CPLR 2201 has a narrow scope and only permits a court to stay its own proceedings. *See* Siegel, New York Practice § 255.

The court noted that there is limited solace for the plaintiff in this dilemma, as disclosure of the two required actions can be coordinated and the parties can be invited to the depositions, with transcripts made available to all.

Even if Actions Do Not Have Common Question of Law or Fact, Court Can Transfer Action to Part Where Related Action Is Pending

CPLR 602(a) permits a court, on motion, to consolidate or jointly try actions involving a common question of law or fact. *See* Siegel, New York Practice § 128 (5th ed. 2011). Yet, if the actions do not have a common question of law or fact, the court can transfer an action to the same part where a related action is pending "solely for 'purposes of disposition'." *Bermejo v. New York City Health & Hosps. Corp.*, 133 A.D.3d 808, 809, 20 N.Y.S.3d 401, 402 (2d Dep't 2015). In *Bermejo*, "[g]iven that both actions [we]re related to the same underlying incident, the transfer for this limited purpose was not improper under the circumstances . . . ."

XIII. CPLR 1003. Nonjoinder and misjoinder of parties.

Party Added Without Leave of Court Outside CPLR 1003's Time Frames Waives Defect by Failing to Promptly Assert It

The 1996 amendments to CPLR 305(a) and 1003 allow the plaintiff to add additional parties to an action without court leave if the plaintiff acts no later than the 20th day after the defendant's service of the answer. *See* Siegel, New York Practice § 65. If a party is improperly added outside the time frames in CPLR 1003, she had better raise a prompt objection. In *Wyatt v. City of New York*, 46 Misc. 3d 1210(A), 2015 WL 232918 (Sup. Ct., New York County 2015), the court ruled that plaintiffs added MTA Bus Company as a defendant without court leave outside the time periods in CPLR 1003. Nonetheless, the court concluded that defendants waived their right to assert the issue because they failed to plead a proper objection in either their original or amended answer to the amended complaint. *Id.* at *5.

Despite the fact that defendants' amended answer contained thirteen affirmative defenses, including lack of personal jurisdiction based on the ground that "plaintiffs have failed to properly serve defendants with the Summons in this matter," it still missed the mark.

The decision is discussed in further detail in section 65 of the January 2017 Supplement to Siegel, New York Practice (5th ed.).

XIV. CPLR 1601. Limited liability of persons jointly liable.

Split Decision from Third Department Permits Apportionment of State's Fault in Supreme Court Action

In *Artibee v. Home Place Corp*, 28 N.Y.3d 739 (2017), plaintiffs sued defendant for injuries sustained while driving on a state highway when a branch from defendant's tree fell and struck plaintiff's car. Plaintiff also sued the State of New York in the Court of Claims.

In the supreme court action, defendant moved in limine to have the jury apportion liability between the defendant and the state. Supreme court ruled that evidence with regard to the state's liability for plaintiffs' alleged damages would be admissible at trial, but denied defendant's request for an apportionment charge.

The Third Department ruled that defendant was entitled to an apportionment charge to permit it to establish that its share of fault was 50% or less. The Court of Appeals reversed, concluding that the factfinder in supreme court cannot apportion fault to the State under CPLR 1601(1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action.

The Court noted that apportionment of fault against a nonparty tortfeasor is available under CPLR 1601(1), unless "the claimant proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor "in said action (or in a claim against the state, in a court of this state)" CPLR 1601(1). The statutory language permits the State to seek apportionment in the Court of Claims against a private tortfeasor subject to jurisdiction in any court in the State of New York. *See* Siegel, New York Practice § 168C at 290 (5th ed. 2011). "The statute does not, however, contain similar, express enabling language to allow apportionment against the State in a Supreme Court action (see id. [acknowledging that such a rule has derived from case law, rather than any "statute in point"])."

The *Artibee* Court stressed that "[m]oreover, even apart from the absence of language permitting apportionment against the State in Supreme Court, CPLR 1601(1) provides that a nonparty tortfeasor's relative culpability must not be considered in apportioning fault "if the claimant ... with due diligence ... was unable to obtain jurisdiction over such person in said action….Inasmuch as no claimant can obtain jurisdiction over the State in Supreme Court and the statute does not, by its terms, otherwise authorize the apportionment of liability against the State in that court, we agree with plaintiff that defendant was not entitled to a jury charge on apportionment in this action." In this respect, the *Artibee* Court ruled that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction.

The Court stressed that "if a defendant believes that it has been held liable in Supreme Court for what is actually the State's negligent conduct, the defendant can sue the State for contribution in the Court of Claims." It must be noted, however, that the State will not be bound by the amount of the judgment or the apportionment of fault in the supreme court action. *See* Siegel, New York Practice § 470 ("Nonjury Determinations; Court of Claims Problems").

The dissent in *Artibee* observed:

> the majority's holding creates anomalous situations that I do not believe were intended by the legislature: (1) a defendant in Supreme Court cannot shift liability to the nonparty State, but a state defendant in the Court of Claims can shift liability to a private party; and (2) a plaintiff in the Court of Claims will face apportionment with the State pointing to an empty chair, but a plaintiff in the Supreme Court will not face apportionment where the empty chair is the State.

In an analogous context, courts have held that where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant, the liability of the bankrupt tortfeasor can been "apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16." *See, e.g., Kharmah v. Metropolitan Chiropractic Ctr.*, 288 A.D.2d 94, 94–95 (1st Dep't 2001). Given

Artibee's conclusion that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction,[1] this area of the law needs to be reexamined.

XV. CPLR 2101. Form of papers.

New Court Rule Requires Attorneys to Redact Certain Confidential Information from Papers Filed in Court

The Administrative Board of the Courts recently promulgated Uniform Rule 202.5(e), which requires the redaction of certain confidential personal information ("CPI") from court filings. Compliance with the rule—effective January 1, 2015—was voluntary through February 28, 2015, but is now mandatory. The new rule covers actions that are using the New York State Courts Electronic Filing System ("NYSCEF"), *see* Siegel, New York Practice § 63 (Connors ed., January 2017 Supplement), as well as those proceeding with actual hard copy papers.

Under the rule, CPI includes "(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; (ii) the date of an individual's birth, except the year thereof; (iii) the full name of an individual known to be a minor, except the minor's initials; and (iv) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof." 22 N.Y.C.R.R. § 202.5(e)(1).

The new rule is discussed in further detail in Siegel, New York Practice § 201 (Connors ed., January 2017 Supplement).

[1] *Artibee*, 28 N.Y.3d at 747-48, 49 N.Y.S.3d at 643-44, 71 N.E.3d at 1210-11.

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State, Second Circuit Declares Statute Constitutional, U.S. Supreme Court Denies Leave

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern." *See Connors*, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," New York Law Journal, May 24, 2016, at 3 (addressing the interplay between the new Part 523 allowing temporary practice in New York State

and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State).

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
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> ***
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002).

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice.

The decision, and its impact, is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., January 2017 Supplement).

XVI. CPLR 2103. Service of papers.

CPLR 2103 Amended to Allow for Service Via Regular Mail Outside New York

While CPLR 2103(b) allows for service of interlocutory papers during an action via several methods, regular mail is still the most popular. Up through 2015, service via "[m]ailing" under CPLR 2103(b)(2) required that the paper be deposited with "the United States Postal Service *within the state*." *See* CPLR 2103(f)(1) (defining "Mailing") (emphasis added).

Effective January 1, 2016, lawyers may deposit interlocutory papers in mailboxes outside New York thanks to an amendment to CPLR 2103(f)(1), which now defines "[m]ailing" as depositing the interlocutory paper with the "United States Postal Service *within the United States*." (emphasis added)

CPLR 2103(b)(2) grants a five-day extension to the recipient of a paper to perform any act where: (1) the time to perform the act runs from the service of a paper, and (2) the paper is served by regular mail. The five days now become six if a party avails itself of the amendment and deposits the interlocutory paper for first class mailing with the United States Postal

Service outside New York, "but within the geographic boundaries of the United States." CPLR 2103(b)(2).

The amendment to CPLR 2103 is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., January 2017 Supplement).

XVII. CPLR 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist.

CPLR 2106 Amended to Permit Person Outside United States to Submit Affirmation

Effective January 1, 2015, CPLR 2106 was amended to add a new subsection (b) to permit the use of an affirmation by any person who subscribes and affirms the statement while located outside the geographic boundaries of the United States and its territories. The amendment is discussed in further detail in Siegel, New York Practice § 206 (Connors ed., January 2017 Supplement). It is important to note that the requirements of CPLR 2309(c) are still imposed when the oath or affirmation is made outside New York State, but within the United States and its territories, as was the situation in the *Midfirst Bank* decision, discussed under CPLR 2309, below.

Affirmation of Doctor Not Authorized to Practice Medicine in New York Does Not Constitute Competent Evidence

Tomeo v. Beccia, 127 A.D.3d 1071 (2d Dep't 2015) highlights one of the pitfalls of the statute. In *Tomeo*, the plaintiff failed to raise a triable issue of fact in opposition to defendant's prima facie showing on its motion for summary judgment. "The affirmation of the plaintiff's expert, Dr. Richard Quintiliani, did not constitute competent evidence, because Quintiliani was not authorized by law to practice medicine in New York State." Therefore, defendant hospital was granted summary judgment dismissing the action against it.

XVIII. CPLR 2214. Motion papers; service; time.

CPLR 2214(c) Amended to Address Issue That Arose in Second Department's *Biscone* Decision

In *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dep't 2012), *appeal dismissed*, 20 N.Y.3d 1084, 965 N.Y.S.2d 72, 987 N.E.2d 632 (2013), addressed in greater detail in Siegel, New York Practice § 246 (Connors ed., January 2017 Supplement), the Second Department concluded that a motion for reargument/renewal was properly denied on the ground that the moving papers were insufficient because plaintiff failed to include a complete copy of the papers submitted on the main motion, as required by CPLR 2214(c).

The *Biscone* decision has prompted an amendment to the statute, which took effect on July 22, 2014. A new sentence was added to CPLR 2214(c), and states as follows:

> Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.

Many supreme court judges require that in all e-filed cases assigned to them, counsel submit hard copies, also known as "working copies," of e-filed documents that are intended for the court's review. *See, e.g.*, § B, 6(a), *Joint Protocols for New York State Courts E-Filing: Cases Filed in Supreme Court New York County*, NYSCEF (March 9, 2016) ("Various Justices require that, in all NYSCEF cases assigned to them, unless otherwise directed, counsel submit working copies of e-filed documents…. Generally, in these Parts, documents intended for judicial review must be filed with the NYSCEF system first and the required working copy must be delivered to the court thereafter.").

Motion for Reargument That Fails to Include or Refer to Original Motion Papers and Order Is "Procedurally Defective"

In *JJM Sunrise Auto., LLC v. Volkswagen Grp. of Am., Inc.*, 49 Misc. 3d 1208(A), 2015 WL 5971752 (Sup. Ct., Nassau County 2015), plaintiff made a motion for leave to reargue under CPLR 2221. The court ruled that the motion failed to conform with CPLR 2214(c) and the rules of the supreme court in Nassau County. Plaintiff not only failed to include the original motion papers, but also the decision and order. Plaintiff also failed to "make reference to [the papers], giving the docket numbers on the e-filing system," as is now permitted under the 2014 amendment to CPLR 2214(c).

The court pointed out that, pursuant to local rules, in an e-filed case, "whenever any paper is filed in the Supreme Court of Nassau County that has a judge assigned at the time of filing (as in the case at bar), the filer receives a notice both in an e-mail and on the confirmation screen after filing," alerting the filing party that the assigned judge requires working copies for, among other things, motions. The notice also states that the movant must submit hard copies of any e-filed documents referenced by docket number in an e-filed motion.

Plaintiff's failure to comply with CPLR 2214(c) and to submit working copies of the e-filed documents with the motion for reargument rendered it "procedurally defective." The court nonetheless granted reargument in part "as an exercise of discretion."

Courts Continue to Deny CPLR 3211 Motions That Fail to Attach Copy of Pleadings

In *1501 Corp. v. Leilenok Realty Corp.*, 2015 WL 2344489 (Sup. Ct, Queens County, 2015), defendant moved to dismiss plaintiff's amended complaint based on documentary evidence pursuant to CPLR 3211(a)(1) and for failure to state a cause of action pursuant to CPLR 3211(a)(7). The court denied the motion noting that:

> Movant failed to annex a copy of the amended complaint it seeks to dismiss herein. As such, the court is unable to determine whether the amended complaint, in fact, is legally sufficient to withstand a motion to dismiss.
>
> There is no authority compelling the Court to consider papers which were not submitted in connection with the motion on which the Court

is ruling. Indeed, CPLR § 2214 (c), permits the Court to refuse to consider improperly submitted papers (*Biscone v JetBlue Airways Corporation*, 103 AD3d 158 [2012].

See also Gibbs v. Kings Auto Show Inc., 2015 WL 1442374 (Sup. Ct., Kings County 2015) ("In accordance with CPLR 2214(c), [defendant] must at a minimum, annex a copy of the pleading to its motion which it wants the court to dismiss"; defendant moved under CPLR 3211(a)(1) and requested a conversion of the motion to one for summary judgment pursuant to CPLR 3211(c)); *compare* CPLR 3212(b) (specifying that "[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").

What if the opponent on the motion submits the pleading that is being attacked?

In *Thompson v. Iannucci*, 50 Misc. 3d 1226(A), 2015 WL 10437745 (Sup. Ct., Ulster County 2015), the court ruled that "[t]he fact that the opposition attached the Complaint does not satisfy the burden of the moving party [under CPLR 2214(c)], nor is the Court required to consider these papers." Therefore, the court denied defendants' CPLR 3211(a)(7) motion to dismiss as "procedurally deficient" under CPLR 2214(c).

XIX. CPLR 2215. Relief demanded by other than moving party.

Improper Cross Motion Seeking Relief Against Nonmoving Defendants Could Not Relate Back to Main Motion to Establish Timeliness

The caselaw continues to demonstrate that attorneys use the cross motion authorized by CPLR 2215 for improper purposes, and in many instances to their detriment. A recent example of the problem arose in *Sanchez v. Metro Builders Corp.*, 136 A.D.3d 783, 25 N.Y.S.3d 274 (2d Dep't 2016), where plaintiff, who had fallen from a roof, moved for summary judgment on liability against the defendant in a Labor Law action. Defendant cross moved for summary judgment dismissing the complaint insofar as asserted against it, and for partial summary judgment on liability against two

codefendants for indemnification. The supreme court denied the cross-motion as untimely.

The Second Department modified the supreme court's order by concluding that the branch of defendant's cross-motion that was for summary judgment dismissing the complaint insofar as asserted against it was timely pursuant to CPLR 2215. In this portion of its cross-motion, defendant was seeking affirmative relief against the plaintiff, who was the moving party, and it therefore properly denominated the request for relief as a cross-motion. The cross-motion was, of course, subject to the shorter notice periods in CPLR 2215 and was deemed timely by the Second Department.

The remaining branches of defendant's motion seeking partial summary judgment on liability against the two codefendants could not, however, be considered as a cross motion because defendant was seeking affirmative relief against nonmoving parties. *See* CPLR 2215 ("a party may serve *upon the moving party* a notice of cross-motion demanding relief") (emphasis added). The court ruled that these branches of the motion were untimely because they were made "after the deadline to make a motion for summary judgment had passed, and failed to demonstrate good cause for the delay." *See* CPLR 3212 (a).

The *Sanchez* court did not discuss the point, but a cross-motion for summary judgment that is served after the statutory deadline in CPLR 3212(a) can be entertained if it is sufficiently related to a timely motion for summary judgment. *See* Siegel, New York Practice § 279. The close relationship between a timely motion for summary judgment and an untimely cross-motion can provide "good cause" for a court to entertain the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244 (1st Dep't 2006). In *Sanchez*, those branches of defendant's cross-motion seeking relief against the nonmoving defendants could not rely on this doctrine to establish good cause.

XX. CPLR 2219. Time and form of order.

Delays Ranging from Six to Eighteen Months in Issuing Orders on Four Motions Warrant Issuance of Judgment to Compel

If a judge inordinately delays in rendering an order on a motion, a party may commence an Article 78 proceeding in the nature of mandamus to compel the determination of the motion. This course of action is not highly recommended, but it was followed in *Liang v. Hart*, 132 A.D.3d 765, 17 N.Y.S.3d 771 (2d Dep't 2015), where petitioner made four separate motions that were fully submitted on June 17, 2013, July 24, 2013, November 26, 2013, and June 19, 2014. In February of 2015, the petitioner commenced an Article 78 proceeding against the judge to compel her to issue orders. Citing to CPLR 2219(a), the Second Department concluded that "the petitioner demonstrated a clear legal right to the relief sought" and directed the respondent judge to issue written orders on the four motions within 30 days.

XXI. CPLR 2221. Motion affecting prior order.

On Post-Appeal Motion for Leave to Renew, Movant Bears a Heavy Burden of Showing Due Diligence

CPLR 2221(e)(3) explicitly requires that a motion to renew contain "reasonable justification for the failure to present such facts on the prior motion." The Second Department continues to apply this requirement strictly, especially if the renewal motion is made after the underlying order or judgment has been subject to appellate review. For example, in *Priant v. New York City Transit Auth.*, 142 A.D.3d 491, 36 N.Y.S.3d 201 (2d Dep't 2016), the plaintiff was in a desperate spot: appealing from an order of supreme court denying his motion for leave to renew that branch of his prior motion which was for leave to serve a late notice of claim. The appellate division had already weighed in on the matter by reversing supreme court's original order and denying plaintiff's motion to serve a late notice of claim. Unless the plaintiff could successfully apply for leave to appeal from the Court of Appeals, this was the end of the line.

The Second Department observed, as it had on many prior occasions, that "[o]n a postappeal motion for leave to renew, the movant bears a heavy

burden of showing due diligence in presenting the new evidence to the Supreme Court." The plaintiff did not meet that burden in *Priant*, as it "failed to establish that the new evidence offered in support of his motion for leave to renew could not have been discovered earlier through the exercise of due diligence." *See* CPLR 2221(e)(3).

Second Department Grants Motion to Renew Even Though Facts Were Not "Newly Discovered"

In a decision handed down on the same day as *Priant*, discussed above, the Second Department showed a somewhat more lenient approach to motions for renewal in *In re Defendini*, 35 N.Y.S.3d 495 (2d Dep't 2016). In *In re Defendini*, a turnover proceeding was brought in surrogate's court against the respondents and the petitioner was awarded summary judgment. While a renewal motion may be based on "new facts not offered on the prior motion," CPLR 2221(e)(2), there is no requirement in the statute that the facts be "newly discovered," as some of the decisions indicate.

In *In re Defendini*, the court elaborated on the point, observing that "[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion 'if the movant offers a reasonable excuse for the failure to present those facts on the prior motion.'" The respondents in *In re Defendini* did provide a reasonable excuse for their failure to present the "new facts" in opposition to the motion for summary judgment. Therefore, the appellate division granted leave to renew and, upon renewal, ruled that the surrogate's court should have denied the motion for summary judgment on the petition because the new facts created a triable issue. *See also Family Care Acupuncture, PLLC v. Ameriprise Auto & Home*, 2016 WL 3636759 (App. Term 2016) (granting motion for renewal, and reversing order of summary judgment for plaintiff, where nonparty driver and mother had not testified before first return date of motion and the transcripts of their examinations under oath were not yet available in admissible form on final return date of motion).

Second Department Permits Defective Affidavit to be Cured by Motion for Renewal

In *Defina v. Daniel*, 140 A.D.3d 825, 33 N.Y.S.3d 421 (2d Dep't 2016), plaintiff submitted an unnotarized statement of a chiropractor in opposition to defendant's motion for summary judgment. The supreme court granted defendant's motion, finding that the statement of the plaintiff's chiropractor had not been submitted in admissible form. *See* CPLR 2106; Siegel, New York Practice § 205 (Thomson, Connors ed., January 2017 Supplement) (discussing professionals who can affirm under penalties of perjury, rather than swearing before a notary). The plaintiff then moved for leave to renew, submitting a notarized affidavit of the chiropractor and an attorney's affirmation explaining that he mistakenly included the unnotarized copy of the chiropractor's statement with the plaintiff's opposition papers instead of the notarized affidavit.

The Second Department has taken a somewhat rigid position on these types of renewal motions where a party attempts to cure such deficiencies, denying them regardless of the lack of prejudice if the defendant fails to provide a reasonable justification for the defects in the documents originally submitted. *See* Siegel, New York Practice § 254 (Thomson, Connors ed., January 2017 Supplement) (discussing pertinent caselaw and conflicting approaches in various departments). Therefore, it could not have been a surprise when supreme court denied the plaintiff's motion to renew.

Rather, the surprise came on appeal, where the Second Department ruled that the supreme court "improvidently exercised its discretion in denying the plaintiff's motion for leave to renew." The court reiterated that "CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form." The Second Department ruled that the lawyer's mistake in not including the notarized affidavit constituted law office failure and provided "a reasonable justification for the plaintiff's failure to provide the affidavit to the court in opposing the original motion." *See* CPLR 2221(e)(3).

Upon granting renewal, the appellate court considered the affidavit and concluded that it created a question of fact, necessitating a reversal of the order of summary judgment. *But see Cioffi v. S.M. Foods, Inc.*, 129 A.D.3d

888, 10 N.Y.S.3d 620 (2d Dep't 2015)(supreme court "lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion"; "[r]easonable justification does not exist where 'the "new evidence" consists of documents which the [moving party] knew existed, and were in fact in his own possession at the time the initial motion was made'"); *Robinson v. Viani*, 140 A.D.3d 845, 34 N.Y.S.3d 109 (2d Dep't 2016) ("plaintiffs failed to set forth a reasonable justification for failing to present the new facts on the original motion, especially in light of the fact that most of the new documents submitted in support of the motion for leave to renew were reasonably available to the plaintiffs prior to the date on which they filed their opposition to the original motion").

XXII. CPLR 2222. Docketing order as judgment.

9% Interest Runs from Presentation to Clerk of Order Directing the Payment of Money

The rarely cited CPLR 2222 is a sleeper provision that, when coupled with the 9% interest offered by CPLR 5004, can have a dramatic impact on a money award. In *Han Soo Lee v. Riverhead Bay Motors*, 134 A.D.3d 656, 21 N.Y.S.3d 624 (1st Dep't 2015), the supreme court issued an order awarding former counsel in the matter $50,000 as his proportionate share of the contingency fee in the underlying personal injury action. The First Department ruled that because CPLR 2222 directs that, upon request, "the clerk shall docket as a judgment an order directing the payment of money," supreme court correctly concluded that the clerk erred by refusing to enter the October 18, 2011 order as a judgment when requested to do so on March 19, 2014.

Therefore, the court ruled that statutory interest at 9% should be calculated from the latter date pursuant to CPLR 5003. The former counsel also sought stage 2 interest to run from the date of the award to the date of the judgment, but the court concluded that the award was not a "verdict, report or decision" under CPLR 5002. Therefore, former counsel was limited to interest from the date the order was docketed as a judgment under CPLR 2222. We wonder if former counsel lost two and one-half years of interest by not

seeking to docket the October 18, 2011 award immediately. That amounts to almost $11,000.

XXIII. CPLR 2303. Service of subpoena; payment of fees in advance.

Service of Subpoena on Corporation Must Comply with CPLR 311

If a subpoena is served on a corporation, it must be personally served on one of the people listed in CPLR 311(a)(1). *See* Siegel, New York Practice, § 70 ("Service on a Corporation"). In *Jamaica Wellness Med., P.C. v. USAA Cas. Ins. Co.*, 49 Misc. 3d 926, 16 N.Y.S.3d 444 (N.Y. City Civ. Ct. 2015), for example, the court ruled that the subpoena was properly served in that it was personally delivered to a "managing agent" in accordance with CPLR 311(a)(1). *See also Gihon LLC v. 501 Second St., L.L.C.*, 2016 WL 144132 (Sup. Ct., Kings County 2016) (ruling that subpoenas were improperly served on corporation and limited liability company because they were not delivered to the appropriate person in accordance with CPLR 311 and 311-a, respectively).

XXIV. CPLR 2308. Disobedience of subpoena.

Federal District Court Orders Compliance with Information Subpoena under CPLR 2308(a)

CPLR 2308(a) covers subpoenas issued after an action has gone to judgment, notably those being used to aid enforcement of the judgment under CPLR 5224. The decision in *Federal Insurance Co. v. CAC of NY, Inc.*, 2015 WL 5190850 (E.D.N.Y. 2015), demonstrates the application of the provision in federal court.

In *Federal Insurance*, judgment was entered against defendants in the amount of $227,844.40. In an attempt to identify assets in satisfaction of the judgment, plaintiff served a CPLR 5224(a)(3) information subpoena on defendants requesting financial and asset information regarding defendants' property, income, or any other means relevant to the satisfaction of judgment. The use of CPLR Article 52's enforcement devices in federal court is authorized by FRCP 69(a)(2), which states that "[i]n aid of the

judgment or execution, the judgment creditor ... may obtain discovery from any person—including the judgment debtor—including the judgment debtor-as provided in these rules *or by the procedure of the state where the court is located*." (emphasis added). *See* Siegel, New York Practice §§ 492, 641 (Thomson 5th ed., 2011).

When the subpoena went unanswered by one of the defendants, plaintiff made a motion to compel that defendant to provide the information and documents identified in the information subpoena and to hold the defendant in contempt. The court noted that under CPLR 2308(b)(1), if the recipient of an information subpoena fails to respond within seven days, the court can order compliance. In that the documents sought in the information subpoena, such as identification of defendant's bank accounts, accounting records, assets, and accounts receivable, were relevant to the enforcement of the judgment, the court ordered compliance with the information subpoena within 30 days of its order. That branch of the motion that sought to hold defendant in contempt was denied without prejudice.

XXV. CPLR 2309. Oaths and affirmations.

First Department Allows Nunc Pro Tunc Correction of Out-of-State Affidavit to Conform to CPLR 2309(c)

The decisions are all over the map on the penalties to be imposed for a failure to comply with CPLR 2309(c), with some courts simply disregarding the defect under CPLR 2001, while others refusing to even consider the affidavit. *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Naughton*, 137 A.D.3d 1199, 28 N.Y.S.3d 444 (2d Dep't 2016) (citing CPLR 2001, court held that "failure of [plaintiff]'s affidavit to include a certificate of conformity pursuant to CPLR 2309(c) was not fatal"); *Redlich v. Stone*, 51 Misc. 3d 1213(A) (Sup. Ct., New York County 2016) (disregarding CPLR 2309(c) defect pursuant to CPLR 2001 where defendants did not reject the affidavit in opposition and failed to demonstrate that a substantial right of theirs had been prejudiced). The CPLR 2309(c) problem often arises in mortgage foreclosure actions where plaintiff banks often submit affidavits that are executed outside New York.

In *Bank of New York v. Singh*, 139 A.D.3d 486, 33 N.Y.S.3d 1 (1st Dep't 2016), for example, the plaintiff bank established standing to foreclose through the affidavit of its vice president, which was executed in New Jersey. The defendant moved to vacate the judgment of foreclosure and to dismiss the action based, in part, on the ground that the affidavit did not include a certificate of conformity in accordance with CPLR 2309(c). The court denied the motion, but directed plaintiff to correct the defect nunc pro tunc by providing a new conforming affidavit.

Traffic-Control Signal Photo Violation Dismissed Because of Defective Affidavit

In *People v Eisenstadt*, 48 Misc.3d 56, 15 N.Y.S.3d 542 (Sup. Ct., Appellate Term 2015), an action "was commenced to impose a civil liability upon defendant as the owner of a vehicle which was recorded by a 'traffic-control signal photo violation-monitoring' device failing to comply with a traffic-control device." It was alleged in the notice of liability that a vehicle owned by defendant had not stopped at a red light on March 5, 2011 at "EB [eastbound] Old Country Manetto Hill RD/Plainview Rd."

Pursuant to Vehicle and Traffic Law section 1111–b(2)(d), "[a] certificate, sworn to or affirmed by a technician employed by Nassau County in which the charged violation occurred ... based upon inspection of photographs, microphotographs, videotape or other recorded images produced by a traffic-control signal photo violation-monitoring system, shall be prima facie evidence of the facts contained therein." To be effective, the court noted, such a certificate must be sworn to or affirmed before a notary public or other authorized official pursuant to CPLR 2309(a).

The court ruled that "the certificate was not in authorized form since it was neither sworn to nor affirmed before a notary public or other authorized individual (see CPLR 2309[a])." Therefore, the certificate was found to be "without probative value" and the action was dismissed.

CPLR 2106 Amended to Permit Person Outside United States to Submit Affirmation

Effective January 1, 2015, CPLR 2106 was amended to add a new subsection (b) to permit the use of an affirmation by any person who

subscribes and affirms the statement while located outside the geographic boundaries of the United States and its territories. The amendment is discussed in further detail in Siegel, New York Practice § 206 (Connors ed., January 2017 Supplement). It is important to note that the requirements of CPLR 2309(c) are still imposed when the oath or affirmation is made outside New York State, but within the United States and its territories, as was the situation in the *Midfirst Bank* decision, discussed immediately above.

XXVI. CPLR 3012. Service of pleadings and demand for complaint.

Conflict Between First and Second Departments on Requirements for CPLR 3012(d) Application for Extension of Time to Appear

CPLR 3012(d) addresses an "[e]xtension of time to appear or plead" and permits the court to extend "the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." While the statute does not expressly require it, the Second Department has repeatedly held that a defendant must not only provide a reasonable excuse for the delay in appearing, but also must "demonstrate a potentially meritorious defense to the action." *KI 12, LLC v. Joseph*, 137 A.D.3d 750, 26 N.Y.S.3d 573 (2d Dep't 2016). The First Department does not require a defendant to demonstrate the existence of a meritorious defense on an application under CPLR 3012(d). *See Hirsch v. New York City Dept. of Educ.*, 105 A.D.3d 522, 961 N.Y.S.2d 923 (1st Dep't 2013).

The issue is explored in further detail in Siegel, New York Practice § 231 (Main volume & Connors ed., January 2017 Supplement).

Jurisdictional Problems Arise Where Codefendants Have Not Yet Appeared in Action

In *Caronia v. Peluso*, 2016 WL 799364 (Sup. Ct., Suffolk County 2016), an automobile accident case, plaintiff commenced an action against the defendant and also against the owner and operator of the automobile that struck her. The owner and operator defaulted, but defendant appeared and ultimately served an amended answer containing cross-claims against the

owner and operator. The amended answer was served via regular mail on all parties.

Plaintiff's application for a default judgment against the owner and operator met clear sailing. Defendant's application for default judgments against the owner and operator on its cross claims was, however, denied. CPLR 3012(a) states that "'a subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons.'" Because the owner and operator had defaulted in the action by never appearing, this provision required that defendant obtain jurisdiction over them by serving the answer with cross claims upon them personally. *See* CPLR 308; Main Practice Commentary to C3012:7.

In that the amended answer containing the counterclaims was only served upon the owner and operator via regular mail, the default judgment application could not be granted against them because the defendant could not establish proof of proper service as required by CPLR 3215(f). *See* Siegel, New York Practice § 295.

A similar problem arose in *K.M. ex rel. Mobley v. Mobley*, 2016 WL 1367927 (Sup. Ct., Kings County 2016), where the plaintiff served defendant (D-1), but sought an extension of time under CPLR 306-b to serve co-defendant (D-2). D-1 realized the jurisdictional dilemma it faced in securing jurisdiction over D-2 on its cross-claims and also sought an extension of time under CPLR 306-b to make proper service of its answer with cross claims on D-2. The court granted both parties applications to extend the time to make service, with D-1's deadline to make service of the answer with cross claims extended until approximately two weeks after plaintiff's time extension.

Second Department Reverses Order Granting Extension of Time to Answer to LLC That Claimed It Did Not Receive Process Served on Secretary of State

The courts are putting some teeth into CPLR 3012(d), and are not disposed to grant extensions of time to appear or plead based on the mere denial of receipt of the initiatory papers. Another example of the point is contained in the Second Department's decision in *Ultimate One Distrib. Corp. v. 2900*

Stillwell Ave., LLC, 140 A.D.3d 1054, 36 N.Y.S.3d 142 (2d Dep't 2016), which should be required reading for any attorney representing a corporate entity.

In *Ultimate One*, the defendant was a LLC served through the secretary of state pursuant to Limited Liability Company Law section 303(a). The defendant successfully obtained an order from supreme court under CPLR 3012(d) extending its time to appear in the action, and then granting its CPLR 3211(a)(7) motion to dismiss the complaint.

On appeal to the Second Department, that court stressed that "[t]he showing of reasonable excuse that a defendant must establish to be entitled to relief under CPLR 3012(d) is the same as that which a defendant must make to be entitled to vacate a default judgment" under CPLR 317 or 5015(a)(1). *See* Siegel, New York Practice §§ 108, 427 (Thomson 5th ed. 2011). Applying the standards governing motions under those provisions, the court found that defendant failed to make an adequate showing, "as the mere denial by its member of receipt of a copy of the summons and complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service."

The court went on to observe that if the defendant failed to actually receive the summons and complaint from the Secretary of State due to a change of address, "'it was due to its own fault as it failed to keep the Secretary of State advised [of] its current address for the forwarding of process'." That latter proposition should be emblazoned on the walls of every corporation counsel's office, regardless of whether they litigate. A lapse in such a relatively ministerial task can result in dire consequences down the road.

Dire consequences will likely face the defendant in *Ultimate One*, as the Second Department ruled that supreme court improvidently exercised its discretion by granting defendant's motion under CPLR 3012(d) to extend the time for it to appear in the action. Furthermore, because defendant's pre-answer motion to dismiss was made after the time to appear had expired, the supreme court's order dismissing the action had to be reversed.

The defendant went from having the action against it dismissed, to an appellate division order finding it guilty of an inexcusable default.

XXVII. CPLR 3012-b. Certificate of merit in certain residential foreclosure actions.

Failure to Comply with Administrative Order 431/11 or CPLR 3012-b Leads to Denial of Summary Judgment in Mortgage Foreclosure Action

Effective with actions filed on or after August 30, 2013, CPLR 3012-b requires the filing and service of a "certificate of merit" with the initiatory papers in many residential foreclosure actions. See Siegel, New York Practice § 205 (Connors ed., January 2017 Supplement). In *One West Bank v. Chapilliquen*, 2016 WL 1380855 (Sup. Ct., Queens County 2016), plaintiff commenced a mortgage foreclosure action on August 13, 2012. The action was not released from the foreclosure conference part until September 9, 2014, when defendants failed to appear on that date. Plaintiff then moved for summary judgment, but failed to submit proof of compliance with Administrative Order 431/11 or CPLR 3012-b, as is required for actions commenced before August 30, 2013. *See* AO/208/13. This defect, among several others, required denial of the motion for summary judgment.

XXVIII. CPLR 3013. Particularity of statements generally.

First Department, in Major Address to Defendant's Pleading Obligations, Concludes That Statute of Limitations Defense Was Improperly Pleaded

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 76 (1st Dep't 2015), defendant pleaded sixteen affirmative defenses "within a boilerplate, catchall paragraph" that also asserted "any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein." Following disclosure, defendant moved for summary judgment dismissing the complaint based on, among other grounds, the statute of limitations. Defendant contended that the claim accrued by 2001, when the alleged negligent work was completed, and that the commencement of the action in 2008 was untimely. *See* Siegel, New York Practice § 40 (Connors ed., January 2017 Supplement) (discussing

caselaw holding that contract claim accrues against a contractor on the date of completion of the work).

In response to defendant's motion, plaintiff argued that defendant failed to adequately plead the statute of limitations and, therefore, waived the defense. The supreme court agreed, but nonetheless granted defendant's motion on the merits. The First Department reversed and reinstated the complaint with a set of extensive writings, including a signed majority opinion and a two-judge concurrence, dedicated primarily to the pleading issues raised by the plaintiff.

The entire First Department ruled that this method of pleading "the defense within a laundry list of predominantly inapplicable defenses did not provide plaintiff with the requisite notice" required under CPLR 3013. Furthermore, the court ruled that the defense "was inadequately pleaded because of its failure to separately state and number the defense and that plaintiff was prejudiced by the defective pleading." *See also* CPLR 3014("Separate causes of action or defenses shall be separately stated and numbered."); CPLR 3026("Defects [in pleadings] shall be ignored if a substantial right of a party is not prejudiced."). Nonetheless, "because the prejudice is curable by permitting discovery on the statute of limitations issue," the court remanded the matter to the motion court to allow defendant to correct its defective pleading and for plaintiff to obtain necessary discovery.

The *Scholastic* decision is discussed in further detail in Siegel, New York Practice §§ 208, 212, 214, 223, 230 (Connors ed., January 2017 Supplement).

Third Department Concludes That Amended Complaint Alleging Breach of Contract Satisfies CPLR 3013's Pleading Requirements

The simplicity and brevity of New York's pleading requirements is demonstrated in the Third Department's decision in *12 Baker Hill Road, Inc. v. Miranti*, 130 A.D.3d 1425, 14 N.Y.S.3d 787 (3d Dep't 2015), a breach of contract action. In *12 Baker Hill Road*, the court rejected defendant's argument that plaintiff's amended complaint was defective because it did not specify the provision of the contract that was allegedly breached. The court stressed that "the primary function of a pleading is to apprise an adverse party of the pleader's claim." To accomplish this goal, a complaint must be

sufficiently detailed to meet CPLR 3013's instruction "to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

In *12 Baker Hill Road*, the amended complaint's fourth cause of action alleging breach of contract identified the parties and the property that was the subject of the contract, alleged that defendant agreed to purchase the property for $75,000, and claimed that defendant breached the contract, resulting in damages. That was sufficient to satisfy CPLR 3013, and the plaintiff "was not required to attach a copy of the contract or plead its terms verbatim."

With the rescinding of the Appendix of Official Forms, addressed below, decisions such as *12 Baker Hill Road* will take on more prominence in demonstrating the simplicity and brevity of New York's pleading rules. Lawyers who principally practice in federal court should be aware that New York's pleading rules now stand in stark contrast to the pleading requirements in federal courts, which became more demanding after a pair of recent United States Supreme Court decisions. *See Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Siegel, New York Practice § 631 ("Pleadings in Federal Practice").

XXIX. CPLR 3018. Responsive Pleadings.

Plaintiff Successfully Moves to Dismiss Several Affirmative Defenses in Mortgage Foreclosure Action

In *One West Bank v. Chapilliquen*, 2016 WL 1380855 (Sup. Ct., Queens County 2016), plaintiff commenced a mortgage foreclosure action. As is typical in these actions today, defendants interposed an answer with numerous affirmative defenses (10) and two counterclaims. Plaintiff was successful in dismissing five of the ten affirmative defenses, including the potentially explosive defense of lack of personal jurisdiction based on

improper service and the two counterclaims that were closely related to the dismissed defenses.

While plaintiffs prosecuting mortgage foreclosure actions in this day and age will encounter difficult procedural obstacles, an answer containing numerous boilerplate defenses can be successfully confronted with the proper steps at the outset of the litigation. As in *One West Bank*, the plaintiff may not be successful in dismissing all of the affirmative defenses, but a CPLR 3211(b) motion in the hands of the right judge will often help to narrow the issues in the litigation moving forward.

Claim That Prior Settlement Among Some Parties Was Not Reasonable Should Be Pleaded as Affirmative Defense

The list of affirmative defenses in CPLR 3018(b) is not exhaustive. *See* Siegel, New York Practice § 223 (5th ed. 2011). To provide a checklist for lawyers drafting answers, we have compiled a list of several items beyond those expressly included in the statute that courts have denominated as affirmative defenses. *See* McKinney's Practice Commentaries, CPLR 3018, C3018:14 ("List in CPLR 3018(b) Not Preemptive"). The claim that a prior settlement among some of the parties to an action was not reasonable should be added to the list. In *Thome v. Benchmark Main Transit Associates, LLC*, 125 A.D.3d 1283, 3 N.Y.S.3d 475 (4th Dep't 2015), the Fourth Department granted third party defendant's motion to amend the answer to include this affirmative defense.

XXX. CPLR 3019. Counterclaims and cross-claims.

Federal Courts' Compulsory Counterclaim Rule Bars Assertion of Claim in State Court Despite New York's Permissive Counterclaim Rule

All counterclaims are "permissive" in New York practice. This is in contrast with federal practice, where the defendant must plead a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim, or it is deemed waived. *See* Federal Rules of Civil Procedure ("FRCP") 13(a); Siegel, New York Practice §§ 224, 632 (Thomson 5th ed. 2011).

What happens if the plaintiff commences an action in federal court, where counterclaims are "compulsory," and the defendant withholds a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim. Can the defendant in the federal court action then turn to New York State court and commence an action to assert that claim here under our permissive counterclaim rule?

In *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 141 A.D.3d 464, 36 N.Y.S.3d 11 (1st Dep't 2016), the appellate division ruled that "the later assertion in a state court action of a contention that constituted a compulsory counterclaim (FRCP rule 13[a]) in a prior federal action between the same parties is barred under the doctrine of res judicata." *Id.* This principle of law required dismissal of the complaint in the state court action, which sought damages of $8 million, representing attorneys' fees incurred in the federal action, plus interest.

Defendant's Answer Requesting Apportionment of Liability Did Not Constitute Cross Claim against Co-Defendant

The last sentence to CPLR 3019(b) allows a cross-claim to assert that another party "may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." In *Ilyayeve v. City of New York*, 2016 WL 4490623 (Sup. Ct., New York County 2016), plaintiff alleged that New York City, its fire department, and its agents sent the wrong type of ambulance and personnel to attend to her husband. Plaintiff also alleged that the ambulance personnel, who were employees of defendant New York and Presbyterian Hospital, improperly attended to her husband causing his conscious pain and suffering and eventual death.

The hospital's answer contained six separately captioned affirmative defenses, including a CPLR Article 16 defense. The answer also demanded "that the liability, if any, be apportioned," but failed to interpose a cross claim against the city.

The city and the fire department moved for summary judgment dismissing the complaint and added a request in the wherefore clause of counsel's affirmation that "any and all cross-claims" be dismissed. Plaintiff and the hospital opposed the motion and the hospital cross-moved "pursuant to

CPLR 1007 for an order converting its alleged contribution cross claim into a third-party action against the City."

The court ruled that the "moving defendants' request, set forth only in the wherefore clause of their counsel's affirmation, that summary judgment also be granted dismissing any and all cross claims, while merely surplusage boilerplate, is granted." *Id.* at *24. Furthermore, the court also denied the hospital's cross-motion to convert its pleading into a third-party action against the codefendants.

Defendants often encounter problems when failing to separately address the interrelated concepts of comparative fault, apportionment of fault among defendants, and CPLR Article 16. *See* Siegel, New York Practice §§ 168D, 168E (Thomson, Connors ed., January 2017 Supplement).

XXXI. CPLR 3020. Verification.

Decedent's Mother, Who Was Issued Letters of Administration Prior to Commencement, Can Verify Claim in Accordance with Court of Claims Act

In *Austin v. State*, 49 Misc.3d 282 (Ct. of Claims 2015), the State moved to dismiss the claim, which was verified by decedent's mother, on the ground that it did not comply with the verification requirement in section 8-b of the Court of Claims Act.

The court stated that no case had been brought to its attention involving a claimant who had died before having an opportunity to verify a claim brought under section 8-b of the Court of Claims Act. In an analogous situation, the specific verification requirements in section 8-b of the Court of Claims Act were held to govern in *Long v. State*, 7 N.Y.3d 269 (2006), to the exclusion of CPLR 3020(d)(3), resulting in the dismissal of a claim that had been verified by the claimant's attorney. *See* McKinney's Practice Commentary, CPLR 3020, C3020:8 ("Verification by Attorney").

Although the option of an attorney's verification was not available to the claimant in *Austin*, the court observed that the administrator of the estate "stands in the shoes" of the deceased for purposes of bringing a lawsuit. *See*

CPLR 1004 (permitting the executor or administrator of a decedent's estate to sue on behalf of decedent).

XXXII. CPLR 3022. Remedy for defective verification.

If Verification Is Optional, Defective Verification Is a Red Herring

When there is no requirement to verify a particular pleading, but the party does it voluntarily, the consequences of a defective verification are not serious. When this problem arises, the opposing party typically treats the defectively verified pleading as an unverified one and simply serves an unverified response to it. In *Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 25 N.Y.S.3d 85 (1st Dep't 2016), however, defendants argued in support of their CPLR 3211 motion to dismiss that the complaint was improperly verified by the plaintiff's attorney. The First Department classified the argument as "a red herring, as the complaint was not required to be verified at all."

Rejection of Answer, Unaccompanied by Specific Objections, Properly Ignored

In *Gaffey v. Shah*, 131 A.D.3d 1006, 1007–08, 17 N.Y.S.3d 46, 47–48 (2d Dep't 2015), the court concluded that "the plaintiffs' rejection of the defendant's answer was ineffective, as it failed to specify the reasons or objections with sufficient specificity" as required by CPLR 3022. Therefore, the Second Department ruled that the alleged "defect was properly 'ignored' by the Supreme Court."

Court Addresses "Due Diligence" Requirement When Party Contests Verification

A party entitled to a verified pleading can treat an unverified or defectively verified one "as a nullity," but must assert the objection by providing notice to the adverse party's attorney "with due diligence." CPLR 3022. Many decisions have construed "due diligence" to mean "within twenty-four hours," but the Court of Appeals has never "employed a specific time period

to measure due diligence." *Miller v. Bd. of Assessors*, 91 N.Y.2d 82, 86 n.3, 666 N.Y.S.2d 1012, 1014 n.3 (1997).

In *Rodriguez v. Westchester County Bd. of Elections*, 47 Misc.3d 956, 5 N.Y.S.3d 826 (Sup. Ct., Westchester County 2015), petitioner commenced a special proceeding pursuant to the Election Law. Respondents raised the defense of lack of proper verification of the petition in their answers and cross motions. Petitioner, in turn, argued that because the lack of verification of the petition was not raised immediately, i.e., within 24 hours of its service, the defense was waived.

The *Rodriguez* court acknowledged the twenty-four hour rule stated in many reported decisions, but observed that "it is extraordinarily rare that a court actually imposes a 24-hour deadline, and curiously, not one court that has done so cites to the actual origin of the alleged rule." *Id.* at 958. Finding what it deems to be a lack of foundation for the twenty-four hour rule, the *Rodriguez* court ultimately concludes that "24 hours has never been, nor should it be, a strict deadline for determining due diligence" under CPLR 3022. *Id.* at 962.

The *Rodriguez* court compiled a helpful list of facts and circumstances to be considered when a party treats a pleading as a nullity to ascertain if the notice is made with "due diligence" under CPLR 3022. These include: "the amount of time elapsed between service of the faulty pleading and the return; reasons for, and reasonableness of time elapsed; whether the party rejecting the pleading already had counsel or is an attorney; whether the issue was raised at the first opportunity, whether in writing or in court; whether a statute of limitations or other deadline has expired during the time elapsed; and the credibility of the party in its pleadings and testimony given, if any." *Id.* at 962. Applying these factors, the court found that the respondents did exercise due diligence under CPLR 3022 and dismissed the unverified petition.

Second Department Concludes That "Due Diligence" Is Not Satisfied When Party Waits 15 Days before Raising Verification Defect

The Second Department has recently provided some guidance in this area. In *Rozz v. Law Offs. of Saul Kobrick, P.C.*, 134 A.D.3d 920, 22 N.Y.S.3d 113 (2d Dep't 2015), the plaintiff waited fifteen days after receiving an

unverified answer before raising an objection. The defect was deemed waived because the late notice did not comport with CPLR 3022's "due diligence" requirement.

XXXIII. CPLR 3025. Amended and supplemental pleadings.

Second Department Cites Failure to Include Proposed Amended Pleading as Basis to Affirm Denial of Motion to Amend

Several trial courts have denied motions to amend for failure to include a copy of the proposed pleading, as is required by the 2012 amendment to CPLR 3025(b). *See* Siegel New York Practice § 237 (Connors ed., January 2017 Supplement). We now have authority from the appellate division reaching the same conclusion. In *Drice v Queens County District Attorney*, 136 A.D.3d 665, 23 N.Y.S.3d 896 (2d Dep't 2016), for example, the Second Department cited several of its prior cases in concluding that "the supreme court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve an amended complaint, since he did not provide a copy of his proposed amended complaint, and the proposed amendments were palpably insufficient or patently devoid of merit." *See also Fermas v. AMPCO Sys. Parking*, 2016 WL 743777 (Sup. Ct., Queens County 2016) (supreme court denied motion to amend because defendants failed to submit proposed amended answer that actually highlighted the difference between the original answer and the proposed amended answer).

Failure to Reject Amended Complaint Containing Allegations Pertaining to Post-Commencement Conduct, Which Required Court Leave, Results in Waiver

In *Hernandez v. City of New York*, 2016 WL 1449413, at *2 n.5 (Sup. Ct., Kings County 2016), plaintiff's amended complaint contained factual allegations relating to defendants' treatment of plaintiff occurring after commencement of the action. The court observed that these allegations should have been made in a supplemental complaint, which can only be obtained by leave of court or stipulation of the parties. *Id.* (*citing* CPLR 3025 (a) & (b)). "Defendants, however, by apparently failing to reject service of the amended complaint made without leave of court and by failing

to object to the addition of these post-commencement allegations in the instant motion, would appear to have waived any procedural defect in adding the post-commencement claims."

See Siegel, New York Practice § 237 (Connors ed., January 2017 Supplement).

Co-defendant Must Serve Answer to Amended Complaint Even if Amendments Are Not Germane to Her Denials

Under CPLR 3025(d), an amended complaint will require a fresh answer. In *Wells Fargo Bank, NA v. Gerasimou*, 2016 WL 909522 (Sup. Ct., Queens County 2016), a mortgage foreclosure action with several defendants, defendant answered the original complaint, but then failed to serve an answer to plaintiff's amended complaint. The court quoted from the practice commentaries to CPLR 3025 in denying defendant's cross motion for an order vacating her default pursuant to CPLR 5015 and deeming her answer to the original complaint as the answer to the amended complaint. Defendant argued that because plaintiff's motion to amend the complaint had nothing to do with her denial of the plaintiff's claims in the original complaint, she should not be found in default for not serving an amended answer. The court deemed the argument to be without merit.

Amendment to Answer Served in Response to Amended Complaint Preserves Statute of Limitations Defense

In *Moezinia v. Ashkenazi*, 136 A.D.3d 990, 25 N.Y.S.3d 632 (2d Dep't 2016), defendant served an answer to an amended complaint that failed to assert the defense of statute of limitations. Within 20 days of the service of the amended complaint, however, defendant amended that answer as of right to include the defense of statute of limitations. *See* CPLR 3025(a) (permitting amendment of pleading as of right within 20 days after its service). That amended answer successfully preserved the statute of limitations defense.

XXXIV. CPLR 3101. Scope of Disclosure.

Court Orders Production of Relevant Facebook Material, but Denies In Camera Review

In *Melissa "G" v. North Babylon Union Free Sch. Dist.*, 48 Misc.3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk County 2015), plaintiffs commenced an action to recover damages for personal injuries allegedly sustained by "Melissa" as the result of sexual contact that she had with a teacher employed by the defendant school district from September 2003 through March 2004. Defendants then moved under CPLR 3124 for an order compelling plaintiffs to disclose complete, unedited account data for all Facebook accounts maintained only by plaintiff Melissa, including all postings, status reports, e-mails, photographs and videos posted on her web page to date.

Applying the standards set forth in CPLR 3101(a), the court noted that "[i]nsofar as plaintiffs claim as part of their damages that Melissa suffers a loss of enjoyment of life, among other things, the scope of relevant information subject to disclosure is broad." In that defendants established that plaintiff's public Facebook pages contain photographs of Melissa engaged in a variety of recreational activities that are probative to her damage claims, the court concluded that "it is reasonable to believe that other portions of her Facebook pages may contain further evidence relevant to the defense."

The court directed plaintiff to print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials. Citing to federal case law, the court observed that "[i]n discovery matters, counsel for the producing party is the judge of relevance in the first instance." The court also concluded that "in camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel can not honestly and accurately perform the review function in this case." Therefore, the court ordered plaintiffs' counsel to review plaintiff's Facebook postings and to disclose all postings that are relevant to plaintiff's damage claims within sixty days of its order. *See* Siegel, New York Practice § 344 (Connors ed., January 2017 Supplement)

(discussing issues arising when party seeks disclosure of adverse party's social media site).

Court Orders Disclosure of Post-Accident Photographs Posted on Facebook After Plaintiff Deactivated Site

In *Forman v. Henkin*, 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dep't 2015), *lv granted* __ A.D.3d __ (1st Dep't 2016) plaintiff sued for injuries sustained in a fall from defendant's horse. Defendant moved to compel plaintiff to provide authorizations to obtain records of her private Facebook postings, but plaintiff had deactivated the site after she commenced the action. The First Department concluded that defendant failed to make a threshold showing of relevance sufficient to require disclosure of either plaintiff's private Facebook photographs, "or information about the times and length of plaintiff's private Facebook messages…. However, in accordance with standard pretrial procedures, plaintiff must provide defendant with all photographs of herself posted on Facebook, either before or after the accident, that she intends to use at trial."

A two-judge dissent suggested that the First Department reexamine its caselaw addressing the disclosure of social media postings. After an extensive review of appellate case law in the area, the dissent observed that:

> The procedure created by these cases, by which a defendant may obtain discovery of nonpublic information posted on a social media source in a plaintiff's control only if that defendant has first found an item tending to contradict the plaintiff's claims, at which time the trial court must conduct an in camera review of all the items contained in that social media source, imposes a substantial—and unnecessary—burden on trial courts.

Courts Continue to Order Disclosure from Nonparty Mediators

In *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd*, 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008), the courts affirmed the denial of a mediator's motion to quash a subpoena. Similarly, in *City of Newburgh v. Hauser*, 126 A.D.3d 926, 3 N.Y.S.3d 616 (2d Dep't 2015), plaintiff sued defendants for breach of contract and professional malpractice. The defendants sought to compel the plaintiff to produce documents

submitted in a private mediation proceeding between the plaintiff and a nonparty. The court concluded that "the subject documents are material and relevant to the defense of this action" and affirmed an order compelling their production. The court also rejected plaintiff's contention that CPLR 4547 ("Compromise and offers to compromise") bars disclosure of the subject documents, "as that statute is concerned with the admissibility of evidence, and does not limit the discoverability of evidence." *See* Siegel, New York Practice § 345 (Connors ed., January 2017 Supplement).

Courts Continue to Allow Disclosure of Information Pertaining to Collateral Sources

"Pretrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing." *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 35, 852 N.Y.S.2d 148, 161 (2d Dep't 2008), *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 608, 896 N.E.2d 94; *see Stolowski v. 234 E. 178th St. LLC*, 89 A.D.3d 549, 933 N.Y.S.2d 232 (1st Dep't 2011). In *Firmes*, the court observed that "the most common discovery mechanism, of course, is the demand for collateral source information…served by many defense practitioners with their clients' answers." *Firmes*, 50 A.D.3d at 35, 852 N.Y.S.2d at 162. A demand for a bill of particulars would also be an appropriate vehicle for obtaining information on collateral sources. *McKenzie v. St. Elizabeth Hosp.*, 81 A.D.2d 1003, 1004, 440 N.Y.S.2d 109, 110 (4th Dep't 1981); *Lewis v. MTA Bus Co.*, 51 Misc.3d 1204(A), 2016 WL 1228569 (Sup. Ct., New York County 2016); *see* CPLR 3043 Practice Commentaries, C3043:1 ("Bill in Personal Injury Actions").

XXXV. "Privileged Matter" under CPLR 3101(b).

Court of Appeals Refuses to Expand Common Interest Doctrine of Attorney-Client Privilege

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), the Court of Appeals addressed the absolute immunity offered by CPLR 3101(b) for any information protected by the attorney-client privilege. In *Ambac*, the discovery dispute centered on whether defendant Bank of America was required to produce approximately

400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger.

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." *Id.* at 625. The common interest doctrine has been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation." *Id.* at 627.

While Bank of America and Countrywide certainly had a common legal interest in successfully completing the merger, they did not reasonably anticipate litigation at the time of the communications. The Court rejected Bank of America's argument that the common interest doctrine should be expanded to include communications made in furtherance of "any common legal interest" and adhered to the litigation requirement. Therefore, the documents will need to be disclosed.

The decision is discussed in further detail in the 2016 Supplementary Practice Commentaries to CPLR 3101, C3101:25 ("Privileged Matter" under CPLR 3101(b)).

XXXVI. CPLR 3101(d)(1)(i). Scope of Disclosure; Trial preparation; Experts.

Conflict on Whether CPLR 3101(d)(1)(i) Requires Disclosure of Treating Doctor Who Will Act As Expert

In *Schmitt v. Oneonta City School Dist.*, --- N.Y.S.3d ----, 2017 WL 2466902 (3d Dep't 2017), plaintiffs noticed the deposition of a treating doctor to preserve his testimony for trial. During the EBT, plaintiffs attempted to offer the treating doctor "as an expert in the field of orthopedic

surgery.” Defendant objected, citing plaintiffs' failure to provide any expert disclosure under CPLR 3101(d)(1)(i).

The Third Department noted that “[u]nlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as ‘requir[ing] disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony’ (Norton v. Nguyen, 49 AD3d at 929; compare Hamer v. City of New York, 106 AD3d 504, 509 [1st Dept 2013]; Jing Xue Jiang v. Dollar Rent a Car, Inc., 91 AD3d 603, 604 [2d Dept 2012]; Andrew v. Hurh, 34 AD3d 1331, 1331 [4th Dept 2006], lv denied 8 NY3d 808 [2007]).” See Siegel, New York Practice §348A (Connors ed., January 2017 Supplement)(discussing caselaw). The court also noted that while a CPLR 3101(d)(1)(i) expert disclosure demand “is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply [with] or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose.”

The court rejected plaintiffs' argument that the transcript of the doctor’s videotaped testimony could serve as a substitute for the required CPLR 3101(d)(1)(i) disclosure. As for the appropriate remedy, the court determined that there was no indication that the disclosure violation was willful and, therefore, that preclusion was not appropriate. The court ruled that if plaintiffs wanted to use the treating doctor “as an expert witness (or as both a fact witness and as an expert witness), they must—within 30 days of the date of this Court's decision—tender an expert disclosure that satisfies all of the requirements of CPLR 3101(d)(1)(i) and—within 60 days of the date of this Court's decision—produce [the doctor] (at their expense) for the purpose of being deposed as an expert.”

A two-justice concurrence argued, among other things, that plaintiffs should be bound by the format that they selected when they sought to videotape the treating doctor’s deposition for use at trial, and not be afforded a second opportunity to call the doctor as a live witness at trial. *See* 22 N.Y.C.R.R. §202.15(a)(rules for videotaping of civil depositions).

Plaintiff's Failure to Promptly Object to Defendant's CPLR 3101(d)(1)(i) Expert Disclosure Forecloses Objection to Lack of Specificity at Trial

In *Rivera v. Montefiore Medical Center*, 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *aff'd* 28 N.Y.3d 999 (2016), plaintiff moved to strike all trial testimony from defendant's expert that the decedent's death was caused by a sudden cardiac arrest. Plaintiff contended that defendant's expert testimony should be precluded based on the lack of specificity of defendant's CPLR 3101(d)(1)(i) disclosure, which stated 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."

The First Department affirmed the trial court's order denying plaintiff's in limine application during trial as untimely. The court emphasized that upon receipt of defendant's expert disclosure, "[p]laintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death." Therefore, "[h]aving 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." *See also Dedona v. DiRaimo*, 137 A.D.3d 548 (1st Dep't 2016) (during eight month period after expert disclosure was served, "defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice"). Furthermore, plaintiff's own experts acknowledged on cross-examination that a sudden cardiac event was a possibility.

The dissent contended that plaintiff could not have been expected to raise the objection at the time of the expert disclosure exchange because "no one had hypothesized that the decedent died of a heart attack" prior to the treating doctor's testimony on cross examination. The dissent maintained that "disallowing a motion to limit expert testimony by excluding a new theory revealed for the first time at trial would eviscerate the procedural protection that CPLR 3101(d) was drafted to create."

In a memorandum decision dated October 20, 2016, the Court of Appeals affirmed. *Rivera*, 28 N.Y.3d 999 (2016). The Court held that supreme court did not "abuse[] 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." The Court emphasized that the trial courts possess broad discretion in their supervision of expert disclosure under CPLR 3101(d)(1). The Court reasoned that:

> 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 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.

XXXVII. CPLR 3106. Priority of depositions; witnesses; prisoners; designation of deponent.

CPLR 3106(a)'s Priority Rules Do Not Apply in Action Removed to Federal Court

Priority in taking depositions is generally with the defendant in New York practice, as long as the defendant seeks it expeditiously. *See* CPLR 3106(a). In *Roth v. 2810026 Canada Ltd. Ltd.*, 2016 WL 3882914 (W.D.N.Y. 2016), a personal injury action was removed to federal court and the plaintiffs moved to compel defendants' depositions. Defendants objected, asserting that they secured priority under CPLR 3106(a) by noticing plaintiffs' depositions first. Therefore, they contended that they could not be deposed until plaintiffs' depositions had been completed.

The federal district court noted that, upon removal, "state procedure law is inapplicable to the action." *See* Fed.R.Civ.P. 81(c)(1) (Federal Rules of Civil

Procedure "apply to a civil action after it is removed from a state court"). Under the federal rules, absent a stipulation or court order, the "method of discovery may be used in any sequence." Fed.R.Civ.P. 26(d)(3)(A). Defendants did not cite a stipulation or court order and the court rejected defendants' contention that CPLR 3106(a) applied in federal court. Therefore, the court granted plaintiffs' motion and ordered the defendants' depositions to be conducted within 45 days.

XXXVIII. CPLR 3126. Penalties for Refusal to Comply with Order or to Disclose.

Third Department Outlines Standards for Issuing Order of Preclusion

The Third Department has issued a recent series of decisions that provide guidance, and warning, to lawyers regarding the possible penalties that can be imposed under CPLR 3126 for a failure to comply with disclosure obligations. For example, in *BDS Copy Inks, Inc. v. International Paper*, 123 AD3d 1255, 999 N.Y.S.2d 234 (3d Dep't 2014), the appellate court ruled that the supreme court did not abuse its discretion by striking plaintiffs' complaint under CPLR 3126(3). The record confirmed that during a period of twenty one months, the court met with counsel for the parties on at least six occasions and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations.

Plaintiffs argued that they complied with their disclosure obligations by repeatedly offering the defendants the opportunity to search through 60 to 80 banker's boxes stored in a warehouse. Furthermore, plaintiffs continued to maintain that this response was adequate, even after the court made it clear that it did not consider this offer to be adequate. The court seemed to emphasize that plaintiff's principal made no claim that he actually went to the warehouse to inspect the bankers boxes that were offered in document production, while he "continued to maintain that each document in each of the unspecified number of boxes was responsive to defendants' demand."

Noting that a disclosure sanction "is not disturbed in the absence of a clear abuse of discretion," the Third Department affirmed the order striking plaintiffs' complaint. Thus, plaintiffs' alleged damages in the amount of $1,500,000 are likely forfeited.

A more recent decision from the Third Department also involved a plaintiff who compromised their claim by failing to satisfy disclosure obligations. In *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 34 N.Y.S.3d 678 (3d Dep't 2016), plaintiff bank commenced a foreclosure action on defendants' residential real property, which was mortgaged for approximately $82,600. Defendants' answer alleged that plaintiff was not the holder of the note, a common affirmative defense in today's mortgage foreclosure world. The Third Department recounted "a series of delays resulting primarily from conduct by plaintiff and its attorneys which prompted two preclusion motions by defendants." *Id.* at 1435, 34 N.Y.S.3d 679. The supreme court granted the second motion and issued an order under CPLR 3126(2) precluding plaintiff from offering proof of indebtedness as alleged in the complaint.

Among the facts demonstrating a pattern of noncompliance by plaintiff were: 1) its refusal to appear for a deposition, 2) the cancelling of depositions at the last minute, 3) a missed CPLR 3408 court-ordered mandatory settlement conference, 4) a failure to comply with a court-ordered deposition deadline, and 5) the confusion and delay caused by plaintiff's inadequate and unclear effort to substitute counsel.

While the action was not dismissed, we wonder if there are any options left for plaintiff bank? See Citibank, N.A. v. Bravo, --- N.Y.S.3d ----, 2017 WL 935519 (Sup. Ct., Tompkins County 2017)("Defendants' motion is granted and the complaint is dismissed, with prejudice; the mortgage which plaintiff seeks to foreclose in this action is discharged and cancelled, the notice of pendency filed in this action is cancelled, and the Tompkins County Clerk is ordered to mark her records accordingly.")

First Department, Applying Standards Outlined in *Pegasus* and *VOOM*, Reverses Order Dismissing Complaint and Orders Adverse Inference Charge

With the ink barely dry on the Court of Appeals 2015 decision in *Pegasus*, the First Department applied the standards set forth therein to a legal malpractice action in *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 36 N.Y.S.3d 2 (1st Dep't 2016). In *Arbor Realty*, plaintiff's destruction of the ESI constituted, "at a minimum, gross negligence,"

because it: (1) failed to institute a formal litigation hold until approximately two years after it had an obligation to do so, (2) failed to identify all of the key players in the loan transaction that was the subject of the legal malpractice action, and (3) failed to preserve the ESI pertaining to those key players. Therefore, because the spoliation was the result of the plaintiff's intentional destruction or gross negligence, the decisions in *Pegasus* and *VOOM* warranted a presumption that the lost or destroyed ESI was relevant. The First Department concluded that although plaintiff failed to rebut that presumption, dismissal of the complaint was too severe a sanction.

The *Arbor Realty* court noted that dismissal of a complaint as a spoliation sanction is warranted only where: (1) "the spoliated evidence constitutes 'the sole means' by which the defendant can establish its defense" (2) "the defense was otherwise 'fatally compromised'" or (3) "defendant is rendered 'prejudicially bereft' of its ability to defend as a result of the spoliation." The record before the appellate court did not support these findings because there was still "mass document production" of other records, and several key witnesses were still available to testify. In this regard, the appellate division noted that defendant had not yet served interrogatories or deposition notices on these witnesses at the time it made its renewal motion.

Based on the above circumstances, the First Department modified the order of supreme court and ruled that an adverse inference charge was an appropriate sanction.

The decision in *Arbor Realty*, and additional developments after *Pegasus*, are addressed in Siegel, New York Practice § 367 (Connors ed., January 2017 Supplement).

XXXIX. CPLR 3211(a)(1). Motion to Dismiss Based on Documentary Evidence.

Can an Email Suffice as Documentary Evidence Under CPLR 3211(a)(1)?

In *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't 2015), the First Department rejected the supreme court's conclusion that correspondence such as emails do not suffice as "documentary

evidence" for purposes of CPLR 3211(a)(1), and cited several decisions in which it has "consistently held otherwise." *See Amsterdam Hospitality Group, LLC v. Marshall–Alan Assoc., Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dept.2014) ("emails can qualify as documentary evidence if they meet the 'essentially undeniable' test.");*see also* Kany v. Kany, 148 A.D.3d 584, 50 N.Y.S.3d 337 (1st Dep't 2017).

The Second Department takes a different view. *See JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015) (emails, correspondence, and affidavits do not constitute "documentary evidence" under CPLR 3211(a)(1)); *Prott v. Lewin & Baglio*, LLP, 150 A.D.3d 908 (2d Dep't 2017) and *25–01 Newkirk Ave., LLC v. Everest Natl. Ins. Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015) ("letters, emails, and affidavits fail to meet the requirements for documentary evidence" on a CPLR 3211(a)(1) motion).

XL. CPLR 3211(a)(7). Pre-Answer Motion to Dismiss for Failure to State a Cause of Action.

In *Miglino v. Bally Total Fitness of Greater New York, Inc*., 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013), plaintiff commenced a wrongful death action against defendants Bally's and Bally Total Fitness after his father died from a heart attack at one of defendant's facilities, alleging statutory and common law liability. The defendants served a joint answer to the complaint and subsequently moved to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

The Court of Appeals concluded that General Business Law section 627-a does not create a duty running from a health club to its members to use an Automated External Defibrillator ("AED") required by that section to be maintained on site. As for the common law claim, the Court observed that "New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises." In that defendant moved to dismiss under CPLR 3211(a)(7), the Court noted that it was limited "to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and … plaintiff may not be penalized for failure to

make an evidentiary showing in support of a complaint that states a claim on its face." *See Rovello v Orofino Realty Co*., 40 NY2d 633, 635, 389 N.Y.S.2d 314, 316, 357 N.E.2d 970, 972 (1976); Siegel, New York Practice, §§ 265, 270. While defendant's motion was supported by affidavits that contradicted plaintiff's claim, the Court concluded that "this matter comes to us on a motion to dismiss, not a motion for summary judgment." Therefore, the Court concluded that "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."

* * *

The *Miglino* decision has been subject to conflicting interpretation. In *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.,* 115 AD3d 128 (1st Dep't 2014), the majority concluded that "the Court of Appeals has made clear that a defendant can submit evidence in support of the [CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim." While the First Department cited to *Rovello* and *Guggenheimer* and numerous Appellate Division decisions to support its holding, it did not even mention *Miglino*. The concurrence in *Basis Yield* observed that while a motion to dismiss under CPLR 3211(a)(1) permits consideration of documentary evidence, under *Miglino* a CPLR 3211(a)(7) motion "'limits [courts] to an examination of the pleadings to determine whether they state a cause of action'." In that the motion at issue in *Basis Yield* was a pre-answer motion to dismiss based solely on CPLR 3211(a)(7), the concurrence reasoned that "there was no basis for the motion court to consider documents outside the complaint at this stage of the proceeding." *See also Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global Mkts., Inc.*, 119 A.D.3d 136, 139 n. 2 (1st Dep't 2014); *Marston v. General Elec. Co.*, 121 A.D.3d 1457, 995 N.Y.S.2d 646 (3d Dep't 2014) (citing *Miglino*, court notes that "plaintiff cannot be faulted for not coming forward with any evidence in opposition to the motion to dismiss inasmuch as it was never converted to a motion for summary judgment").

In *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 A.D.3d 85 (4th Dep't 2015), the Fourth Department expressly considered whether the language in *Rovello* permitting consideration of evidentiary submissions on a CPLR 3211(a)(7) pre-answer motion to dismiss "remains viable in light of the Court's recent decision in *Miglino*." The court unanimously rejected the

plaintiff's argument "that *Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside the four corners of the complaint." The Fourth Department agreed with the First Department's *Basis Yield* "holding, in effect, that *Miglino* had not altered the longstanding practice by which dismissal might be obtained under CPLR 3211(a)(7) with sufficiently 'conclusive' evidentiary submissions."

The problem is explored in further detail in Connors, "Courts Reconsider Rule Permitting Use of Affidavits on CPLR 3211(a)(7) Motion," 253 (no. 12) New York Law Journal (January 20, 2015)

XLI. CPLR 3211(e). Number, time and waiver of objections; motion to plead over.

The affirmative defense of lack of personal jurisdiction, *see* CPLR 3211(a)(8), lurks in many answers served in New York State court actions. In the aftermath of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (SPR 265:1), *supra*, we suspect that this defense may get a dusting off by corporate defendants and be made the subject of a CPLR 3212 summary judgment motion. In that an objection based on basis of personal jurisdiction is not subject to the sixty-day rule in CPLR 3211(e), it can be raised on a motion for summary judgment made within the deadlines set in CPLR 3212(a) as long as the affirmative defense is pleaded in the answer. *See* Siegel, New York Practice § 111 (Connors ed. January 2017 Supplement).

XLII. CPLR 3212. Motion for Summary Judgment.

CPLR 3212(b) Amended to Address Submission of Expert Affidavits on Summary Judgment Motions

The Second Department has frequently refused to consider the affidavits of experts submitted on a motion for summary judgment when the offering party has failed to provide "timely" disclosure of the expert under CPLR 3101(d)(1)(i). This has often resulted in the dismissal of a party's claims.

The First Department has applied a similar rule. *See, e.g., Scott v. Westmore Fuel Co.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep't 2012).

To address the problem, the Governor signed a bill amending CPLR 3212 on December 11, 2015, which took effect immediately and applies to all subsequent motions for summary judgment, even in pending cases. The law adds a new third sentence within CPLR 3212(b), which states that "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit."

The amendment is discussed in further detail in Siegel, New York Practice § 348A (Connors ed., January 2017 Supplement).

Proof That Meets Requirements of Business Records Exception to Hearsay Rule Can Be Submitted in Support of Summary Judgment Motion

In *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, 25 N.Y.3d 498, 508 (2015), the Court observed that "[c]ertain affidavits and documents submitted in support of a motion for summary judgment may be deemed admissible where those documents meet the requirements of the business records exception to the rule against hearsay under CPLR 4518." In *Viviane Etienne*, plaintiff medical provider commenced an action to recover no-fault insurance benefits to reimburse it for medical services provided to defendants' insureds. In support of its motion for summary judgment, plaintiff submitted eight verification of treatment forms and an affidavit of the president of a third-party billing company it hired to create and submit the forms to insurers. The Court concluded that these documents met the business records exception to the hearsay rule contained in CPLR 4518(a) and awarded plaintiff summary judgment.

The *Viviane* decision, and the issue of whether hearsay can be considered on a summary judgment motion is discussed in further detail in in Siegel, New York Practice § 281 (Connors ed., January 2017 Supplement).

Fourth Department Honors Parties Stipulation Permitting Summary Judgment Motion to be Made Beyond CPLR 3212(a)'s Time Frames; Court of Appeals Cannot Review Issue

In *Bennett v. St. John's Home*, 128 A.D.3d 1428 (4th Dep't 2015), the supreme court granted defendants' motion for summary judgment dismissing the complaint. Plaintiff appealed, contending that that the motion should have been denied as untimely under CPLR 3212(a) because it was made more than 120 days after the filing of the note of issue and defendant did not make the required statutory showing of "good cause" for the delay. The majority concluded that "[p]laintiff waived that contention, however, by expressly consenting to the timing of the motion [in a written stipulation] before it was made."

A dissenting justice, outlining the purpose behind the statutory time frame for moving for summary judgment contained in CPLR 3212(a), maintained that the court was not permitted to simply accept the stipulation of the parties to extend the 120–day deadline. In that the motion was made more than ten months beyond the statutory deadline, the dissent argued that it could not be considered unless the court found "good cause" for the delay. Furthermore, the parties' stipulation was insufficient to excuse the delay because, under the statute, the court has the exclusive authority to extend the statutory deadline and may only do so if it finds "good cause." *See Coty v. Cty. of Clinton*, 42 A.D.3d 612, 614, 839 N.Y.S.2d 825, 826 (3d Dep't 2007). The majority disagreed, concluding that the statutory timing requirements applicable to motions for summary judgment do not constitute a matter of public policy that may not be affirmatively waived by a party.

The Fourth Department granted leave to the Court of Appeals. Unfortunately, however, because the issue of the motion's timeliness under CPLR 3212 (a) was not preserved in the supreme court, the Court of Appeals lacked power to review the matter. *Bennett v. St. John's Home*, 26 N.Y.3d 1033 (2015); *see, e.g., Hecker v. State*, 20 N.Y.3d 1087, 965 N.Y.S.2d 75, 987 N.E.2d 636 (2013) (holding that Appellate Division's review of issue not preserved in supreme court is an exercise of its interests of justice jurisdiction that cannot be reviewed by Court of Appeals).

The *Bennett* decision is discussed in further detail in Siegel, New York Practice § 279 (Connors ed., January 2017 Supplement).

Timeliness of Cross Motion for Summary Judgment

In *Maggio v. 24 West 57 APF, LLC*, 134 A.D.3d 621, 625, 24 N.Y.S.3d 1 (1st Dept.2015), the court noted that in reviewing a summary judgment motion, it may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion. *See* Siegel, New York Practice § 282 (Thomson 5th ed., 2011). Therefore, the court "may even disregard the tardiness of a cross motion and grant the cross movant summary judgment, on the theory that the cross motion was not necessary in the first place." The issue on which the nonmovant is awarded summary judgment must, however, be "nearly identical" to that on which the movant sought relief.

In *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281–282, 824 N.Y.S.2d 244 (1st Dept.2006), *lv. dismissed* 9 N.Y.3d 862, 840 N.Y.S.2d 765, 872 N.E.2d 878 (2007), the main motion sought summary judgment dismissing certain Labor Law claims (section 200 and 241(6)), and the plaintiff's untimely cross motion sought summary judgment on his 240(1) claim. The First Department held that the cross motion was not sufficiently related to the main motion, and refused to entertain it. In *Maggio*, the scenario was the same. "Thus, even though plaintiff has presented facts and arguments in his cross motion suggesting that his accident was caused by defendants' failure to provide him with an adequate safety device, we are constrained by our own precedent to conclude that the court properly declined to consider it" as untimely.

Motion for Summary Judgment Deemed "Made" When Original Motion Papers Were Served Before Plaintiff's Death

In *Pietrafesa v Canestro*, 130 A.D.3d 602 (2nd Dep't 2015), defendant made a motion for summary judgment dismissing the complaint on May 20, 2013. On July 11, 2013, the plaintiff died. The Second Department noted that this automatically stayed the action and divested supreme court of jurisdiction to conduct proceedings until a personal representative was appointed for the plaintiff's estate and substituted in the action. The day after the death, plaintiff's counsel, who may not have been aware of her client's death, filed

papers opposing the defendant's motion, made a cross-motion for summary judgment on the issue of liability, and filed a note of issue.

On February 20, 2014, the executor of plaintiff's estate was substituted as the plaintiff. On August 8, 2014, the defendant made a formal motion to restore the case to the active calendar and for a determination on the pending motion. Without specifically addressing defendant's motion to restore the case to the calendar, the supreme court denied the defendant's motion for summary judgment as untimely because it was "not made until August 8, 2014," more than 120 days after the filing of the note of issue. *See* CPLR 3212(a).

The Second Department reversed, citing to CPLR 2211 and holding that defendant's motion for summary judgment was "made" when the motion papers were served in May of 2013. The Second Department ruled that "[u]nder the circumstances presented here, the timeliness of the defendant's motion must be judged by the date of service of the original motion papers, rather than the renewed motion papers."

Local Rules in Sixth Judicial District (and Elsewhere) Require Summary Judgment Motions to be Filed, Rather Than Served, within 60 Days After Filing of the Note of Issue

Courts can prescribe short time frames for making motions for summary judgment in all sorts of places, including preliminary conference orders, scheduling orders, individual court rules, county rules, and rules of a judicial district. In *McDowell & Walker, Inc. v. Micha*, 113 A.D.3d 979, 979 N.Y.S.2d 420 (3d Dep't 2014), the Third Department applied the local rules of the Sixth Judicial District, which require that "[s]ummary judgment motions must be *filed* no later than [60] days after the date when the Trial Note of Issue is filed," unless permission is obtained for good cause shown. (emphasis added). Compliance with this local rule, covering Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, and Tompkins Counties, can be tricky.

CPLR 3212(a) speaks in terms of when a summary judgment motion may be "made" and provides that the court may set a deadline for making such motions, as long as that date is no earlier than thirty days after the filing of the note of issue. Pursuant to CPLR 2211, a motion is "made" when the

motion or order to show cause is "served," not when it is "filed." *See* § 243; McKinney's Practice Commentaries to CPLR 2211, C2211:4 ("When Motion on Notice Deemed 'Made'"). Lawyers making motions for summary judgment in the Sixth Judicial District must take pains to not only make, i.e., serve, their motions for summary judgment within 60 days from the filing of the note of issue, but also to file them within that time frame. We suspect that there are other local or individual rules in the state that require the "filing" of a motion for summary judgment, rather than its mere service, within a specific time frame. Lawyers need to watch for those too. Finally, the filing may also be required under the terms of a stipulation. *See* Siegel, New York Practice § 279 (5th ed. 2011).

Similarly, in *Connolly v 129 E. 69th St. Corp.*, 127 A.D.3d 617, 7 N.Y.S.3d 889 (1st Dep't 2015), the supreme court's individual part rules required that motions for summary judgment be "filed" within 60 days of the filing of the note of issue. Since plaintiffs filed the note of issue on July 10, 2013, the motions for summary judgment were required to be filed by September 9, 2013. While defendant made (served) a motion for summary judgment on September 4, 2013, it did not file the motion until September 10, 2013, one day after the 60–day time period expired. Therefore, the First Department found defendants' motions to be untimely and reversed the supreme court's order granting defendants' motions for summary judgment dismissing the complaint.

XLIII. CPLR 3213. Motion for summary judgment in lieu of complaint.

Court of Appeals Rules That Unconditional Guarantee Is an "Instrument for the Payment of Money Only"

In *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485 (2015), the Court held that an unconditional guarantee is "an instrument for the payment of money only" under CPLR 3213. The *Cooperatieve Centrale* Court held that the plaintiff must prove three things in such an action: "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." If the plaintiff is successful, "the burden shifts to the defendant to establish, by admissible

evidence, the existence of a triable issue with respect to a bona fide defense."

In *Cooperatieve Centrale*, plaintiff submitted, among other things, the personal guaranty signed by defendant, the purchase agreement that was the subject of the guaranty, and a default judgment plaintiff entered against a corporation whose obligations defendant agreed to guaranty. Relying on its prior decisions, the Court ruled that the "broad, sweeping and unequivocal language[in] the guaranty foreclose[d] any challenge to the enforceability and validity of the documents which establish defendant's liability for payments arising under the purchase agreement, as well as to any other possible defense to his liability for the obligations of the [corporation]." Therefore, defendant's collusion claim was deemed barred by the express language of the guaranty and summary judgment was awarded to the plaintiff to the tune of approximately $42 million. *See* Siegel, New York Practice § 289 (Connors ed., January 2017 Supplement).

CPLR 3213 Motion Cannot Be Brought on by Order to Show Cause

In *Arena Bagels, Inc. v. Brooklyn Bagels, Inc.*, 51 Misc. 3d 1211(A) (Sup. Ct., Kings County 2016), the court held that a CPLR 3213 application is not an ordinary motion, but rather an action. "[A]s such it can not be brought on by the device of an order to show cause." Therefore, the court ruled that the motion papers were procedurally defective and "are rejected without prejudice to renew on proper papers." *See* Siegel, New York Practice § 291 (5th ed. 2011).

XLIV. CPLR 3215. Default judgment.

Defendant Who Appears in Action, Whether Formally or Informally, Waives Dismissal of Action Under CPLR 3215(c)

CPLR 3215(c) requires the plaintiff to "take proceedings" to enter a default judgment within one year after the default occurs. The failure to do so can result in a forfeiture of not only the right to apply for a default judgment, but the right to proceed with the action, as the statute prescribes that the court "shall dismiss the complaint as abandoned." The defendant can waive this "default within the default," however, and has been held to do so by

appearing in the action by serving a belated answer, along with discovery demands. *See* Siegel, New York Practice § 294 (5th ed. 2011).

In *Torres v Jones*, 26 N.Y.3d 742 (2016), the Court of Appeals concluded that supreme court erroneously dismissed plaintiff's claims against a defendant on the ground that she failed to timely request a default judgment pursuant to CPLR 3215(c). At the start of the defendant's deposition, counsel for the codefendant city stated that he represented the defendant in the action and waived all jurisdictional defenses on the defendant's behalf. This conduct constituted an informal appearance on behalf of the defendant which, "unequivocally waived any right to dismissal that he might have had, including his right to dismissal upon plaintiff's failure to timely seek a default judgment under CPLR 3215(c)." *See* Siegel, New York Practice (5th ed.) § 112 ("Informal Appearance"), § 294 ("Time for default application").

CPLR 2221 Motion for Reargument/Renewal Is Improper Vehicle to Challenge Default Judgment

In *Country Wide Home Loans, Inc. v. Dunia*, 138 A.D.3d 533, 28 N.Y.S.3d 319 (1st Dep't 2016), the supreme court granted defendant's motion pursuant to CPLR 3215(c) to dismiss plaintiff's foreclosure action because plaintiff failed to move for a default judgment within one year of defendant's default. This is the classic "default within the default" scenario in which a plaintiff who fails to "take proceedings" to enter a default judgment within one year after the default occurs forfeits the right to proceed with the action. *See* Siegel, New York Practice § 294 ("Time for default application"). Remarkably, with the stakes seemingly so high, the defendant's motion was granted on default without any opposition. Plaintiff then moved for renewal under CPLR 2221.

The First Department affirmed the denial of plaintiff's motion to renew. In that the order was granted on default, the court held that the proper remedy for plaintiff was a motion to vacate under CPLR 5015(a)(1), not a motion to renew under CPLR 2221. *See also Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term 2016).

We report the decision here because we have seen recent decisions in which parties have sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. The proper vehicle to challenge an

order entered on default is CPLR 5015(a)(1). *See* Siegel, New York Practice § 427.

Additional Notice Requirement in CPLR 3215(g)(4) Does Not Apply When Seeking Default Judgment Against Limited Liability Company

In *Gershman v. Ahmad*, 131 A.D.3d 1104, 16 N.Y.S.3d 836 (2d Dep't 2015), plaintiff commenced an action against a limited liability company ("LLC") via service of process on the New York Secretary of State. *See* Limited Liability Company Law § 303(a) (permitting service of process on secretary of state as agent for LLC). Plaintiff stipulated to two extensions of time to answer the complaint, but no appearance was forthcoming. Approximately nine months after the last stipulated extension of time, the plaintiff applied to the court for a default judgment against the LLC. One month later, the LLC opposed the plaintiff's application, and cross-moved to compel acceptance of its proposed answer. The supreme court denied the plaintiff's application and granted the LLC's cross motion.

The Second Department reversed, holding that plaintiff's application for a default judgment should have been granted because plaintiff submitted the proof required under CPLR 3215(f), including: (a) proof of service of the summons and complaint on the secretary of state, (b) proof of the facts constituting her claim, by virtue of a verified complaint, and (c) proof of the LLC's default in answering the complaint. The court rejected the defendant LLC's argument that plaintiff was required to comply with the additional notice requirement in CPLR 3215(g)(4)(i). The Second Department stressed that the additional notice requirement in that provision applies only when a default judgment is sought against a "domestic or authorized foreign *corporation*" served pursuant to Business Corporation Law section 306(b), and does not govern where a defaulting defendant is an LLC. *See also Confidential Lending, LLC v. Nurse*, 120 A.D.3d 739, 992 N.Y.S.2d 77 (2d Dep't 2014) (additional notice requirements in CPLR 3215(g) do not apply when seeking default judgment against the New York City Environmental Control Board because it is neither a "natural person" (CPLR 3215(g)(3)(i)), nor "a domestic or authorized foreign corporation" that had been served with process pursuant to Business Corporation Law § 306(b) (CPLR 3215(g)(4)(i))).

XLV. CPLR 3216. Want of Prosecution.

CPLR 3216 Amended Effective January 1, 2015 to Address Issues Raised by Court of Appeals *Cadichon* Decision

In *Cadichon v. Facelle*, 18 N.Y.3d 230 (2011), a multi-party medical malpractice action was dismissed by the court on its own initiative pursuant to CPLR 3216. The court, however, failed to notify the parties of this momentous development and they continued to slug it out for over two months by scheduling depositions and engaging in motion practice. In a 4-3 decision, the Court of Appeals reversed and reinstated the complaint, but it was a close call for the plaintiff. In response to the *Cadichon* decision, and the fear that similar instances might be occurring in other parts of the State, the legislature has amended CPLR 3216 in several important respects for the first time in 27 years.

CPLR 3216(a) provides that the court may dismiss a party's pleading for neglect to prosecute on its own initiative or, more typically, upon the motion of a party. The statute was amended to require that, in either instance, the dismissal be "with notice to the parties," so as to avoid a *Cadichon* type administrative dismissal that might not come to the attention of the litigants.

The court's power to dismiss an action for neglect to prosecute is constrained by CPLR 3216(b). Subdivision (2) of that provision has always required that at least one year must have passed since the joinder of issue before a motion to dismiss under CPLR 3216(a) for neglect to prosecute can be made. An amendment to CPLR 3216(b) now includes an additional time frame that must pass before a motion to dismiss can be made, requiring that "six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued." *See* Uniform Rule 202.12 (setting out the details for a preliminary conference).

Finally, CPLR 3216(b)(3) was amended to address the situation in which the written demand to serve and file the note of issue is served by the court, rather than an opposing party. When the written demand is served by the court, as was the case in *Cadichon*, the statute now requires that the demand "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

The amendments to CPLR 3216 take effect on January 1, 2015, and we presume that they apply to all cases pending on that date. The legislation is discussed in further detail in Siegel, New York Practice § 375 (Connors ed., January 2017 Supplement).

XLVI. CPLR 3408. Mandatory settlement conference in residential foreclosure actions.

Amendments to Mandatory Settlement Conference Procedures in CPLR 3408 to Take Effect on December 20, 2016

CPLR 3408 has been substantially amended to require, among other things, that the parties consider a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option at a mandatory settlement conference. CPLR 3408(a). CPLR 3408(c) was amended to require that "each party's representative at the conference … be fully authorized to dispose of the case."

The plaintiff must now bring the following forms, among others, to the conference: "the mortgage and note or copies of the same; standard application forms and a description of loss mitigation options, if any, which may be available to the defendant; and any other documentation required by the presiding judge." CPLR 3408(e)(1). "If applicable," the defendant must bring the following to the conference: "information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge." CPLR 3408(e)(2).

CPLR 3408(f) now provides:

> Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
>
> 1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;

2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and

3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.

Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

XLVII. CPLR 5015. Relief from judgment or order.

Second Department Concludes That Failure to Comply with Notice Requirements in CPLR 3215(g)(1) Renders Default Judgment Void

In *Paulus v Christopher Vacirca, Inc.*, 128 A.D.3d 116 (2d Dep't 2015), plaintiff failed to provide the required notice to the defendant under CPLR 3215(g)(1) before moving for leave to enter a default judgment. That provision requires that "whenever application [for a default judgment] is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application."

Defendant moved to vacate the default judgment under CPLR 5015(a)(1) and(4). The Second Department held that supreme court properly concluded that defendant was not entitled to vacatur of the default judgment pursuant to CPLR 5015(a)(1) because he failed to demonstrate a reasonable excuse for failing to answer the complaint. Nonetheless, the Second Department ruled, in an issue of "first impression" in that court, that the default judgment should have been vacated pursuant to CPLR 5015(a)(4) because the failure to comply with the notice requirements of CPLR 3215(g)(1) deprived the supreme court of jurisdiction to entertain the plaintiffs' motion for leave to enter a default judgment.

The First, Third, and Fourth Departments have addressed the issue of vacating a default judgment for an appearing party who received no notice of the motion for leave to enter a default judgment, but have reached different results. *See Fleet Fin. v. Nielsen*, 234 A.D.2d 728 (3d Dep't 1996) (concluding that failure to provide notice in accordance with CPLR 3215(g)(1) and (3) does not, standing alone, warrant vacatur of a default judgment); *Walker v. Foreman*, 104 AD3d 460 (1st Dep't 2013) (vacating judgment, court noted that the failure to give proper notice under CPLR 3215(g)(1) requires a new inquest, on proper notice); *Dime Sav. Bank of N.Y. v. Higner*, 281 A.D.2d 895 (4th Dep't 2001) (granting motion to vacate default judgment and foreclosure sale based upon failure to provide notice to defendant homeowner who appeared informally by sending a letter to the bank's attorney denying the validity of the bank's claim). For further discussion of the matter, see Siegel, New York Practice § 295 (Connors ed., January 2017 Supplement).

XLVIII. CPLR 5019. Validity and correction of judgment or order; amendment of docket.

Court of Appeals Holds That Statutory Interest Cannot Be Pursued After Judgment Is Entered

Lawyers attempting to secure 9% statutory interest under CPLR Article 50 for their clients should be careful to resolve all matters relating to interest within the action, and before the final judgment is entered. *See* Siegel, New York Practice §§ 411–12 (January 2017 Supplement)(discussing recent caselaw under CPLR Article 50).

The Court of Appeals recent decision in *CRP/Extell Parcel I, L.P. v. Cuomo*, 27 N.Y.3d 1034 (2016), makes the point. In *CRP/Extell*, the Attorney General ordered the sponsor of a condominium offering to return down payments to purchasers. The sponsor then commenced an Article 78 proceeding challenging the Attorney General's determinations as arbitrary and capricious and seeking reformation of the purchase agreements based on a claimed "scrivener's error."

The supreme court denied the petition, directed the release and return of the down payments with accumulated escrow interest, and dismissed the

proceeding. The sponsor returned the down payments and accumulated escrow interest, but the purchasers also made a motion and obtained an award of statutory interest under CPLR 5001 totaling $4.9 million! Unfortunately, they did not seek this substantial relief until after the final judgment dismissing the proceeding was entered. *See* CPLR 7806. The Court of Appeals affirmed the appellate division's vacatur of the award, holding that "[o]nce Supreme Court dismissed CRP's petition and judgment was entered, the court was without jurisdiction to entertain the purchasers' postjudgment motion for statutory interest." *See* Siegel, New York Practice § 420.

Stipulation as to Liability Does Not Trigger Accrual of Category II Interest

In *Mahoney v. Brockbank*, 142 A.D.3d 200, 205, 35 N.Y.S.3d 459, 463 (2d Dep't 2016), *lv. granted* 2017 WL 1224136 (2017), the parties in a personal injury action resolved the issue of liability by stipulation. Almost 2 ½ years later, a trial was held on the issue of damages. The issue presented on appeal was whether, pursuant to CPLR 5002, prejudgment interest on the award should be computed from the date of the jury verdict on the issue of damages or, instead, from the date of the stipulation on the issue of liability. The Second Department concluded that the supreme court correctly computed prejudgment interest from the date of the jury verdict because a stipulation as to liability does not trigger the accrual of category II interest under CPLR 5002.

XLIX. CPLR 5222. Restraining notice.

Court of Appeals Holds That "Separate Entity" Rule Prevents Judgment Creditor from Ordering Garnishee Bank with Branch in New York to Restrain Debtor's Assets Held in Bank's Foreign Branches

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 Court held that 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 of the bank."

The decision is discussed in further detail in Siegel, New York Practice §§ 487, 491, 510 (Connors ed., January 2017 Supplement).

L. CPLR 5225. Payment or delivery of property of judgment debtor.

Fourth Department Addresses Right to Jury Trial in Proceedings Under CPLR 5225 and 5227

In *Matter of Colonial Surety Co. v. Lakeview Advisors, LLC*, 125 A.D.3d 1292, 3 N.Y.S.3d 800 (4th Dep't 2015), the Fourth Department concluded that a special proceeding "under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the 'ancient creditor's bill in equity,' which was used after all remedies at law had been exhausted." The judgment creditor in this situation is seeking legal relief to the extent she desires an adjudication of whether the third-party owes a money debt to the judgment debtor and also equitable relief in that she wants any such debt to be paid to her and not the judgment debtor. In that the judgment creditor's use of CPLR 5225 and 5227 in *Colonial Surety* was "in furtherance of both legal and equitable relief," the court ruled that it was not entitled to a jury trial. *See* CPLR 4102(c).

The decision is discussed in further detail in Siegel, New York Practice § 510 (Connors ed., January 2017 Supplement).

LI. CPLR 5231. Income execution.

CPLR 5231 Amended to Address Income Executions

CPLR 5231 contains one of the CPLR's most popular, but complicated, judgment enforcement devices: the 10% income execution. The statute sets up a procedure that most often leads to a two-step service of the income execution. The "first service" is made by the sheriff upon the judgment debtor, and it requires the debtor to make installment payments. *See* CPLR 5231(d). This service affords the debtor the opportunity to honor the execution and avoid the embarrassment of any "second service" of the

execution on the person who owes the judgment defendant money, such as an employer.

If the judgment debtor fails to pay installments for a period of twenty days, or if the sheriff is unable to serve an income execution upon the judgment debtor within twenty days after the execution is delivered to the sheriff, the second step service is required. *See* CPLR 5231(e). This second step service is not on the judgment debtor, but rather on the person "from whom the judgment debtor is receiving or will receive money." CPLR 5231(e).

On December 11, 2015, the Governor signed into law several amendments to CPLR 5231 designed to clarify and modernize the procedure for income executions. The new last sentence in CPLR 5231(e) clarifies that the "second service" of the income execution can be made in "any county in which the person or entity from whom the judgment debtor is receiving or will receive money has an office or place of business . . . ." This revision recognizes the reality that "second service" is not made on the judgment debtor, but rather on "the person or entity from whom the judgment debtor is receiving or will receive money," which is most typically the judgment debtor's employer.

The amendments to CPLR 5231 are discussed in further detail in Siegel, New York Practice § 502 (Connors ed., January 2017 Supplement).

LII. CPLR Article 54. Enforcement of Judgments Entitled to Full Faith and Credit.

Supreme Court Applies Full Faith and Credit Doctrine to Require Alabama to Honor Georgia Judgment Allowing Plaintiff to Adopt Lesbian Partner's Two Biological Children

In *V.L. v. E.L.*, _ U.S._, 136 S. Ct. 1017 (2016), the Supreme Court applied the full faith and credit doctrine in holding that a Georgia decree allowing plaintiff to adopt her lesbian partner's two biological children was entitled to full faith and credit in Alabama. The Georgia court that rendered the judgment had subject matter jurisdiction to grant the judgment of adoption and personal jurisdiction over the parties to that proceeding. Therefore, that

judgment was entitled to full faith and credit in Alabama, regardless of its merits. *See* Siegel, New York Practice (5th ed.), § 471.

LIII. CPLR 5501. Scope of review (on an Appeal from a Final Judgment).

Appeal from Order Denying Motion to Set Aside Verdict Does Not Allow Full Review of All Orders That Affect Final Judgment

An appeal from an order on a CPLR 4404 motion will not bring up for review all issues that affect the final judgement. In *Rivera v. Montefiore Medical Center*, 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *aff'd* 28 N.Y.3d 999 (2016), plaintiff appealed from an order denying a motion to set aside the verdict. The court noted that while "an appeal from a judgment, …brings up for review any ruling to which the appellant objected and any non-final order adverse to the appellant (CPLR 5501[a][1], [3]), '[a]n appeal from an order usually results in the review of only the narrow point involved on the motion that resulted in the order'." Although plaintiff objected to the trial court's order precluding plaintiff's economist from including certain testimony in his calculations, that ruling was not brought up for review on the appeal from the order denying the motion to set aside the verdict.

Failure to Appeal from Final Judgment Forecloses Review of Prior Nonfinal Order from which Appeal was Taken

The entry of final judgment precludes the continuance of an appeal from a nonfinal order. *See* Siegel § 530. This can result in calamitous consequences. In *Smith v. Town of Colonie*, 100 A.D.3d 1132, 952 N.Y.S.2d 923 (3d Dep't 2012), plaintiff did not file a notice of appeal from the final judgment, but appealed only from a nonfinal order partially granting defendant's motion for summary judgment and limiting plaintiff's failure to warn claim. The court dismissed the appeal, noting that plaintiff's right to appeal from the nonfinal order terminated upon the entry of the final judgment after trial. While the interlocutory order necessarily affected the final judgment, and would have been reviewable on appeal from the final judgment "inasmuch as it removed legal issues from the case," the failure to appeal from the final judgment prevented the court from reviewing it.

LIV. CPLR 5515. Taking an appeal; notice of appeal.

New 2015 Legislation Expanding Judiciary's Powers to Adopt E-filing Affects Filing and Service of Notice of Appeal

We address this new legislation in Siegel New York Practice §§ 11, 63, 531, 533 (Connors ed., January 2017 Supplement). We note it under CPLR 304, above, and again here because if mandatory e-filing in a particular category of action has been adopted in the county where the action was commenced, the filing and service of a notice of appeal under CPLR 5515(1) is subject to the e-filing rules. CPLR 2111(c). That means that any notice of appeal in those actions must be electronically filed and served. The new legislation will also have an impact on the time to serve and file the notice of appeal under CPLR 5513(a).

LV. CPLR 5526. Content and form of record on appeal.

Party Objecting to Contents of Appellate Record Must Do So with Specificity

The failure to assemble a proper record as prescribed by CPLR 5526 will not always warrant dismissal of the appeal. In *Martinez v. Premium Laundry Corp.*, 137 A.D.3d 419 (1st Dep't 2016), for example, defendant failed to identify any material information omitted from the record on appeal that was relevant to a determination of the issues raised and the appellate division concluded that the record was sufficiently complete to address the merits. *See* Siegel, New York Practice (5th ed.) § 538.

LVI. CPLR 5528. Content of briefs and appendices.

Argument Not Included in Table of Contents or Point Headings of Appellate Brief Deemed Waived

The First Department's Rules of Practice require, among other things, that the appellant's brief contain "an index or table of contents including the titles of the points urged in the brief" and "the argument for the appellant,

which shall be divided into points by appropriate headings distinctively printed." 22 N.Y.C.R.R. § 600.10(d)(2)(i), (iv). Relying on these provisions in *DaSilva v. Everest Scaffolding, Inc.*, 136 A.D.3d 423, 25 N.Y.S.3d 141 (1st Dep't 2016), the First Department ruled that defendant's "argument that it is also entitled to contractual indemnification by third-party defendant is not properly before us since it is not included in the table of contents or as a point heading in the argument in [appellants'] main brief, as required by this Court's rules." *See* Siegel, New York Practice § 539 (Connors ed., January 2017 Supplement).

LVII. CPLR 5713. Content of order granting permission to appeal to court of appeals.

Court of Appeals Not Bound by Appellate Division's Characterization in Its Certification Order Granting Leave

In an order granting leave to appeal from a nonfinal order, the appellate division certifies the question of law deemed decisive of its determination. *See* CPLR 5713. Even if the certified question states that the "determination was made as a matter of law and not in the exercise of discretion," the Court of Appeals is not bound by the appellate division's characterization in its certification order. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015). Instead, the Court will make an independent determination of whether the appellate division's decision nonetheless reflects a discretionary balancing of interests. If an appellate division's determination is deemed to be discretionary in nature, the Court of Appeals' review is limited to whether the intermediate appellate court abused its discretion as a matter of law. This issue is discussed in further detail in Siegel, New York Practice (5th ed.) §§ 528-529.

LVIII. CPLR 7501. Effect of arbitration agreement.

Court Enforces Arbitration Clause in Nursing Home Admission Agreement

In *Friedman v Hebrew Home for the Aged at Riverdale*, 131 A.D.3d 421, 13 N.Y.S.3d 896 (1st Dep't 2015), plaintiff sued to recover for injuries sustained by his mother at defendant nursing facility. The supreme court denied defendant's motion to stay the action pending arbitration, but the First Department reversed and granted the motion. The court concluded that the arbitration clause in the admission agreement that plaintiff executed in placing his mother in defendant's care did not run afoul of Public Health Law § 2801–d ("Private actions by patients of residential health care facilities"), which was preempted by the Federal Arbitration Act because defendant was engaged in interstate commerce.

Furthermore, the court found that the arbitration clause was "not unconscionable, either procedurally or substantively."

LIX. CPLR 7803. Questions raised.

Court of Appeals Holds That Writ of Prohibition Is Appropriate To Prevent Judge from Compelling Criminal Prosecution

In *Soares v. Carter*, 25 N.Y.3d 1011 (2015), the Court of Appeals affirmed the granting of a writ of prohibition enjoining the City Court Judge from enforcing his orders compelling the People to call witnesses and prosecute a criminal matter after the District Attorney had decided to discontinue the prosecution. "Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions. Such a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all phases of criminal prosecution." (citations omitted) Therefore, any attempt by the Judge to compel prosecution through the use of his contempt power exceeded his jurisdictional authority and warranted the granting of the writ of prohibition. *See* Siegel, New York Practice (5th ed.) § 559.

LX. CPLR 7804. Procedure.

Court of Appeals Remits Proceeding to Supreme Court to Allow Respondent to Serve Answer in Article 78 Proceeding

CPLR 7804(f) provides that if a motion to dismiss in an Article 78 proceeding "is denied, the court *shall* permit the respondent to answer." (emphasis added). Despite the mandatory tone of this subdivision, in *Kickertz v. New York University*, 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 547, 29 N.E.3d 893, 894 (2015), the Court of Appeals observed that a court need not permit a respondent to serve an answer after denying a motion to dismiss "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.'"

In *Kickertz*, the First Department reversed supreme court and denied respondent's motion to dismiss the petition. Rather than allowing respondent to now answer the petition, the court granted the petitioner judgment on the merits. The Court of Appeals concluded that there were several triable issues of fact with regard to whether the respondent, a private educational institution, substantially complied with its established disciplinary procedures before expelling the petitioner. Therefore, the Court vacated that portion of the order granting the petition and remitted the proceeding to supreme court to permit the respondent to serve an answer to the petition.

LXI. Judiciary Law § 753. Power of courts to punish for civil contempts.

Court of Appeals Outlines Elements Required to Establish Civil Contempt

In *El-Dehdan v. El-Dehdan*, 26 NY3d 19, 29, 19 N.Y.S.3d 475, 481, 41 N.E.3d 340, 346 (2015), the Court of Appeals outlined the elements necessary to establish civil contempt under Judiciary Law section 753:

> First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect." Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed." Third, "the party to be held in contempt must have had knowledge of

> the court's order, although it is not necessary that the order actually have been served upon the party." Fourth, "prejudice to the right of a party to the litigation must be demonstrated."

The plaintiff in *El-Dehdan*, a matrimonial action, sought civil contempt penalties against her spouse who failed to comply with an order requiring him to deposit in escrow the proceeds of the sale of properties which were the subject of a prior equitable distribution determination. The Court held that plaintiff met her burden by establishing the above four elements by clear and convincing evidence.

The *El-Dehdan* Court also stressed that neither Judiciary Law section 753 nor its prior case law impose a "willfulness" requirement for civil contempt. Judiciary Law section 750, which governs criminal contempt, does contain such a requirement as it only permits a court to impose punishment for criminal contempt for "[w]illful disobedience to its lawful mandate." Judiciary Law § 750(A)(3).

For further discussion of civil contempt, see Siegel, New York Practice §§ 481-484 (5th ed. 2011).

LXII. New York State Bar Exam Replaced by Uniform Bar Exam.

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

LXIII. 22 N.Y.C.R.R. Part 523: Rules of the Court of Appeals for the Temporary Practice of Law in New York

Part 523 of the Rules of the Court of Appeals, which became effective on December 30, 2015 allows lawyers not licensed in New York to practice here temporarily. The new rules track much of the language in Rule 5.5 of the ABA Model Rules of Professional Conduct, which provides for the "Multijurisdictional Practice of Law." The new Part 523 is discussed in Connors, *No License Required: Temporary Practice in New York State*, New York Law Journal, March 10, 2016, at p. 4.

New York lawyers will not likely be concerned with Part 523's workings unless they are assisting a non-New York lawyer in negotiating its provisions, or actively participating in, and assuming joint responsibility for, the matter. *See* 22 N.Y.C.R.R. § 523.2(a)(3)(i). New York lawyers will be most concerned with multijurisdictional practice rules in other states where they are not licensed. The ABA Commission on Multijurisdictional Practice maintains a helpful website that tracks these developments: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services was rendered in New York." (emphasis added).

LXIV. 28 U.S.C.A. § 1332. Diversity of citizenship; amount in controversy; costs.

Real Estate Investment Trust Possesses the Citizenship of All of Its Shareholders for Diversity Purposes

An unincorporated association is not treated as an entity for diversity purposes, which means that each of its members must have citizenship different from all those on the other side of the litigation. *See* Siegel, New York Practice § 611 (5th ed.). In *Americold Realty Trust v. Conagra Foods, Inc.*, _ U.S. _, 136 S.Ct. 1012 (2016), the Supreme Court observed that for unincorporated entities such as joint-stock companies or limited partnerships, it has "adhere[d] to [its] oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all [its] members.'" (second alteration in original). Applying this principle, the Court has identified "the members of a joint-stock company as its shareholders, the members of a partnership as its partners, [and] the members of a union as the workers affiliated with it." In *Americold*, the Court ruled that the plaintiff, a "real estate investment trust," possessed the citizenship of all of its shareholders.

LXV. Federal Rules of Civil Procedure Rule 4. Summons.

Time Limit for Service Upon a Defendant in Rule 4(m) Reduced to 90 Days

Effective December 1, 2015, Rule 4(m) was amended to reduce the presumptive time for serving a defendant from 120 days to 90 days. This change was designed to reduce delay at the beginning of litigation. *See* Siegel, New York Practice §§ 624-625 (5th ed.).

LXVI. Federal Rules of Civil Procedure Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

Rule 37 Amended to Provide Uniform Standards for a Party's Failure to Preserve Electronically Stored Information

Rule 37 contains provisions addressing sanctions for the violation of disclosure obligations in federal practice. *See* Siegel, New York Practice §§ 638 (5th ed.). Substantial amendments to this Rule became effective on December 1, 2015.

Rule 37(a)(3)(B)(iv) was amended to reflect the common practice of producing copies of documents or electronically stored information ("ESI"), rather than simply permitting inspection of one's electronic database.

Rule 37(e), adopted in 2006, was replaced in its entirety and is now entitled "Failure to Preserve Electronically Stored Information." Rule 37(e)(2) only allows the court to presume that lost information was favorable to a party, or to charge the jury with an adverse inference instruction, upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." The Advisory Committee notes emphasize that the amendment "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."

Coincidentally, just after the amendment to Rule 37(e) took effect, the New York Court of Appeals issued a decision addressing sanctions for the failure to preserve ESI. *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015).

The amendment to Rule 37 is discussed in further detail in Siegel, New York Practice § 638 (Connors ed., January 2017 Supplement).

LXVII. Federal Rules of Civil Procedure Rule 84. Forms.

Rule 84, Which Authorized Use of Official Forms in Federal Court, Abrogated Effective December 1, 2015

The Advisory Committee Notes explain that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted [in 1938], has been fulfilled." *See* Siegel, New York Practice § 620 (5th ed.) (discussing forms in federal court). Therefore, "recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated."

As a result of the abrogation of Rule 84 and the official forms, former Forms 5 and 6 were directly incorporated into Rule 4. Rule 4 now contains these forms entitled "Notice of a Lawsuit and Request to Waive Service of Summons" and "Rule 4 Waiver of the Service of Summons."

Similarly, the New York courts rescinded the Appendix of Official Forms for the CPLR, which were adopted in 1968. The administrative order became effective on July 1, 2016. *See* AO/119/16, dated May 23, 2016. *See* Siegel, New York Practice § 7 (Thomson, Connors ed., January 2017 Supplement)