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MEMORANDUM

DATE: September 19, 2018

RE: RECENT CPLR DECISIONS OF INTEREST

FROM: Burton N. Lipshie

TABLE OF CONTENTS

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JURISDICTION

CPLR 301 – GENERAL JURISDICTION

BNSF Railway Co. v. Tyrrell, ___ U.S. ___, 137 S.Ct. 1549 (2017) – In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), almost certainly its most important jurisdiction decision in some 70 years, an eight-Justice majority of the Supreme Court essentially rewrote the law of general jurisdiction. The result is that a corporation will, with narrow exceptions, only be subject to general jurisdiction in the States in which it is either incorporated or maintains its principal place of business; in the Court's language, a State in which the corporation is "at home." The once familiar standard for general jurisdiction – corporate "presence" in a State in which it "does business" both "continuously and systematically" – has been abrogated, except, possibly, in "exceptional" cases. The Court issued a sweeping opinion on the constitutional limits of "presence jurisdiction," and, in the process, swept away decades of New York CPLR 301 jurisprudence. First, the Court rejected the argument, accepted and followed by many Circuits [*see*, *Gelfand v. Tanner*, 385 F.2d 116 (2d Cir. 1967)(regularly cited and followed by New York courts)], that when a local agent performs services for the foreign principal that are so important that "if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," the presence of the agent in the state makes the principal present in that state. That test, said the Court, "stacks the deck," because "it will always yield a pro-jurisdiction answer." Instead, the Court relied heavily on – and expanded upon – its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), saying that "*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. 'For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the

corporation is fairly regarded as *at home*'" [emphasis added]. And, for a corporation, "the place of incorporation and principal place of business are 'paradigm bases for general jurisdiction.'" The Court recognized that "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums" [emphasis by the Court]. Here, "plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business' [citation omitted]. That formulation, we hold, is unacceptably grasping." This marks a dramatic change in the law. In New York, the formulation proposed by the *Daimler* plaintiffs had been the law since Judge Cardozo's 1917 opinion in *Tauza v. Susquehanna Coal Company*, 220 N Y 259 (1917). The majority opinion cites *Tauza*, and proclaims that it was "decided in the era dominated by *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)]'s territorial thinking," and "should not attract heavy reliance today." The new standard articulated by the Court is that the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render it essentially at home in the forum State.'" The Court acknowledged "the possibility that *in an exceptional case* [citation omitted; emphasis added], a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State [citation omitted], quite another to expose it to suit on claims having no connection whatever to the forum State." Finally, and importantly, the Court held that "the general jurisdiction inquiry does not 'focus solely on the magnitude of the defendant's in-state contacts' [citation omitted]. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States [citation omitted]. Nothing in *International Shoe* [*Co. v. Washington*, 326 U.S. 310 (1945)] and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of activity' having no connection to any in-state activity." Here, in *BNSF*, the Supreme Court re-emphasizes its holding in *Daimler* that determining whether a corporation is "at home" in a forum requires measuring its activities in the forum as against its total activities, and that merely doing a lot of business in the forum is not enough to find general jurisdiction. "BNSF has over 2,000 miles of railroad track [6% of its total] and more than 2,000 employees [5% of its total] in Montana [in which it generates almost 10% of its total revenue]. But, as we observed in *Daimler*, 'the general jurisdiction inquiry does not focus solely on the

magnitude of the defendant's in-state contacts' [citation omitted]. Rather, the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; 'a corporation that operates in many places can scarcely be deemed at home in all of them' [citation omitted]. In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana." Justice Sotomayor, who dissented in *Daimler*, continued "to disagree with the path the Court struck in *Daimler*." Although we have not yet seen cases where the issue is where, in fact, a defendant corporation's "principal place of business" is, those are also certain to arise. Back in 2010, the Supreme Court, *albeit* in the context of diversity jurisdiction, assayed a definition. In *The Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the Court concluded "that 'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center,' and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)."

Ford v. Bhatoe, N.Y.L.J., 1515401434 (Sup.Ct. Kings Co. 2017)(Rivera, J.) – One of the significant questions raised in the wake of the *Daimler* decision is the future of "tagging" jurisdiction – which provides that if process is personally delivered to defendant while defendant is physically in New York, the New York courts have general jurisdiction over that defendant. Tagging jurisdiction was upheld as constitutional by a unanimous Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604 (1990). And *Daimler* itself is silent on the issue. But, surely, an individual is not "at home" in New York when the basis for jurisdiction is simply tagging here. Here, in *Ford*, the Court holds that, in light of *Daimler*, "the fact that service was effectuated in accordance with CPLR 308 on an individual who is not domiciled in the State of New York is not sufficient by itself to confer Constitutional personal jurisdiction."

Amelius v. Grand Imperial, LLC, 57 Misc 3d 835 (Sup.Ct. N.Y.Co. 2017)(Freed, J.) – Under traditional New York law, the registration of a foreign corporation to do business here sufficed to render it subject to general jurisdiction [*see, Flame, S.A. v. Worldlink International (Holding), Inc.*, 107 A D 3d 436 (1st Dept. 2013)]. The issue arises whether *Daimler* mandates a change in that rule. The first appellate decision in New York to address that issue, *albeit* in a more limited context, was *Matter of B&M Kingstone, LLC v. Mega International Commercial Bank Co., Ltd.*, 131 A D 3d 259 (1st Dept. 2015). There, petitioner judgment-creditor sought information from respondent

bank, headquartered in Taiwan, by service of an information subpoena on its New York branch. The Appellate Division, First Department, directed enforcement of the subpoena with respect to accounts held in *any* of the bank's branches. "Mega's New York branch is subject to jurisdiction requiring it to comply with the appropriate information subpoenas, because it consented to the necessary regulatory oversight in return for permission to operate in New York." Then, dealing with a non-bank corporation, the Second Circuit, in *Brown v. Lockheed Martin Corp.*, 2016 WL 641392 (2d Cir. 2016), concluded that the relevant Connecticut statute for registration of foreign corporations and the designation of an agent for service of process there – which may be the Secretary of State – is "ambiguous" and not "clear enough" as to whether such registration constitutes, under Connecticut law, a "consent" to jurisdiction there. Accordingly, the Court did not need to "raise constitutional questions prudently avoided absent a clearer statement by the state legislature or the Connecticut Supreme Court." However, in pretty powerful *dicta*, the Court strongly suggested that it would view a clearer statute, like New York's, which "has been definitively construed to accomplish that end," as violating due process as interpreted by the Supreme Court in *Daimler*. For, "the analysis that now governs general jurisdiction over foreign corporations – the Supreme Court's analysis having moved from the 'minimum contacts' review described in *International Shoe* to the more demanding 'essentially at home' test enunciated in *Goodyear* and *Daimler* – suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent' – perhaps unwitting – to the exercise of general jurisdiction by state courts, particularly in circumstances where the State's interests seem limited." And, "it appears that every state in the union – and the District of Columbia, as well – has enacted a business registration statute [citation omitted]. States have long endeavored to protect their citizens and levy taxes, among other goals, through this mechanism. If mere registration and the accompanying appointment of an in-state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief. In *Daimler*, the Court rejected the idea that a corporation was subject to general jurisdiction in every state in which it conducted substantial business. Brown's interpretation of the Connecticut statute could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*, so long as it had registered" [emphasis by the Court]. And, in *Genuine Parts Company v. Cepec*, 2016 WL 1569077 (Del. 2016) the Supreme Court of Delaware weighed in on the issue, and, overruling one of its pre-*Daimler* cases, interpreted its statute, which, like New York's, provides for the designation of a State official as agent for service of process upon becoming authorized to do business, as *not* "a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware." After *Daimler*, "it is not tenable to read Delaware's registration statutes" to constitute such consent. For,

"an incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market. *Daimler* makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not 'essentially at home' in a state for claims having no rational connection to the state." Last year's "Update" reported on *Serov v. Kerzner International Resorts, Inc.*, N.Y.L.J., 1202764623785 (Sup.Ct. N.Y.Co. 2016), in which the Court followed *Matter of B&M Kingstone*, and applied it to foreign corporations in general, holding that "by taking the affirmative step of registering to do business in New York, those defendants availed themselves of the benefits of being able to do business here. Those benefits are accompanied by the reasonable expectation that they could be hailed [*sic*] into New York courts." Here, in *Amelius*, the Court holds that "registration to do business, in and of itself, does not confer general personal jurisdiction" over non-New York corporations. And it distinguishes *Matter of B&M Kingstone*. There, "the Appellate Division, First Department held that the courts of this state could exercise general jurisdiction over a bank despite having only a branch in New York, since the bank had consented to the complex regulatory authority of this state to govern financial institutions. But that case is distinguishable from this one, since Yelp never consented to be subject to the type of regulatory framework governing financial institutions that applied there."

Mischel v. Safe Haven Enterprises, LLC, N.Y.L.J., 1202787244868 (Sup.Ct. N.Y.Co. 2017)(Coin, J.) – Reaching the same conclusion as in *Amelius*, directly above, the Court here concludes that registration is not sufficient to make a foreign corporation subject to general jurisdiction. "All 50 states require registration of foreign corporations to do business [citation omitted]. If, after *Daimler*, these statutes were deemed to meet due process standards, foreign corporations seeking to avoid general jurisdiction in a state would be faced with unenviable choices: (1) not doing business in the state; (2) registering and subjecting themselves to general jurisdiction; or (3) doing business in the state without registration and thereby breaking the law." The Court finds that "the net effect of finding jurisdiction by registration would be coercive." Moreover, "the New York registration statute (BCL §304), while designating the secretary of state as the registrant's agent for service of process, is silent on the jurisdictional effect of registering to do business here. In apparent recognition of this omission, a bill was introduced in the State Assembly to make plain that registration constituted consent to the general jurisdiction of the courts of this state [citation omitted]. The proposed statute was not enacted."

Kyowa Seni, Co., Ltd v. ANA Aircraft Technics Co., Ltd., 60 Misc 3d 898 (Sup.Ct. N.Y.Co. 2018)(Scarpulla, J.) – Here, too, noting that "after the *Daimler* case, most New York courts have rejected general jurisdiction by consent based on corporate

registration," the Court agrees that "simple registration in New York is an insufficient grounds for this Court to exercise general jurisdiction over" the foreign corporate defendant.

Homeward Residential v. Thompson Hine LLP, N.Y.L.J., 1521521561 (Sup.Ct. N.Y.Co. 2018)(Bluth, J.) – A national law firm, organized under the laws of Ohio, does not become subject to general jurisdiction in New York by opening a New York office, and filing as a "foreign limited liability partnership" with the Department of State. Nor is it estopped from arguing the absence of jurisdiction because the Department of State website lists the firm's Madison Avenue address as its "Principal Executive Office." For, "that is not a synonym for principal place of business," but, rather, relates "primarily to issues of venue." Of course, "a national law firm might be subject to specific jurisdiction arising out of its work or dealings in New York. But that is not the case in this action. Here, plaintiff wants to sue defendant in New York even though the work was performed in Georgia (where defendant has another office), plaintiff made payments issued by defendant's Ohio office and there is no evidence whatsoever that defendant made any statements or representations that it was headquartered in New York. There is no dispute that defendant does business in New York – it has an office in New York – but plaintiff does not argue that those contacts rise to the level of general jurisdiction. Instead, plaintiff claims that defendant is equitably estopped from arguing about personal jurisdiction." The Court dismisses the complaint.

FIA Leveraged Fund Ltd. v. Grant Thornton LLP, 150 A D 3d 492 (1st Dept. 2017) – Three decades before the *Daimler* decision, The Second Circuit, in *Volkswagenwerk AG v. Beech Aircraft Corporation*, 751 F.2d 117 (2d Cir. 1984), laid out a four-prong test for determining whether the presence in New York of a subsidiary of a non-New York corporation sufficed to provide general jurisdiction here over the parent corporation: (1) common ownership; (2) financial dependence of the subsidiary on the parent; (3) assignment by the parent of executive personnel of the subsidiary, and failure to observe corporate formalities; (4) parental control over the subsidiary's marketing and operational policies. Post-*Daimler*, that holding is at least called into question, since the non-New York parent is not "at home" in New York. But, here, in *FIA Leveraged Fund Ltd*, the Court declined jurisdiction over the non-New York parent corporation because "plaintiffs failed to satisfy the four factors set out in *Volkswagenwerk AG v. Beech Aircraft Corp.* [citation omitted], which we have adopted."

Wolberg v. IAI North America, Inc., 161 A D 3d 468 (1st Dept. 2018) – Here, again, as in *FIA Leveraged Fund Ltd.*, reported on directly above, which the Court cites with approval, the First Department re-affirms its reliance upon *Volkswagenwerk AG v. Beech Aircraft Corporation*, 751 F.2d 117 (2d Cir. 1984), despite the command of *Daimler* that general jurisdiction is limited to the place where the defendant corporation is "at home." The Court finds that defendant subsidiary, which "does business in New York," is "not a

mere department" of the Israeli defendant, and, applying the *Volkswagenwerk* standards, rejects jurisdiction over the parent corporation.

Imax Corporation v. The Essel Group, 154 A D 3d 464 (1st Dept. 2017) – Although *Daimler* dealt with a state's general jurisdiction over corporations, the Court stated that "'for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile.'" In *Magdalena v. Lins*, 123 A D 3d 600 (1st Dept. 2014), the First Department, citing *Daimler*, held that there was no basis for general jurisdiction over an individual defendant because, "while Lins, a Brazilian national, owns an apartment in New York, he is not domiciled there." And, again, in *Hopeman v. Hopeman*, 128 A D 3d 488 (1st Dept. 2015), the First Department held that the defendant was not subject to general jurisdiction in New York because "there was no evidence that he had established 'physical presence in the State and an intention to make the State a permanent home.'" Here, in *Imax*, the Court holds that, "New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state [citations omitted] or in an exceptional case where 'an individual's contacts with a forum are so extensive as to support general jurisdiction notwithstanding domicile elsewhere.'"

Reich v. Lopez, 858 F.3d 55 (2d Cir. 2017) – "Owning property in a forum does not alone establish domicile. 'One may have more than one residence in different parts of this country or the world, but a person may have only one domicile' [citation omitted]. In an 'exceptional case,' an individual's contacts with a forum might be so extensive as to support general jurisdiction notwithstanding domicile elsewhere [citing *Daimler*], but the Second Circuit has yet to find such a case." And, "this is not a case in which we need to decide the question of whether it would ever be possible to exercise general jurisdiction over an individual in a forum other than the one in which he is domiciled, nor do we need to define the exact contours of what could make such an 'exceptional case' [citation omitted]. Betancourt, a Venezuelan citizen, has relationships with New York banks and law firms, and owns an apartment in New York; but he spent fewer than 5% of nights in New York during a 31-month period the district court examined. Trebbau, also a Venezuelan citizen, does not own or rent any property in New York. In the same 31-month period, he spent fewer than 3% of nights in New York. The defendants' contacts with New York do not approach the point at which general jurisdiction over them would comport with due process."

CPLR 302 – LONG ARM JURISDICTION

Bristol-Myers Squibb Co. v. Superior Court of California, ___ U.S. ___, 137 S.Ct. 1773 (2017) – Non-California plaintiffs sued, in California, the manufacturer of a drug they claimed caused them harm in their home states, joining several California residents who made the same claim. The Supreme Court rejects the "sliding scale approach to specific jurisdiction." "Under this approach, 'the more wide-ranging the defendant's forum

contacts, the more readily is shown a connection between the forum contacts and the claim.'" Here, the California Supreme Court "concluded that 'BMS's extensive contacts with California' permitted the exercise of specific jurisdiction 'based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required.'" And, 'this attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested)." But, under long arm jurisdiction, "'the *suit*' must 'arise out of or relate to the defendant's contacts with the *forum*' [citations omitted; emphasis by the Court]. In other words, there must be 'an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation' [citation omitted]. For this reason, 'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Thus, "the California Supreme Court's 'sliding scale approach' is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum, and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough." And, "the mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims." Justice Sotomayor dissented. "Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler* [citation omitted]. Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State. I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike."

SPV Osus Ltd. v. UBS AG, ___ F.3d ___, 2018 WL 798291 (2d Cir. 2018) – "The Supreme Court has yet to address exactly how a defendant's activities must be tied to the forum for a court to properly exercise specific personal jurisdiction over a defendant. Some circuits require that the in-forum conduct to be the proximate cause of plaintiff's injuries, while others find the standard satisfied if the defendant's activities are the 'but

for' cause of those injuries [citation omitted]. In this Circuit, the standard applied depends on 'the relationship among the defendant, the forum, and the litigation.'"

Katherine Sales and Sourcing, Inc. v. Fiorella, N.Y.L.J., 1202799590099 (Sup.Ct. Suffolk Co. 2017)(Emerson, J.) – "What constitutes the transaction of business has not been precisely defined, but it is clear that a single act may constitute a transaction as long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted [citation omitted]. The clearest case in which New York courts have CPLR 302 jurisdiction occurs when a defendant is physically present in New York at the time the contract establishing a continuing relationship between the parties was negotiated and made and the cause of action arose out of such contract [citation omitted]. Courts are generally loathe to uphold jurisdiction under the transaction-of-business prong of CPLR 302 if the contract at issue was negotiated solely by mail, telephone and fax without any New York presence by the defendant." Here, defendant never entered New York, and his "only contacts with New York directly relating to the agreement were telephone calls and e-mails with Danzinger, who is located in Hauppauge. Although such contact can, in rare cases, constitute 'transacting business' in the state if the defendant actively projects himself into New York to conduct business transactions [citations omitted], such is not the case here." Defendant "did not project himself into ongoing New York commerce, thereby purposely availing himself of the business privileges and protections of the State."

Robins v. Procure Treatment Centers, Inc., 157 A D 3d 606 (1st Dept. 2018) – In this medical malpractice case, plaintiff claims jurisdiction over the New Jersey-based facility, claiming that the cause of action arose from the facility's transaction of business here. "The record shows that [defendant] PPM's activities in New York were 'purposeful and that there is a substantial relationship between the transaction and the claim asserted' [citations omitted]. PPM chose and marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium's doctors with privileges at its facility. In contrast to *Paterno v. Laser Spine Inst.*, 24 N Y 3d 370 (2014), a medical malpractice action in which the plaintiff argued that New York courts had jurisdiction over a Florida-based facility and its doctors based on an advertisement and communications, in this case, plaintiff did not seek out PPM. She says that she was directed to PPM by her New York doctor, defendant Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava's services."

Ripplewood Advisors, LLC v. Callidus Capital SIA, 151 A D 3d 611 (1st Dept. 2017) – "New York does not have personal jurisdiction over defendants pursuant to CPLR 302(a)(1), as they did not avail themselves 'of the privilege of conducting activities

within this State, thus invoking the benefits and protections of its laws' [citation omitted]. The telephone and email communications between the Latvian defendants and plaintiff's office in New York, concerning a contemplated association in the acquisition of a Latvian bank (with no presence in New York) undergoing privatization, do not suffice to constitute the transaction of business in New York. In so concluding, we find it persuasive that defendants never entered New York in connection with their dealings with plaintiff, that the parties' electronic communications also ran between defendants and plaintiff's London office, that plaintiff traveled to Latvia in connection with this matter, and that the parties' contemplated association (if the bank were acquired) would be centered in Latvia."

First Manhattan Energy Corporation v. Meyer, 150 A D 3d 521 (1st Dept. 2017) – "Plaintiff made a sufficient showing of jurisdiction pursuant to CPLR 302(a)(1) to withstand dismissal [citation omitted]. The record establishes *prima facie* that defendant, while not a party to the instant escrow agreement, was designated in the escrow agreement as the 'Assigned Escrow Agent' into whose account the funds would be deposited, and that he accepted the funds pursuant to the agreement. In so doing, pursuant to his agreement with the New York escrowee, defendant 'affected local commerce' in New York by 'changing plaintiff's economic position,' and in receiving the funds into his California account via wire transfer, he transacted business here by availing himself of modern technology to participate in and confer upon himself the benefit of the transaction while living and physically working elsewhere."

Nick v. Schneider, 150 A D 3d 1250 (2d Dept. 2017) – In this action for fraud, plaintiffs adequately demonstrated that their cause of action arises out of the Florida-domiciled defendant's transaction of business in New York. "The defendant allegedly utilized Sommer & Schneider's New York escrow account to further the alleged fraudulent investment scheme by directing the plaintiffs to deposit the funds for investment deals into the escrow account, by acting as the agent for the purported investment deals, and by using and allowing [his co-defendant] to use the investment money deposited in the escrow account for personal expenses."

Allen v. The Institute for Family Health, 159 A D 3d 554 (1st Dept. 2018) – "Plaintiff alleges that defendant Dauito, a radiologist, negligently read her sonogram, leading to a delay in the diagnosis and treatment of her breast cancer. Dr. Dauito avers that, at all relevant times, he was a New Jersey resident and worked only at an office in New Jersey. However, he acknowledges that he was licensed to practice medicine in New York and that he contracted with defendant Madison Avenue Radiology, P.C., a New York corporation, to provide radiology services to some of its New York patients. Plaintiff's sonogram was performed in New York, Dr. Dauito relayed his diagnostic findings to Madison Avenue Radiology in New York, and Madison Avenue Radiology issued a report based on his findings that was allegedly relied upon by plaintiff and her doctors.

Under these circumstances, New York courts may exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(1), notwithstanding his lack of physical presence in New York, because he transacted business with Madison Avenue Radiology and provided radiology services to patients in New York, including plaintiff, projecting himself into the State by electronically or telephonically transmitting his diagnostic findings."

D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N Y 3d 292 (2017) – Defendant, a Spanish winery, entered into a contract, in Spain, with plaintiff, a Spanish business broker, agreeing that if plaintiff located a distributor to import defendant's wine into the United States, defendant would pay commissions on wine sales made to such distributor. Thereafter, both parties came to New York several times to meet potential distributors. On one such trip, to attend a showcase of Spanish wines, plaintiff introduced defendant to a New York wine importer, and defendant began selling wine to that importer. Thereafter, plaintiff and defendant twice came to New York to events that featured the importer's Spanish wine portfolio, including defendant's wine. Subsequently, the parties had a dispute about the terms of their agreement, and plaintiff commenced this action in New York. The Court of Appeals unanimously concludes that defendant is subject to jurisdiction in New York pursuant to CPLR 302(a)(1). Defendant transacted business in New York, and, "plaintiff's claim arises from" that transaction. The "arises from" inquiry is "'relatively permissive' and an articulable nexus or substantial relationship exists 'where at least one element arises from the New York contacts' rather than 'every element of the cause of action pleaded' [citation omitted]. The nexus is insufficient where the relationship between the claim and transaction is 'too attenuated' or 'merely coincidental.'" And, here, "plaintiff's claim has a substantial relationship to defendant's business activities in New York. Defendant traveled to New York to attend the Great Match Event where plaintiff introduced defendant to Kobrand. Defendant then joined plaintiff in attending two promotional events hosted by Kobrand in New York, which resulted in Kobrand purchasing defendant's wine and, eventually, entering an exclusive distribution agreement for defendant's wine in the United States. Those sales to Kobrand – and the unpaid commissions thereon – are at the heart of plaintiff's claim."

Kyowa Seni, Co., Ltd v. ANA Aircraft Technics Co., Ltd., 60 Misc 3d 898 (Sup.Ct. N.Y.Co. 2018)(Scarpulla, J.) – "A plaintiff's claim must have an 'articulable nexus' or 'substantial relationship' with the defendant's transaction of business, and although this inquiry is 'relatively permissive,' the claim must not be 'completely unmoored' from the transaction [citation omitted]. Here, two Japanese parties negotiated and signed an MOU [for plaintiff's sales of seat covers for defendant's airplanes) in Japan and the performance pursuant to the MOU took place in Japan as well. Thus, although the complaint states that the ANA Companies' passenger plane 'destinations in the United States include *inter alia* John F. Kennedy International Airport, located within the City of New York and the State of New York,' it utterly fails to state a specific 'articulable

nexus' between New York and the claims arising out of the MOU's termination and the alleged misrepresentations/fraud" that are the basis of the action.

Crozier v. Avon Products, Inc., N.Y.L.J., 1533849511 (Sup.Ct. N.Y.Co. 2018)(Mendez, J.) – Plaintiff, a non-New Yorker, sues, *inter alia*, the non-New York manufacturers of asbestos-contaminated raw talc to which she was exposed upon her purchase of defendant Avon's body powder. The manufacturers had shipped the raw talc to Avon in New York, where Avon used it to make the powder. The Court concludes that the New York courts may exercise jurisdiction over the manufacturers pursuant to CPLR 302(a)(1) "because there is an articulable nexus or substantial relationship between their in state conduct and the claims asserted." The defendants sold to Avon, "and shipped into New York on a continuous basis, asbestos-contaminated talc for the manufacture of Avon talc powder, which was subsequently shipped throughout the nation." And, the complaint alleges that Mrs. Crozier's injury arose from the use of Avon talc powder containing the asbestos-contaminated talc shipped into New York by the Moving Defendants."

Katherine Sales and Sourcing, Inc. v. Fiorella, N.Y.L.J., 1202799590099 (Sup.Ct. Suffolk Co. 2017)(Emerson, J.) – To support jurisdiction under CPLR 302(a)(2) against a non-New York actor, under a conspiracy theory, "the plaintiff must establish (1) that the out-of-state co-conspirator had an awareness of the effects of his activity in New York, (2) that the New York co-conspirator's activity was for the benefit of the out-of-state co-conspirator, and (3) that the New York co-conspirator acted at the behest of, on behalf of, or under the control of the out-of-state co-conspirator."

Williams v. Beemiller, Inc., 159 A D 3d 148 (4th Dept. 2018) – In *Walden v. Fiore*, ___ U.S. ___, 134 S.Ct. 1115 (2014), a unanimous Supreme Court curtailed the reach of long arm jurisdiction when the cause of action arises from tortious conduct that has taken place outside of the forum state. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." Thus, "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State" [emphasis by the Court]. And, "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." Accordingly, "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." For "due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." The Court rejected the argument that defendant's "knowledge" of plaintiffs' "strong forum connections" sufficed. For that approach "impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and

makes those connections 'decisive' in the jurisdictional analysis." In sum, "mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question 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." Here, in *Williams*, the Court addresses the impact that *Walden* has on the New York Courts' interpretation of CPLR 302(a)(3)(ii). That statute provides for long arm jurisdiction over a defendant who commits a tort outside of New York, causing injury in New York, when, *inter alia*, the defendant should expect or reasonably expect the conduct to have consequences here, and defendant derives substantial revenue from interstate or international (but not necessarily New York-related) commerce. If jurisdiction were to be based solely upon a defendant knowing that its out-of-state conduct might injure a New Yorker, it would, it appears, violate due process as articulated in *Walden*. Back in 2012, before *Walden* was decided, this case was before the Fourth Department on plaintiff's appeal from an order which, *inter alia*, dismissed the complaint against defendant Brown for lack of jurisdiction. Brown was an Ohio-based gun dealer who, the complaint alleged, sold some 180 hand guns in Ohio to one Bostic, who Brown knew or should have known was the leader of a New York gun ring. One of the guns Brown sold to Bostic's ring ended up in the hands of a gang member in Buffalo, New York, who used it to shoot plaintiff. The Court concluded that, if it were shown that Brown derived substantial revenue from interstate or international commerce, jurisdiction was appropriate under CPLR 302(a)(3)(ii), and remanded for a hearing on that issue. For, "the complaint sufficiently alleges that Brown expected or reasonably should have expected that his sale of guns to Bostic's trafficking ring would have consequences in New York." Now, post-*Walden*, the case is back in the Fourth Department, Supreme Court having found sufficient evidence that Brown in fact derived substantial revenue from interstate commerce. But, ruled the Appellate Division, after *Walden*, that was no longer the dispositive issue. "We hold that the exercise of personal jurisdiction under New York's long-arm statute does not comport with federal due process under the circumstances of this case." For, *Walden* makes clear that the constitutionally required relationship among the defendant, the forum, and the litigation, "must arise out of contacts that the defendant *himself* creates with the forum state" [emphasis by the Court]. And, in the absence of efforts by Brown to service the New York market, "Brown's knowledge that guns sold to Bostic might end up being resold in New York if Bostic's ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York, because such circumstances demonstrate, at most, Brown's awareness of the mere possibility that the guns could be transported to and resold in New York." And plaintiff's argument "would impermissibly allow the contacts that Bostic, a third party, had with Brown and New York 'to drive the jurisdictional analysis' [citation omitted]. In short, Brown did not 'purposefully avail himself of the privilege of conducting activities within New York' [citation omitted] and,

therefore, he lacks the requisite minimum contacts to permit the exercise of jurisdiction over him."

Deutsche Bank AG v. Vik, 163 A D 3d 414 (1st Dept. 2018) – "To comport with due process, 'there must also be proof that the out-of-state defendant has the requisite minimum contacts with the forum state and that the prospect of defending a suit here comports with traditional notions of fair play and substantial justice' [citations omitted]. The 'minimum contacts' requirement is satisfied where 'a defendant's conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there' [citation omitted]. Under the 'effects test' theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff's claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant 'expressly aimed' its conduct at the forum [citation omitted]. Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient."

Imax Corporation v. The Essel Group, 154 A D 3d 464 (1st Dept. 2017) – In the course of attempting to execute on a judgment entered upon an arbitration award, petitioner seeks to satisfy that judgment against those in control of the judgment debtor who, it is alleged, "perpetrated a fraud against it by fraudulently demerging [judgment debtor] E-City during the arbitration proceedings that resulted in the judgment and transferring assets out of E-City and into other Essel Group companies, including the corporate respondents, to avoid paying damages." But, "petitioner failed to establish that New York courts have personal jurisdiction over the Essel Group and the individual respondents on the basis of a tortious act committed without the state 'causing injury to person or property within the state' (CPLR 302[a][3]). As the original event that caused the economic injury was the demerger of E-City in India, the situs of the injury is India [citation omitted]. Petitioner's executive offices in New York do not alone constitute a sufficient predicate for jurisdiction [citations omitted]. Nor does it avail petitioner that respondent Subhash Chandra, chairman of the Essel Group, traveled to New York to negotiate the agreement with petitioner, since the injury petitioner alleges arose not from the breach of the agreement but from the demerger."

JURISDICTION BY CONSENT

Oak Rock Financial, LLC v. Rodriguez, 148 A D 3d 1036 (2d Dept. 2017) – The law in New York is that "'a party may agree by contract to submit to jurisdiction in a given forum and that such a forum selection clause, when it is part of the contract that forms the basis of the action, will be enforced, obviating the need for a separate analysis of the propriety of exercising personal jurisdiction.'" Here, the underlying agreement provided that "Borrower consents to the jurisdiction of any State or Federal Court located within the State of New York." And, "although the guaranty executed by the defendant does not

contain a similar provision, generally, 'documents executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are "substantially" contemporaneous.'"

Ausch v. Sutton, 151 A D 3d 802 (2d Dept. 2017) – Plaintiff broker sues for his commissions relating to a Purchase Agreement. "Contrary to the plaintiff's contention, [defendant] Lisani's consent to jurisdiction in New York for issues arising out of the Purchase Agreement does not constitute a consent to jurisdiction with respect to the plaintiff's claims for a commission."

FORUM NON CONVENIENS

GENERAL CONSIDERATIONS

Estate of Kainer v. UBS AG, N.Y.L.J., 1511331787 (Sup.Ct. N.Y.Co. 2017)(Friedman, J.) – When a defendant moves to dismiss an action on both jurisdictional grounds and on grounds of *forum non conveniens*, must the Court first decide the jurisdiction issue, regardless how complicated, before deciding the *forum non conveniens* issue, regardless how clearly the facts call for dismissal on that ground? "In New York, there are two long-standing conflicting lines of authority on this threshold issue." The Supreme Court of the United States, in interpreting the Federal rule, has held that the Court may, in this circumstance, ignore the jurisdiction question and dismiss on *forum non conveniens* grounds [*Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007)]. In New York – and particularly the First Department – there are decisions on both sides of the issue [*see, Wyser-Pratte Management Co., Inc. v. Babcock Borsig AG*, 23 A D 3d 269 (1st Dept. 2005)(Court must pass on jurisdiction issue first); *Payne v. Jumeirah Hospitality and Leisure (USA), Inc.*, 83 A D 3d 518 (1st Dept. 2011)(having affirmed *forum non conveniens* dismissal, "we need not consider whether the court should have dismissed the action for lack of personal jurisdiction"); *Flame S.A. v. Worldlink International (Holding), Inc.*, 107 A D 3d 436 (1st Dept. 2013)(re-affirming *Wyser-Pratte*)]. But, while "the weight of appellate authority in this Department requires a court to address jurisdictional issues before undertaking a *forum non conveniens* analysis, the Appellate Division decisions do not discuss the reasoning of *Sinochem* and do not discuss the conflicting lines of authority." And "the Court of Appeals has not addressed the issue, although dictum in a pre-*Sinochem* decision stated that the doctrine of *forum non conveniens* is inapplicable unless personal jurisdiction has been obtained." The Court here concludes that "absent binding authority to the contrary, the court follows the second line of cases and *Sinochem*, which the court finds to be more persuasive." The Court thus dismisses this action on grounds of *forum non conveniens* without consideration of the issue of personal jurisdiction.

Crozier v. Avon Products, Inc., N.Y.L.J., 1533849511 (Sup.Ct. N.Y.Co. 2018)(Mendez, J.) – In this action for injuries caused to the non-New York plaintiff by exposure to asbestos-contaminated talc, the non-New York defendants, the manufacturers of the talc, who shipped it into New York to Avon, move to dismiss on grounds of *forum non conveniens*. The motion is denied. "When there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted." For other defendants are New York based, documents regarding the shipping are located in New York, relevant acts occurred here, and there is a substantial nexus between the action and New York. Thus, "the action should not be dismissed as the 'balance is not strong enough to disturb the choice of forum made by the Plaintiff.'"

Bacon v. Nygard, 160 A D 3d 565 (1st Dept. 2018) – The Court lists various reasons for its refusal to dismiss this action on grounds of *forum non conveniens*. "It is true that the alleged defamation related to events occurring in the Bahamas, and that some of the nonparty witnesses and documents are likely to be located in the Bahamas. However this is not dispositive." For, "plaintiff is a New York resident. While also not dispositive, this is generally 'the most significant factor in the equation.'" Also, only one defendant is a resident of the Bahamas, and "all of the defendants have substantial connections to New York." Because of those connections, and defendants' "ample resources," it "would not be a hardship for them to litigate here." By contrast, "plaintiff would suffer hardship if required to litigate in the Bahamas, which has no jury trial right and no mechanism to obtain pre-trial deposition testimony from Bahamian witnesses." Finally, "the fact that defendants waited fourteen months before bringing the instant motion" after motion practice and discovery, "also counsels against dismissal."

Park v. Cho, 153 A D 3d 1311 (2d Dept. 2017) – "Plaintiff alleges that he sustained personal injuries when the defendant assaulted him on a plane at John F. Kennedy Airport in Queens, New York. However, both the plaintiff and the defendant are Korean citizens who reside in Seoul, the plaintiff received medical treatment for the injuries he allegedly sustained as a result of the incident in Korea, and criminal charges stemming from the incident were brought against the defendant in Korea. Under these circumstances and considering all of the relevant factors, including the fact that all potential witnesses are in Korea, we find no basis to disturb the Supreme Court's determination" to dismiss the action on grounds of *forum non conveniens*.

Guezou v. American University of Beirut, N.Y.L.J., 1202796093477 (Sup.Ct. N.Y.Co. 2017)(Jaffe, J.) – "Plaintiff, a citizen and resident of France, was in Lebanon on a beach owned and maintained by defendant. He allegedly sat on a broken chair and fell backwards, injuring himself. After receiving some medical treatment in Lebanon, he returned to France, where he received the remainder of his treatment [citation omitted]. Defendant is a university incorporated under New York law. It has administrative offices

in New York, although since its founding, its campus and facilities are in Lebanon." The Court grants defendant's motion to dismiss on grounds of *forum non conveniens*. "The defendant bears the heavy burden of demonstrating that the forum is inconvenient, and unless the balance is strongly in favor of the defendant, 'the plaintiff's choice of forum should rarely be disturbed' [citations omitted]. However, New York courts are under no 'compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus to New York' [citations omitted]. New York courts are not unduly burdened by accepting jurisdiction here, as the translation of testimony and documents does not warrant dismissal [citations omitted], or by the application of foreign law [citation omitted]. However, while videoconferencing is a viable alternative to live depositions [citation omitted], it would not 'obviate the inconvenience and expense of requiring multiple witnesses to travel for trial' [citations omitted]. Moreover, there is an insubstantial nexus between this case and New York, especially as Lebanon is the situs of the accident and the location of potential witnesses, other than plaintiff's doctors and plaintiff, all of whom reside in France [citations omitted]. And there is also no indication that adjudication in Lebanon would not serve the interests of substantial justice [citations omitted]. As the balance of these facts is 'strongly in favor of the defendant,' and in the interest of substantial justice, Lebanon is the better venue."

FORUM SELECTION CLAUSES

Hemlock Semiconductor Pte, Ltd. v. Jinglong Industry and Commerce Group Co., Ltd., 56 Misc 3d 324 (Sup.Ct. N.Y.Co. 2017)(Oing, J.) – The parties' agreement provided for the application of New York law to any dispute, and for the "exclusive jurisdiction" of New York State or Federal Courts. The Court rejects defendant's argument that General Obligations Law §5-1401, which provides that parties "may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such * * * agreement * * * bears a reasonable relation to this state," violates the Commerce Clause or the Due Process Clause of the United States Constitution.

Stein v. Frontier Travel Camp, N.Y.L.J., 1526968398 (Civ.Ct. N.Y.Co. 2018)(Nock, J.) – The claim that a "contract, in general, is tainted by 'fraud in the inducement," is not sufficient to overcome a forum selection clause. Absent an allegation "that the forum selection clause, *per se*, was the result of any fraud or coercion," the clause will be enforced.

Carlyle CIM Agent, L.L.C. v. Trey Resources, Inc., 148 A D 3d 562 (1st Dept. 2017) – The agreement between the parties had a forum selection clause that was permissive as to plaintiff, but "required defendants to commence any cause of action against plaintiff exclusively in the state or federal courts of New York County." Plaintiff commenced this action in New York on the notes that were the subject matter of the agreement, and a separate action in Oklahoma "seeking to preserve its collateral represented in oil and gas assets and real property" located there. Defendant counterclaimed in the Oklahoma

action, and moved to dismiss this action pursuant to CPLR 3211(a)(4). The Appellate Division reverses the granting of that motion. "There is no merit to defendants' argument that the forum selection clauses did not pertain to counterclaims brought in another venue. This is because there is no distinction between a claim and a counterclaim, the latter of which 'is itself a cause of action.'" Defendants "contractually agreed not to file any claim outside of New York County, and doing so was a defined breach under the clear terms of the mandatory forum selection clauses. Thus, absent plaintiff's consent, it is therefore improper to dismiss the New York actions pursuant to CPLR 3211(a)(4) so as to consolidate them with the Oklahoma proceedings." Dismissal was also improper by virtue of General Obligations Law §5-1402, "which provides that any party may maintain an action in New York State courts where there is a contractual agreement providing for a choice of New York law and forum, and the case involves at least $1 million, all of which occur here [citation omitted]. Under this statute, a New York court may not decline jurisdiction even if 'the only nexus is the contractual agreement' [citations omitted]. The purpose of General Obligations Law §5-1402 is to enhance New York as 'one of the world's major financial and commercial Centers,' by 'encouraging the parties to significant commercial, mercantile or financial contracts to choose New York law' and forum."

Energy Conservation Group v. Applied Underwriters, Inc., N.Y.L.J., 1522126398 (Sup.Ct. Queens Co. 2018)(Grays, J.) – "The Applied defendants waived any right they may have had under the forum selection clause to have this dispute determined by the courts of Nebraska by actively litigating this case in this Court since 2015. Where a defendant has substantially delayed in seeking to enforce a forum selection clause and where a 'significant degree of activity has already taken place,' there is 'a particularly high burden to carry,' in seeking to enforce a forum selection clause [citation omitted]. The Applied defendants have already in this court participated in three disclosure conferences, propounded and responded to interrogatories, made document requests, and noticed depositions. They have moved for summary judgment and have engaged in other activity. The plaintiff began this action on October 15, 2015. The Applied defendants offered no plausible excuse for their two year delay in seeking to enforce the forum selection clause." Thus, "under the circumstances of this case, enforcement of the forum selection clause would be unreasonable and unjust."

VENUE

Effective October 23, 2017, CPLR 503(a) has been amended. Previously, the only proper venue of a "transitory" cause of action – an action not involving ownership, use or possession of land or of a chattel – was the county of residence of any of the parties, regardless where the facts giving rise to the cause of action occurred. The statute now

provides, as an additional basis for venue of such an action, "the county in which a substantial part of the events or omissions giving rise to the claim occurred."

Tower Broadcasting, LLC v. Equinox Broadcasting Corp., 160 A D 3d 1435 (4th Dept. 2018) – Plaintiff seeks a declaration "that it owns a broadcast tower located on real property owned by defendant and has a right to remove the tower from that property." Defendant seeks a change of venue from Monroe County to Chemung County, where "the tower and the real property upon which it is situated" are located. The Court affirms the denial of that motion. "First, this action concerns a broadcasting tower, which is a trade fixture and therefore retains its character as personal property [citations omitted]. Thus, CPLR 507, which concerns actions involving real property, is inapplicable. Second, although CPLR 508 provides that the 'place of trial of an action to recover a chattel *may* be in the county in which any part of the subject of the action is situated at the time of the commencement of the action' [emphasis by the Court], that section is permissive and not mandatory. Thus, it does not preclude an action in another venue, particularly where, as here, there is a written agreement fixing the place of trial in that other venue."

Zee N Kay Management v. Thyme Natural Market, N.Y.L.J., 1528444282 (Civ.Ct. N.Y.Co. 2018)(Padilla, J.) – This commercial holdover proceeding was transferred from Queens County, where the property is located, to New York County, which was the forum agreed upon in the parties' sublicense. The Court here, *sua sponte*, re-transfers the proceeding to Queens County. "A summary proceeding for the recovery of real property is a special proceeding governed exclusively by statute." And such a proceeding "is not a common law action which allows other considerations, like a parties' contractual desires, to come into play [citations omitted]. RPAPL 701(2), concerning the commencement of summary proceedings for the recovery of real property, states in pertinent part: 'The place of trial of the special proceeding *shall* be within the jurisdictional area of the court in which the real property or a portion thereof is situated [emphasis by the Court]. Moreover, the NYC CCA §303 states, 'A summary proceeding to recover possession of real property' '*shall* be brought in the county in which the real property or a part thereof is situated' [emphasis by the Court]. Lastly, NYC CCA §302 states, 'a real property action, no matter by whom asserted, may be tried in a county other than that in which the real property or a part thereof is situated *only* if there is reason to believe that an impartial trial cannot be had in the latter county' [emphasis by the Court]." Thus, "if the action is brought and tried in a county of New York City other than that where the property is located, the court lacks jurisdiction unless the court has made a finding that an impartial trial cannot be had in the county where the property is located." Since there was no such finding here, there is a "defect in subject matter jurisdiction, [and] this Court can raise the issue *sua sponte*."

Gordillo v. Champ Hill LLC, 157 A D 3d 470 (1st Dept. 2018) – "The untimeliness of defendant's demand for a change of venue and the subsequent motion is excusable because the summons improperly indicated that plaintiff resided in Bronx County." For, "while plaintiff does not reside on the island of Manhattan, his Marble Hill building is located in New York County, and not the Bronx. The record shows that defendant promptly moved after ascertaining that the statement made by plaintiff was incorrect."

Janis v. Janson Supermarkets LLC, 161 A D 3d 480 (1st Dept. 2018) – "Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as 'the county within this state where its office is to be located' [citation omitted]. Wakefern's designation of New York County in its application is controlling for venue purposes, even if it does not actually have an office in New York County."

Merchant Cash and Capital, L.L.C. v. Laulainen, 55 Misc 3d 349 (Sup.Ct. Nassau Co. 2017)(Diamond, J.) – The agreement between the parties provided that "either the state or federal courts in New York shall have jurisdiction over any dispute" between them. Plaintiff is a foreign corporation, authorized to do business in New York, with its principal place of business in New York County. Defendant is a foreign corporation with no connections to New York. The Court grants defendant's motion to change venue from Nassau County to New York County. The choice of forum clause in the agreement "does not specify that venue will be placed in Nassau County specifically. Thus, while the waiver provision of this section addresses such claims that a court in the State of New York is inconvenient and that such dispute should be brought in a court located in another state, the parties have not by agreement done away with the requirements of CPLR 503 entirely." On these facts, Nassau County is not a proper county, and the action is transferred.

Merchant Cash and Capital, LLC v. Portland Wholesale Jewelry, LLC, N.Y.L.J., 1202795385358 (Sup.Ct. Nassau Co. 2017)(McCormack, J.) – The Court here distinguishes *Merchant Cash and Capital, L.L.C. v. Laulainen*, reported on directly above. Here, the agreement between the parties also provided for exclusive jurisdiction in New York, but further provided that "Seller and Guarantor(s) waive any claim that the venue of the action is improper." Thus, the venue chosen by plaintiff is upheld, "absent proof it was unjust, unreasonable, violated public policy or was 'gravely' inconvenient."

LG Funding, LLC v. Advanced Pharma CR, LLC, 58 Misc 3d 231 (Sup.Ct. Nassau Co. 2017)(Steinman, J.) – The Court here agrees with the *Laulainen* decision discussed above. The agreement between the parties provided that any action shall, if plaintiff so elects, "be instituted in any court sitting in New York State (the 'Acceptable Forums'). The parties agree that the Acceptable Forums are convenient, and submit to the jurisdiction of the Acceptable Forums and waive any and all objections to jurisdiction

and venue." The Court concluded that "a so-called forum selection clause that doesn't select a forum but instead merely identified a state in which suit could be brought does not provide certainty or predictability to the parties as to where a dispute may be resolved." And, "the provision in the merchant agreement that the parties 'waive any and all objections to jurisdiction and venue' does not change the analysis. Such a waiver, by itself, cannot be enforceable unless the parties agreed to a selected county in which to venue an action in the first instance."

Minenko v. Swinging Bridge Camp Grounds of N.Y., Inc., 155 A D 3d 1413 (3d Dept. 2017) – Defendants moved, in Sullivan County, to change the venue of this action from Kings County to Sullivan County for the convenience of witnesses. The Appellate Division reverses the granting of that motion. "It is well-settled that a motion to change venue on a discretionary ground, such as convenience of material witnesses pursuant to CPLR 510(3) 'must be made in the county in which the action is pending, or, in any county in the judicial district or in any adjoining county' [citations omitted]. Here, it is undisputed that the action is pending in Kings County and that Sullivan County is not in the same judicial district as Kings County nor is it an adjoining county." Thus, "Supreme Court should not have entertained the motion."

Fensterman v. Joseph, 162 A D 3d 855 (2d Dept. 2018) – "It is undisputed that, pursuant to CPLR 503(a), venue of the Ulster County Action is properly in Ulster County, where Bacci, one of the Ulster plaintiffs, resided at the time the action was commenced [citation omitted]. A motion to change venue on discretionary grounds, unlike motion made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county." Since "Ulster County and Nassau County are not contiguous, and Nassau County is not in the 3rd Judicial District, the Fensterman parties' motion to change venue pursuant to CPLR 510(3) based on discretionary grounds was improperly made in the Supreme Court, Nassau County."

Thomas v. Kane Construction Group, Inc., 153 A D 3d 1189 (1st Dept. 2017) – "In seeking a change of venue to Suffolk County for the convenience of material witnesses (CPLR 510[3]), defendants' initial moving papers were deficient in not setting forth, *inter alia*, the names and addresses of witnesses who would be willing to testify, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by a trial in New York County." In any event, "the inconvenience of the two material witnesses identified in defendants' reply papers was not convincingly established, or sufficient to warrant the transfer of venue."

SUBJECT MATTER JURISDICTION

5670 58 Street Holding Corporation v. ASAP Towing Services, Inc., N.Y.L.J., 1202799922014 (App.Term 2d Dept. 2017) – In a commercial holdover proceeding, defendant asserts that Civil Court lacked subject matter jurisdiction because "the description of the subject premises in the petition is 'vague and ambiguous,' and because there was no landlord-tenant relationship between the parties." The Appellate Term rejects that argument. "The Civil Court has subject matter jurisdiction over summary proceedings [citations omitted], and any alleged 'misdescription' of the premises in the petition does not deprive the Civil Court of subject matter jurisdiction within the meaning of CPLR 5015(a)(4) [citations omitted]. Similarly, while proof of the existence of a landlord-tenant relationship is an element of a landlord's *prima facie* case in a holdover proceeding [citation omitted], a claim that there is no landlord-tenant relationship between the parties does not implicate subject matter jurisdiction."

FMC Company v. Driscoll, 56 Misc 3d 638 (Sup.Ct. Richmond Co. 2017)(Saitta, J.) – "The Court of Claims has exclusive jurisdiction to hear any claim against the State for appropriation of real or personal property." And, "an owner cannot bifurcate an inverse condemnation claim by bringing a declaratory judgment action in Supreme Court to establish the State's liability and then a claim for damages for the inverse condemnation in the Court of Claims." But, here, "the amended complaint does not seek a declaratory judgment that the State's actions constitute an inverse condemnation." The complaint, instead, seeks to enjoin the State from "continuing to occupy plaintiff's property and requiring them to remove the alterations they made to the property, and to restore the property to its condition before the defendants entered the property." The "Supreme Court has jurisdiction to enjoin a nuisance even where committed by the State." And, "as the Court of Claims does not have the power to grant injunctive relief, plaintiff is entitled to bring its second cause of action, to enjoin an alleged nuisance, in the Supreme Court."

Matter of Parisi, 59 Misc 3d 1020 (Surr.Ct. Queens Co. 2018)(Kelly, J.) – "The Surrogate's Court's subject matter jurisdiction originates in the New York State Constitution which provides the court's power extends 'over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto.'" Thus, "an action for partition would, at least conceptually, fall within this court's constitutional and statutory mandate [citation omitted]. Nevertheless, the Surrogate's Court's subject matter jurisdiction is not unlimited." Thus, "matters between living persons independent of a decedent's estate are not matters which this court may resolve." Therefore, "a general holding that the Surrogate's Court has the blanket authority to adjudicate a partition action in every instance where a decedent's estate is a co-tenant-in-common in real property is not supported by the case law and expansion of this court's jurisdiction in this regard is unsustainable." Here, where the estate's interest in the properties at issue is a minority position – just 16.666% – the Court dismisses the proceeding for lack of subject matter jurisdiction.

S&R Medical, P.C. v. Allstate Property & Casualty Insurance Company, N.Y.L.J., 1202785146334 (App.Term 2d Dept. 2017) – Civil Court properly denied plaintiff's motion for a default judgment. "Plaintiff's affidavit of service demonstrates that service was made in Hauppauge, which is in Suffolk County, outside the City of New York. Section 403 of the New York City Civil Court Act provides that service 'shall be made only within the city of New York unless service beyond the city be authorized by this act or by such other provision of law, other than the CPLR, as expressly applies to courts of limited jurisdiction or to all courts of the state.' Plaintiff appears to be arguing that defendant is not a resident of the City and, thus, to be implicitly arguing that the service was valid pursuant to CCA 404, which provides for service outside the City upon nonresidents in certain enumerated instances. However, defendant's position is that it is a resident of the City of New York, in which case, pursuant to CCA 403, service was invalid. As neither plaintiff's complaint nor its motion papers set forth any facts allowing for jurisdiction to be acquired over defendant by service outside the City of New York pursuant to CCA 404 [citations omitted] plaintiff has failed to show that service had been validly effectuated, and, thus, plaintiff failed to establish its entitlement to a default judgment."

811 Walton Rescue, LLC v. 811 Walton Tenants Corp., N.Y.L.J., 1202794949290 (Sup.Ct. Bronx Co. 2017)(Tapia, J.) – The Court declines to remove to itself a Civil Court Landlord/Tenant action between the parties for purposes of consolidation with this action. "Civil Court is the preferred forum for resolving landlord-tenant issues because it has the unique ability to resolve such issues [citations omitted]. In the absence of a showing that Civil Court is unable to afford complete relief to the plaintiffs, there is no basis for an application to Supreme Court." And, here, "plaintiff/tenant is entitled to not only assert its causes of action in this instant case as defenses to the civil court matter, but it is also entitled to conduct discovery in civil court regarding the issue of the validity of the Default Notice and Notice to Terminate. Availability of discovery in a summary proceeding has been widely recognized [citation omitted]. Thus, this Court agrees with Defendant/co-op's attorney that Plaintiff/tenant's causes of action can be asserted as defenses in civil court."

Caffrey v. North Arrow Abstract & Settlement Services, Inc., 160 A D 3d 121 (2d Dept. 2018) – In this action pleading various equitable causes of action, Supreme Court transferred the case to Civil Court pursuant to CPLR 325(d). After Civil Court rendered a judgment on the merits – as to which an appeal to the Appellate Term was made – Supreme Court re-transferred the action to itself, pursuant to CPLR 325(b), vacated the Civil Court judgment, and entered, in its place, a Supreme Court judgment adopting the Civil Court's findings. The Appellate Division reverses. First, the Court finds that Supreme Court had the authority to re-transfer to itself, despite the Civil Court judgment. For the action was still "pending." Since Civil Court lacks subject matter jurisdiction over equitable claims, the judgment was a nullity. Moreover, when the action was re-

transferred, an appeal was pending. Hence, the action was not concluded. But the Court erred in merely adopting the Civil Court's judgment. "Since the Civil Court was without jurisdiction to try the instant matter, rendering the trial and judgment void, its findings of fact and conclusions of law cannot as a matter of comity, res judicata, law of the case, or otherwise, be recognized by the Supreme Court upon its CPLR 325(b) removal of the action, and cannot provide a basis for the Supreme Court judgment presently on appeal."

Jeng v. Barrow-Jeng, 58 Misc 3d 911 (Sup.Ct. Monroe Co. 2018)(Dollinger, J.) – Although nothing in CPLR 325 specifically provides for the Supreme Court to remove to itself an action pending in Family Court, the Supreme Court has the "inherent power" to do so pursuant to Art. VI, §19(a) of the State Constitution.

Hart v. New York City Housing Authority, 161 A D 3d 724 (2d Dept. 2018) – "A motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the *ad damnum* clause of the complaint pursuant to CPLR 3025(b) [citation omitted]. Here, the amount stated in the *ad damnum* clause was within the jurisdictional limits of the Civil Court, and no request for leave to amend the *ad damnum* clause was made. In the absence of an application to increase the *ad damnum* clause, the plaintiff's motion to remove the action to the Supreme Court should have been denied."

COMMENCING THE ACTION

Bayridge Prince, LLC v. City of New York, 56 Misc 3d 684 (Sup.Ct. Kings Co. 2017)(Jimenez-Salta, J.) – Last year's "Update" reported on *Wesco Insurance Company v. Vinson*, 137 A D 3d 1114 (2d Dept. 2016) and *Maddux v. Schur*, 139 A D 3d 1281 (3d Dept. 2016), in which the Courts emphasized that, while CPLR 2001 allows the Court to be forgiving of errors in the method of filing, it does not give discretion to overlook errors in what is filed. Thus, complete failure to file a summons with notice, summons and complaint, or petition, is a jurisdictional defect in the commencement of an action or proceeding. Here, in *Bayridge Prince*, the Court holds that "plaintiff brought forth its order to show cause on March 29, 2016. However, at the time, due to what appears to be a clerical oversight, there was no underlying pleading filed with the Clerk of the Court." The Court "does not doubt, based on the assignment of the index number and the acceptance for filing of the order to show cause, that plaintiff's counsel had a good faith basis to believe that the summons and complaint had been accepted for filing with the Clerk of the Court at the time this action was commenced. Furthermore this court has no reason to doubt plaintiff's counsel's assertion that the clerk on the *ex parte* motions office insisted that the office would not accept an order to show cause for filing unless the action was commenced via the filing of a summons pursuant to CPLR 304. It is clear that plaintiff's counsel operated under his good faith assumption that this action was properly

commenced. However, all of these circumstances cannot change the fact that no underlying pleading was filed at the time plaintiff commenced this action. This court has no discretion to waive such a defect. 'Complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001.'"

DiSilvio v. Romanelli, 150 A D 3d 1078 (2d Dept. 2017) – "Under CPLR 304(a), an action in Supreme Court is ordinarily commenced 'by filing a summons and complaint or summons with notice.' The failure to file the initial papers necessary to commence an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity [citation omitted]. Here, the appellant undertook no steps to commence a third-party action, despite his unilateral amendment of the caption of the action in his motion papers to include the nonparty respondents as 'third-party defendants.' Consequently, the jurisdiction of the court was never invoked and the purported third-party action was a nullity [citation omitted]. As a result, all relief sought by the appellant against the nonparty-respondents was properly denied."

Stop The Chop NYNJ, Inc. v. Franchise & Concession Review Commission of New York City, N.Y.L.J., 1516834210 (Sup.Ct. N.Y.Co. 2018)(Bluth, J.) – In this "hybrid" declaratory judgment action/Article 78 proceeding, petitioner/plaintiff filed a summons with notice within the 4-month statute of limitations for the Article 78 proceeding, but did not file a petition until that period had expired. The Court dismisses the Article 78 proceeding. CPLR 304(a) provides that a special proceeding is commenced "by filing a petition." And, "although courts have permitted litigants to pursue hybrid proceedings, petitioner failed to demonstrate that it is entitled to choose whichever CPLR commencement procedures are most convenient for it."

Matter of Oneida Public Library District v. Town Board of the Town of Verona, 153 A D 3d 127 (3d Dept. 2017) – "Notwithstanding the requirement that a notice of petition specify when and where the petition is to be heard (*see* CPLR 403[a]), it is undisputed that the initial notice of petition served and filed by petitioner omitted a return date. We have previously found that such omission was fatal, thereby precluding a court's reliance on CPLR 2001, inasmuch as 'acquisition of personal jurisdiction was a prerequisite to the exercise of a court's discretionary power to correct an irregularity or permit prosecution of a matter brought in an improper form.'" But, "since these decisions, however, CPLR 2001 was amended in 2007 to permit courts to disregard mistakes, omissions, defects or irregularities made at the commencement of a proceeding, which includes commencement by the filing of a petition [citations omitted]. Indeed, the purpose behind amending CPLR 2001 was 'to allow courts to correct or disregard technical defects, occurring at the commencement of an action or proceeding, that do not prejudice the opposing party' and 'to fully foreclose dismissal of actions for technical, non-prejudicial defects' [citation omitted]. In view of the amendment of CPLR 2001, the

rule articulated in our prior decisions – a notice of petition lacking a return date is jurisdictionally defective and, therefore, prohibits a court from exercising its authority under CPLR 2001 – is no longer tenable. We now hold that the omission of a return date in a notice of petition does not constitute a jurisdictional defect so as to deprive the court from assessing whether such omission may be excused under CPLR 2001, and our prior decisions stating to the contrary should no longer be followed for such proposition."

Matter of Kennedy v. New York State Office for People with Developmental Disabilities, 154 A D 3d 1346 (4th Dept. 2017) – In dismissing the petition for failure to include a return date, Supreme Court "relied on a line of cases, all from the Third Department, holding that such an omission constitutes a jurisdictional defect [citations omitted]. Those cases, however, were all decided before CPLR 2001 was amended in 2007 'to permit courts to disregard mistakes, omissions, defects or irregularities made at the commencement of a proceeding, which includes commencement by the filing of a petition' [citation omitted]. And the Third Department has since held that 'the rule articulated in its prior decisions – a notice of petition lacking a return date is jurisdictionally defective and, therefore, prohibits a court from exercising its authority under CPLR 2001 – is no longer tenable' [citation omitted]. We agree inasmuch as 'the purpose behind amending CPLR 2001 was "to allow courts to correct or disregard technical defects, occurring at the commencement of an action or proceeding, that do not prejudice the opposing party" and "to fully foreclose dismissal of actions for technical, non-prejudicial defects."'"

Matter of Bender v. Lancaster Central School District, 155 A D 3d 1590 (4th Dept. 2017) – "A 'notice of petition shall specify the time and place of the hearing on the petition' [citation omitted]. The omission of a return date in a notice of petition does not, however, deprive a court of personal jurisdiction over the respondent [citations omitted]. Indeed, such a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission."

Schwartz v. Chan, 162 A D 3d 408 (1st Dept. 2018) – "As plaintiff's claims were already time-barred under the statute of limitations for libel and slander actions [citation omitted] when he filed the summons, CPLR 306-b is unavailable to him to extend his time to serve the complaint."

Estate of Fernandez v. Wyckoff Heights Medical Center, 162 A D 3d 742 (2d Dept. 2018) – "An attempt at service that later proves defective cannot be the basis for a 'good cause' extension of time to serve process pursuant to CPLR 306-b [citations omitted]. However, the more flexible 'interest of justice' standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant [citation omitted]. Indeed, the court may consider diligence or lack thereof, along with

any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Furze v. Stapen, 161 A D 3d 827 (2d Dept. 2018) – "The plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve Nayak with the summons and complaint was properly granted in the interest of justice." For, "here, the record established that the plaintiff exercised diligence in timely filing, and in attempting to serve Nayak and notify Nayak and her insurance carrier of the summons and complaint, within the 120-day period following the filing of the summons and complaint, although the attempt to serve Nayak was ultimately deemed defective [citation omitted]. While the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the plaintiff promptly cross-moved for an extension of time to serve Nayak, and there was no identifiable prejudice to Nayak attributable to the delay in service."

Gabbar v. Flatlands Commons, LLC, 150 A D 3d 1084 (2d Dept. 2017) – "The Supreme Court providently exercised its discretion in granting the plaintiffs' cross motion pursuant to CPLR 306-b to extend their time to serve the summons and complaint upon the appellant in the interest of justice [citation omitted]. The plaintiffs' time to effect service of process was properly extended since the verified complaint demonstrated a potentially meritorious cause of action, the statute of limitations had expired, the action was commenced within the 3-year statutory period, service of the summons and complaint which was timely made within the 120-day period [citation omitted] was subsequently found to have been defective, and there is no demonstrable prejudice to the appellant that would militate against granting the extension of time to serve it [citations omitted]. In the absence of prejudice to the appellant, it would be unjust to deprive the plaintiffs of the opportunity to prove their causes of action against both defendants."

Singh v. Trahan, 153 A D 3d 961 (2d Dept. 2017) – "The denial of the plaintiff's renewed motion pursuant to CPLR 306-b to extend the time to serve the defendants with the summons and complaint was an improvident exercise of discretion [citation omitted]. While the action was timely commenced, the statute of limitations had expired when the plaintiffs first moved for relief, the timely service of process was subsequently found to have been defective, and the defendants had actual notice of the action within 120 days of commencement of the action [citations omitted]. Furthermore, the plaintiffs demonstrated a potentially meritorious cause of action, and there was no prejudice to the defendants attributable to the delay in service."

Mangar v. Happy Kitchen Inc., 57 Misc 3d 867 (Sup.Ct. Queens Co. 2017)(Butler, J.) – Plaintiff timely served the moving defendant with the original summons and complaint.

Plaintiff then amended the complaint to add a party. The allegations with respect to the moving defendant were unchanged. Plaintiff then failed to timely serve the amended complaint on the moving defendant. The Court denies the motion to dismiss, and grants plaintiff an extension of time to serve the amended complaint. "Defendant does not articulate any coherent manner in which it has been prejudiced by not being timely served with the amended summons and amended verified complaint. Defendant merely contends that enlargement of time for plaintiffs to serve would cause prejudice because the statute of limitations on plaintiffs' claims has now passed, and defendant cannot now conduct a proper investigation. However, defendant's argument is disingenuous, as defendant was previously put on notice of the claims against it in *March 2015*, by service of the initial complaint, and the amended complaint does not alter any of the claims asserted against defendant" [emphasis by the Court].

US Bank National Association v. Saintus, 153 A D 3d 1380 (2d Dept. 2017) – Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b for leave to extend its time to serve the summons and complaint upon Saintus in the interest of justice [citation omitted]. While the action was timely commenced, the statute of limitations had expired when the plaintiff moved for this relief, the timely service of process was subsequently found to have been defective, there was no identifiable prejudice to Saintus attributable to the delay in proper service, and the complaint appears to be potentially meritorious [citations omitted]. Contrary to Saintus's contention, the court did not lack jurisdiction to entertain this branch of the plaintiff's motion. Inasmuch as no judgment was entered dismissing the action, the action was pending when the plaintiff moved to extend the time to serve Saintus with process."

Rosenzweig v. The City of New York, N.Y.L.J., 1202799590375 (Sup.Ct. N.Y.Co. 2017) (Perry, J.) – "Good cause" to extend the time to serve, pursuant to CPLR 306-b, "requires a 'threshold' showing that plaintiff made reasonably diligent efforts to make timely service [citation omitted], while the interest of justice standard takes into account several factors to determine whether a party should be granted additional time to effect service, including diligence in attempting service, the parties' competing interests, the expiration of statutes of limitations, the merit of the case, the length of time service was delayed, any prejudice to the defendant and the promptness of the request for an extension of time." Here, "within two days of commencing this action plaintiff retained a licensed, professional process server to serve the defendants in this action. The record demonstrates that through no fault of plaintiff or her counsel, the process server provided counsel with what turned out to be, given the proof submitted by defendants in opposition to plaintiff's motion, erroneous affidavits of service. Plaintiff has also demonstrated that reliance on a licensed process server providing affidavits of service and GPS tracking photographs, which purportedly confirmed the date, time and location information contained in the Affidavits of Service, was reasonable conduct under the circumstances and provides proof of plaintiff's diligence in attempting to timely serve defendants in this

matter." Thus, "the record before this court demonstrates that plaintiff's conduct in attempting to serve defendants, falls squarely within the 'good cause' analysis set forth in CPLR 306-b and the case law interpreting the statute."

Chan v. Zoubarev, 157 A D 3d 851 (2d Dept. 2018) – Defendant established that service of process upon him was insufficient, as the place where the summons was affixed was not his actual residence. "Nevertheless, the Supreme Court providently exercised its discretion in denying the defendant's motion to dismiss the complaint and granting the plaintiff's cross motion to extend the time to serve the summons and complaint upon the defendant." For, "while the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the timely service of process was subsequently found to have been defective, and the defendant had actual notice of the action within 120 days of commencement of the action [citations omitted]. Moreover, there was no prejudice to the defendant attributable to the delay in service."

Matter of 76 South Central Associates, LLC v. Department of Assessment, 157 A D 3d 666 (2d Dept. 2018) – "The petitioner's time to effect service of process was properly extended since the verified petition demonstrated the merits of the proceeding, the petition was timely filed, the statute of limitations had expired by the time the petitioner moved to extend its time to complete service of process, and there was no demonstrable prejudice to the appellants which would militate against granting the extension of time to serve them."

Matter of Genting New York, LLC v. New York City Environmental Control Board, 158 A D 3d (2d Dept. 2018) – CPLR 306-b provides that, in an action or proceeding subject to a statute of limitations of four months or less, service of process must be made within 15 days of the date when the statute of limitations would have expired. Here, petitioner timely filed the petition, but served it, together with the second order to show cause entered by the Court, beyond the 15 day limit. Indeed, this second order to show cause was signed after the 15 days had already expired. "Contrary to the petitioner's contention, the fact that CPLR 403(d) permits a court to grant an order to show cause to be served 'in lieu of a notice of petition at a time and in a manner specified therein' does not abrogate the jurisdictional time limit established by CPLR 306-b, and the Supreme Court properly granted the respondents' cross motion pursuant to CPLR 3211(a)(8) to dismiss the amended petition for lack of personal jurisdiction based upon the petitioner's failure to comply with CPLR 306-b."

Goldstein Group Holding, Inc. v. 310 East 4th Street Housing Development Fund Corporation, 154 A D 3d 458 (1st Dept. 2017) – "Plaintiff was the substituted plaintiff in a prior foreclosure action against defendant that, three months before plaintiff filed the instant complaint, was dismissed for lack of personal jurisdiction over defendant because defendant-intervenor Howard Brandstein, who had been served on defendant's behalf,

was no longer defendant's president and was not authorized to accept service on its behalf [citation omitted]. Nevertheless, in the instant action, plaintiff initially chose again to try to serve defendants by serving Brandstein, based on its rank speculation that Brandstein might have again become defendant's president. Plaintiff did not detail its efforts, if any, to learn the identity of defendant's current president or any other officer whom it might properly serve. While ultimately plaintiff served defendant's actual president, it did so after expiration of the 120-day period." The Appellate Division affirms the denial of plaintiff's motion for an extension of time to serve.

Holbeck v. Berrios, 161 A D 3d 957 (2d Dept. 2018) – "The plaintiff failed to demonstrate 'good cause' for an extension of time, as he did not show that he exercised reasonable diligence in attempting to effect service [citations omitted]. The plaintiff resorted to affix and mail service after only two attempts to deliver the summons and complaint on a weekday, at approximately the same time of day, when the defendant reasonably could have been expected to be at work [citations omitted]. Further, the affirmation of the plaintiff's counsel does not indicate that he made any effort to verify that the defendant still resided at the address listed on the three-year-old police report, particularly after efforts to deliver the summons and complaint were unsuccessful." And, "the Supreme Court did not improvidently exercise its discretion in declining to grant the plaintiff an extension of time in the interest of justice." For, "here, as a result of the plaintiff's lack of diligence in serving the defendant, the defendant did not receive the summons and complaint until approximately 3 months and 3 weeks after expiration of the 120-day period for service, and approximately 7 1/2 months after expiration of the statute of limitations. Significantly, there is no evidence that the defendant had any notice of the action until that time. Further, the plaintiff did not adduce evidence tending to show a lack of prejudice to the defendant, and there was no showing of merit to the plaintiff's claim of having sustained a serious injury, including even a recitation of the injuries he suffered."

Encarnacion v. Ogunro, 162 A D 3d 981 (2d Dept. 2018) – Plaintiff was injured in April, 2009, and commenced this action in January, 2010. In February, 2010, plaintiff "purportedly" served defendant by "nail and mail." Defendant failed to appear, and plaintiff obtained a default judgment in December, 2014. In October, 2015, defendant moved to vacate the judgment for lack of jurisdiction based on improper service of process. In June, 2016, plaintiff cross-moved for an extension of time to make proper service. The Appellate Division reverses the granting of that cross-motion. "The plaintiff failed to demonstrate good cause. The attempt to serve the defendant pursuant to CPLR 308(4) was ineffective as a matter of law because the place where process was affixed was not the defendant's 'actual place of business, dwelling place or usual place of abode' [citations omitted]. The plaintiff also failed to establish her entitlement to an extension of time for service of the summons and complaint in the interest of justice in view of the extreme lack of diligence in attempting to effect service, the more than six-

year delay between the filing of the summons and complaint and the time the cross motion was made, the plaintiff's failure to move for an extension of time until more than eight months after the defendant moved to vacate the default judgment, the four-year delay between the expiration of the statute of limitations and the defendant's receipt of notice of this action, and the inference of substantial prejudice due to the lack of notice of the plaintiff's causes of action until more than six years after their accrual."

THE SUMMONS

SZ v. KMM, N.Y.L.J., 1521688019 (Sup.Ct. N.Y.Co. 2018)(Helewitz, Sp.Ref.) – "CPLR 2101(a), dealing with the quality, size and legibility of papers served or filed, specifies that 'the letters in the summons shall be in clear type of no less than twelve-point in size.'" Here, the print "was well below even the tenpoint in size." But, "the only test as to whether the failure to follow the dictates of CPLR 2101 is a mere irregularity that may be overlooked or a jurisdictional defect mandating dismissal is whether any party has been prejudiced by the error. In the case at bar, the summons was clearly readable and the fact that defendant responded without opposition to the print size indicates that defendant did not feel any prejudice by this statutory error."

Steuhl v. CRD Metalworks, LLC, 159 A D 3d 1182 (3d Dept. 2018) – Defendant was served with a "bare" summons – with neither notice nor a complaint. Accordingly, "the complaint must be dismissed due to a lack of personal jurisdiction."

Chambers v. Prug, 162 A D 3d 974 (2d Dept. 2018) – "CPLR 305(c) authorizes the court, in its discretion, to 'allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.' Where the motion is to cure 'a misnomer in the description of a party defendant,' it should be granted even after the statute of limitations has run where '(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought' [citations omitted]. 'Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue' [citations omitted]. Here, the evidence established that the correct defendants, Patrick Prue and Weir Welding Company, Inc., misnamed in the original process as Patrick Prug and Weir Welding Co., Inc., were properly served with process within 120 days after the action was timely commenced and, thus, the Supreme Court obtained jurisdiction over them [citations omitted]. Moreover, there was no proof that the defendants would be prejudiced by allowing the caption to be amended to correct the misnomers."

Cancel v. Metropolitan Transportation Authority, 58 Misc 3d 1016 (Sup.Ct. Bronx Co. 2018)(Brigantti, J.) – Last year's "Update" reported on *Konner v. New York City Transit Authority*, 143 A D 3d 774 (2d Dept. 2016). Although that case arose in the context of a notice of claim, it raised issues often seen in summons "misnomer" cases. Plaintiff claimed to have been injured in a subway accident. The notice of claim was addressed to the Metropolitan Transportation Authority and served on that Authority. Plaintiff then received a letter, without letterhead, or other indication as to which Authority sent it, but with a "TA" claim number. It stated that "'by virtue of the power conferred on the *New York City Transit Authority* by Public Authorities Law §1200 *et seq.*, as amended, the claimant is hereby required to appear and be sworn at the office of the Authority" to give testimony [emphasis by the Court]. The hearing was then conducted. When plaintiff commenced this action, the Transit Authority moved for summary judgment on the ground that it had not been served with a notice of claim. The Court was "mindful that the doctrine of equitable estoppel should be invoked against governmental entities sparingly and only under exceptional circumstances," but found the case to present such circumstances. For, "plaintiff's submissions demonstrated that the NYCTA wrongfully or negligently engaged in conduct that misled the plaintiff to justifiably believe that service of the notice of claim upon the MTA was of no consequence, and lulled her into sleeping on her rights to her detriment." Here, in *Cancel*, as in *Konner*, plaintiff urges that the MTA be estopped from relying on the statute of limitations. But the only conduct she could point to was the ubiquitous "MTA" sign on Transit Authority subways and MTA buses, and that the MTA accepted the notice of claim without advising plaintiff that she had sued an improper entity. But estoppel only applies "where a defendant has either engaged in overt affirmative misleading acts or conduct, or where it failed to act when it had an affirmative duty to do so." And "MTA had no affirmative duty or obligation to either reject the notice of claim or advise Plaintiff that it was an improper defendant [citations omitted]. MTA was only obligated to refrain from misleading Plaintiff as to whether she sued the proper party." Thus, unlike *Konner*, "MTA here did not misleadingly correspond with Plaintiff's counsel or schedule Plaintiff for a hearing after receipt of the notice of claim and prior to the expiration of the statute of limitations. MTA did not actively engage in litigation or other acts prior to expiration of the statute of limitations that would have led Plaintiff to believe she had sued the proper entity or discourage her from further investigating the matter."

SERVICE OF PROCESS

SERVICE ON INDIVIDUALS

Deutsche Bank National Trust Company v. O'King, 148 A D 3d 776 (2d Dept. 2017) – Where service is effected pursuant to CPLR 308(4), the affix and mail method, the

plaintiff must demonstrate that the summons was affixed to the door of the dwelling place or usual place of abode of the person to be served and mailed to such person's last known residence [citation omitted]. The 'dwelling place' is one at which the defendant is actually residing at the time of delivery [citation omitted]. The 'usual place of abode' is a place at which the defendant lives with a degree of permanence and stability and to which he intends to return." The same definitions apply to the "leave and mail" provision, CPLR 308(2).

Avis Rent A Car System, LLC v. Scaramellino, 161 A D 3d 572 (1st Dept. 2018) – Defendant rented a vehicle from plaintiff in California, and damaged it there. Plaintiff commenced an action against defendant in New York, and served him, presumably by leave and mail or nail and mail service, at the New York address listed on his driver's license. Upon defendant's default, judgment was awarded to plaintiff. Defendant now moves to vacate the default and dismiss the action, claiming that, prior to the time process was served, he had relocated to Massachusetts. Plaintiff argues that defendant is estopped from claiming that the address was not his "actual residence," since he failed to notify the Department of Motor Vehicles of his change of address, and plaintiff's process server relied upon the address on file with the DMV. "Although, as plaintiff argues, a defendant may be estopped from challenging the propriety of service of process based on his failure to notify the Department of Motor Vehicles of a change of address [citations omitted], he cannot be estopped on that basis from asserting that he is not subject to the jurisdiction of the courts of a state in which he is not a resident." Accordingly, the Appellate Division remanded for a hearing as to whether, in fact, defendant had relocated to Massachusetts prior to the time of service of process.

Marathon Structured Asset Solution Trust v. Fennell, 153 A D 3d 511 (2d Dept. 2017) – "Although defendants demonstrated that service was effected on their then 15-year-old daughter, they failed to establish that their daughter was not 'objectively of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to her [citation omitted], and thus, not a person of 'suitable age and discretion' within the meaning of CPLR 308(2)."

Zabari v. Zabari, 154 A D 3d 613 (1st Dept. 2017) – "The evidence supports the finding that delivery was properly made by placing the papers in the 'general vicinity' of defendant's doorman after he denied the process server access [citations omitted]. Because the documents were mailed to defendant's residence (in addition to his place of business), plaintiff was not required to send them by first class mail, and the use of certified mail was sufficient [citations omitted]. The affidavit of service reflected that the mailing envelope sent to defendant's business address bore the requisite external markings [citations omitted], and no evidence was submitted to the contrary. The fact that the process server was not licensed would not invalidate service, even if a license were required."

Rahhal v. Downing, 157 A D 3d 446 (1st Dept. 2018) – "Although appellants contend that their actual place of business is located in the Bronx Lebanon buildings where they provide medical services, for purposes of service of process pursuant to CPLR 308(2), Bronx Lebanon's Risk Management Office constitutes their 'actual place of business' [citations omitted]. The Risk Management Coordinator accepted service on behalf of defendant Bronx Lebanon, which was sued as the individual appellants' employer, to be liable for their actions pursuant to *respondeat superior* [citation omitted]. The Risk Management Department was well suited to accept process on behalf of the hospital's employees [citation omitted]. In the cases relied upon by appellants, the defendant doctors were not employed by the hospital where service was attempted, and thus service was not proper pursuant to CPLR 308(2)."

JP Morgan Chase Bank, N.A. v. Peters, 55 Misc 3d 849 (Sup.Ct. N.Y.Co. 2017)(Bluth, J.) – Defendant is in prison. Plaintiff caused service to be made, pursuant to CPLR 308(2), at the address where he lived prior to incarceration. Distinguishing *Montes v. Seda*, 157 Misc 2d 895 (Sup.Ct. N.Y.Co. 1993), the Court holds that service was not made at defendant's "usual place of abode." "Unlike the defendant in *Montes* [who was serving an 18-month sentence], Peters faces a 40-years-to-life sentence, which clearly approaches the degree of permanence and stability implied in the term 'usual place of abode." Moreover, "plaintiff presented no evidence in the affidavit of service that the process server attempted to gain access to the fifth floor so he could serve defendant Peters at his former apartment or that the doorman refused to grant the process server permission to enter the building. Plaintiff only claims the doorman confirmed that the defendant lived at the building. Under these facts, the court is unable to find that delivery to a doorman in the lobby of defendant's former residence satisfied due process."

Linden Plaza Pres. LP v. Bethel, N.Y.L.J., 1512783758 (Civ.Ct. Kings Co. 2017) (Weisberg, J.) – Respondent lost the key to her mailbox. "That same month she spoke to 'Kimberly' at the management office and requested a new key. Kimberly informed Respondent that she was not a legal tenant, would not be given a replacement key, and that nothing could be removed from the mailbox for her." Then, "despite apparent knowledge that Respondent did not have access to the mailbox and its refusal to provide her a key to the mailbox, Petitioner commenced this [holdover] proceeding by 'nail and mail' service." The Court vacates respondent's default and dismisses the proceeding.

Thacker v. Malloy, 148 A D 3d 857 (2d Dept. 2017) – At the traverse hearing in this action, the "evidence showed that the process server walked up to the window of the defendant's mother's ground-floor apartment to give her the summons and complaint as he stood on the sidewalk and she stood inside her apartment. Although the defendant resided in the same multiple-dwelling building as his mother, his apartment was on a higher floor, and it was separate and distinct from his mother's apartment. Hence, in

serving the defendant's mother with the summons and complaint while she was inside her own apartment, service was not made at the defendant's actual dwelling."

Cornhill LLC v. Sposato, 56 Misc 3d 364 (City Ct. Rochester 2017)(Yacknin, J.) – "New York appellate courts require that personal service attempts prior to resort to conspicuous service [pursuant to CPLR 308(4)] must comply with at least two key prerequisites to satisfy the due diligence test. First, a minimum of three personal service attempts are required, with at least two attempts on dates and times when it can reasonably be expected that the person to be served will not be at work or in transit." Second, "before resorting to conspicuous service, a process server must make 'genuine inquiries' to ascertain the party's place of work so that the party can be served at work, and must attempt to talk to neighbors or find out where the party might be found [citations omitted]. Where the party seeking a default money judgment following conspicuous service of process fails to demonstrate such inquiries, due diligence is not satisfied."

U.S. Bank, N.A. v. Cepeda, 155 A D 3d 809 (2d Dept. 2017) – "The affidavit of the process server demonstrated that three visits were made to the homeowner's residence, each on different days and at different times of the day. The process server also described in detail his unsuccessful attempt to obtain an employment address for the homeowner, including interviewing a neighbor. Under these circumstances, the Supreme Court improperly concluded that the due diligence requirement was not satisfied."

Sinay v. Schwartzman, 148 A D 3d 1068 (2d Dept. 2017) – "The defendants raised issues of fact as to whether 'affix and mail' service was properly made, i.e., whether the summons and complaint were affixed to the door of their condominium unit, rather than the exterior door of the condominium complex [citation omitted]. Under the circumstances, a hearing to determine the validity of service upon the defendants was warranted."

Greene Major Holdings, LLC v. Trailside and Hunter, LLC, 148 A D 3d 1317 (3d Dept. 2017) – "While the precise manner in which due diligence is to be accomplished [in order to permit service pursuant to CPLR 308(4)] is 'not rigidly prescribed' [citation omitted], the requirement that due diligence be exercised 'must be strictly observed, given the reduced likelihood that a summons served pursuant to CPLR 308(4) will be received' [citations omitted]. What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality' [citations omitted], and the plaintiff, who bears the burden of establishing that personal jurisdiction over the defendant was acquired [citation omitted], must show 'that the process server made genuine inquiries about the defendant's whereabouts and place of employment.'" Here, the process server "attempted to serve defendant at a particular residence in Evanston, Illinois on three occasions – on December 10, 2013 at 8:59 p.m., on December 11, 2013 at 5:17 p.m., and on December 13, 2013 at 4:19 p.m." The

Appellate Division agrees with Supreme Court that "the underlying service attempts – all of which occurred on weekdays and two of which occurred during hours that Rem reasonably could be expected to be either at or in transit from work – fall short of establishing due diligence."

Velez v. Forcelli, 152 A D 3d 630 (2d Dept. 2017) – "The term 'due diligence,' which is not defined by statute, has been interpreted and applied on a case-by-case basis." Here, "seven visits were made to the defendant's residence at different times, including those times when the defendant could reasonably have been expected to be found at his residence [citations omitted]. It was further established at the hearing that the process server sufficiently confirmed that the defendant resided at the premises at which service was attempted. While there was no evidence presented at the hearing of unsuccessful attempts by the process server to obtain an employment address for the defendant, it is undisputed that the defendant was out of work due to injuries he sustained in a car accident. Contrary to the defendant's contention, under these circumstances, the Supreme Court properly concluded that the due diligence requirement was satisfied."

Divito v. Fiandach, 160 A D 3d 1404 (4th Dept. 2018) – Plaintiff served defendant by proper leave and mail, but "plaintiff did not, however, file proof of service in the Monroe County Clerk's Office within 20 days of the delivery or mailing [citation omitted], and he never applied to the court for leave to file a late proof of service [citation omitted]. As a result, plaintiff's subsequent late filing of the proof of service was a nullity." Thus, defendant's time to appear did not begin to run at that time.

JPMorgan Chase Bank, National Association v. Lilker, 153 A D 3d 1243 (2d Dept. 2017) – General Business Law §13 provides that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor." Joining other Courts, the Second Department here holds that "service in violation of General Business Law §13, or its predecessor statute, is void, and personal jurisdiction is not obtained over the party served [citations omitted]. Moreover, we hold that the statute applies not only to personal service upon a defendant, but also to the affixation portion of 'nail and mail' service pursuant to CPLR 308(4) on the door of a defendant's residence, as occurred here." The statute requires malicious intent, but "service on the Sabbath with knowledge that the person to be served observes the Sabbath constitutes malice." And, "the knowledge of a plaintiff or its counsel is imputed to the process server by virtue of the agency relationship."

Signature Bank NA v. Koschitzki, 57 Misc 3d 495 (Sup.Ct. Kings Co. 2017)(Baynes, J.) – "It is undisputed that plaintiff knew that defendants are observant Jews. Therefore,

General Business Law §13 requires that defendants not be served during the Jewish Sabbath. The affidavit of service submitted by plaintiff, Signature Bank N.A. states that the summons and complaint were served at 5:30 p.m. on Saturday, November 26, 2016." While some orthodox groups hold that, on that day, the Sabbath ended at 5:15 p.m., it is the belief of another group, of which defendants are members, that the Sabbath does not end until 72 minutes after sunset, or, here, 5:43 p.m. "The time asserted by defendants is not unreasonable given the conflicting opinions contained in different religious sources. Thus, the court finds that plaintiff was in violation of General Business Law §13 when it served defendants during their Sabbath observance."

SERVICE ON CORPORATIONS

Goins-Tisdale v. GEICO, 56 Misc 3d 1119 (City Ct. Rochester 2017)(Yacknin, J.) – "The persons upon whom service of process on a corporation may be made are not limited to the individuals designated in CPLR 311(a)(1). In addition, service of process on a corporation may be made, pursuant to the apparent authority doctrine, by service on 'someone whom the corporation cloaks with authority.'" Here, defendant permitted a separate company, that sells defendant's insurance policies, to essentially identify itself as defendant – referring to itself as the "local GEICO office"; wearing garments with the GEICO logo; representing themselves as "working for defendant GEICO." Under the circumstances, service on the separate company sufficed as service on GEICO.

SERVICE ON LIMITED LIABILITY COMPANIES

Global Liberty Insurance Co. v. Surgery Center of Oradell, LLC, 153 A D 3d 606 (2d Dept. 2017) – A foreign limited liability company may be served pursuant to Limited Liability Company Law §304, which is modelled on the method for serving foreign corporations under Business Corporation Law §307. LLCL §304 requires delivery of the summons and complaint to the New York Secretary of State, and notice to the defendant by registered mail to defendant's last known address. Then, "plaintiff must file proof of service with the clerk of the court. That proof of service must be in the form of an 'affidavit of compliance.' The affidavit of compliance must be filed with the return receipt within 30 days after the plaintiff has received the return receipt from the post office. Service of process shall be complete 10 days after the affidavit of compliance has been filed." There must be "strict compliance with Limited Liability Company Law §304," including "as to the filing of an 'affidavit of compliance' [citations omitted]. Where the plaintiff has failed to demonstrate strict compliance, the plaintiff will not be entitled to a default judgment."

Chan v. Onyx Capital, LLC, 156 A D 3d 1361 (4th Dept. 2017) – "Plaintiff failed to comply strictly with Limited Liability Company Law §304, and thus the court did not have jurisdiction over defendant." While plaintiff properly served the Secretary of State, plaintiff was unable to comply with the second requirement of the statute. Direct notice

was impossible because defendant's prior property was "unoccupied." And service by registered mail, return receipt requested, came back as "undeliverable." Accordingly, the second step was not completed, nor could proper proof be filed. "These are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice."

SERVICE IN A FOREIGN COUNTRY

Water Splash, Inc. v. Menon, ___U.S. ___, 137 S.Ct. 1504 (2017) – Last year's "Update" reported on *Mutual Benefits Offshore Fund v. Zeltser*, 140 A D 3d 444 (1st Dept. 2016). Back in 2001, the First Department, in *Sardanis v. Sumitomo Corporation*, 279 A D 2d 225 (1st Dept. 2001), held that Article 10(a) of the Hague Convention, which provides that the Convention "shall not interfere with" the "freedom to *send* judicial documents by postal channels, directly to persons abroad" [emphasis added], does not permit *service* of process by such "postal channels." Relying upon a Third Department decision that that Court would later overrule [*Reynolds v. Koh*, 109 A D 2d 97 (3d Dept. 1985)], the Court concluded that "service" is a "term of art," and not encompassed by the word "send." *Sardanis* remained the law in the First Department even though all of the other Departments held to the contrary [*Fernandez v. Univan Leasing*, 15 A D 3d 343 (2d Dept. 2005); *New York State Thruway Authority v. French*, 94 A D 3d 17 (3d Dept. 2012)(overruling *Reynolds*); *Rissew v. Yamaha Motor Company*, 129 A D 2d 94 (4th Dept. 1987)]. In *Mutual Benefits*, the First Department joined the other Departments, overruling *Sardanis*. "We now join our sister Departments and hold that service of process by mail 'directly to persons abroad' is authorized by article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 5568 [1969][Hague Convention]), so long as the destination state does not object to such service." Here, in *Water Splash*, the Supreme Court agrees with what is now all four Appellate Divisions. "The traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not 'interfere with the freedom' to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law" [emphasis by the Court]. When that "otherwise-applicable law" is New York's, presumably service by mail, even in a country that has not objected to Article 10(a), will be limited to circumstances when it has been approved by the Court pursuant to CPLR 308(5) when other methods have proven "impracticable," or subject to the other terms and conditions of, for example, CPLR 312-a, BCL 307, or VTL 253.

Korea Deposit Insurance Corporation v. Jung, 59 Misc 3d 442 (Sup.Ct. N.Y.Co. 2017) (Billings, J.) – The Hague Convention only becomes applicable when service of process must be made in a foreign country. Here, plaintiff seeks to serve an agent of the Korean defendant in New York. Such service is incompatible with Korean law. However, "whether 'recourse to the Convention's means of service' is mandatory," is "dependent on the forum's internal law.'" Thus, "the internal law of the forum state, New York, determines whether the method of service requires transmittal of documents abroad and whether the Hague Convention applies [citation omitted]. A 'method prescribed by the internal law of the receiving state,' the Republic of Korea, or 'compatible with that law' [citation omitted], is required only when the Central Authority is to serve the documents in the Republic of Korea. In particular, where service on an agent in New York is valid and complete under state law and the Federal Constitution's due process guarantees, the Hague Convention is not implicated."

PROOF OF SERVICE

Hickman v. Beretta, 58 Misc 3d 294 (Sup.Ct. Nassau Co. 2017)(Steinman, J.) – "It is often said that a process server's affidavit constitutes *prima facie* evidence of proper service [citation omitted]. This case highlights the dangers of such a sweeping generality, particularly where a default judgment is sought following purported service pursuant to CPLR 308(2). It is more properly stated that the facts contained in a process server's affidavit may be relied upon to *prima facie* establish proper service. Where a process server's affidavit – or other submission in support of a default judgment – fails to contain facts evincing that process was delivered at a defendant's 'actual place of business, dwelling place or usual place of abode' pursuant to CPLR 308(2), no default can be entered in reliance upon that provision." For, "it does not follow, however, that a plaintiff has met its burden of establishing proper service simply by relying upon the conclusory assertions contained in a process server's affidavit that a particular address constitutes an individual's dwelling house or usual place of abode. And that is particularly true here, where the plaintiff's summons reflects a different address for one of the defendants." Thus, "unquestionably the factual details of a process server's method of effecting service as described in an affidavit of service should be given *prima facie* weight – who was served, where, when and how. These details, provided by a licensed individual, are required by statute. See CPLR 306. But whether the place of service constitutes an individual's dwelling house is not something that can fairly be established based solely upon a legal presumption that the bare, hearsay assertion of a process server, lacking factual support, is true." For, "one would not ordinarily expect a process server – typically directed by counsel to attempt service at a particular location – to know whether a location is a defendant's dwelling house. So why should courts engage in the fiction that the process server has such personal knowledge? And if the process server does have such knowledge he or she should disclose its basis in the affidavit."

BAC Home Loans Servicing, LP v. Carrasco, 160 A D 3d 688 (2d Dept. 2018) – "A process server's affidavit of service gives rise to a presumption of proper service [citations omitted]. 'although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to "specific facts to rebut the statements in the process server's affidavits"' {citations omitted]. Here, the affidavit of the defendant Andres H. Carrasco, which was submitted in support of his motion, *inter alia*, to dismiss the complaint insofar as asserted against him, set forth that he did not receive the pleadings, but did not deny the specific facts contained in the process server's affidavit [citations omitted]. Carrasco's conclusory assertion was inadequate to rebut the presumption of proper service [citations omitted]. Accordingly, a hearing to determine the validity of service of process was not warranted under the circumstances of this case."

Wells Fargo Bank, N.A. v. DeCesare, 154 A D 3d 717 (2d Dept. 2017) – "A process server's affidavit of service constitutes *prima facie* evidence of valid service [citations omitted]. A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit [citation omitted]. In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service." Here, the affidavit of service by leave and mail stated that the person who accepted service identified himself as "John DeCesare." Defendant averred that the only person who fit the physical description who "resided at the premises" was her son Richard, who could not have been present at the time, since he was at work. But that submission "did not rebut the sworn allegation that a person fitting the physical description of 'John DeCesare' was present at the residence at the time and accepted service on behalf of defendant [citations omitted]. Indeed, 'valid service pursuant to CPLR 308(2) may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property.'"

New Century Financial Services v. Thomas, N.Y.L.J., 1512000302 (App.Term 2d Dept. 2017) – In this consumer credit action, plaintiff's affidavit of service claimed that process was left with an "Ann Thomas," a relative of defendant, at defendant's residence, and that a copy was mailed to defendant's residence. Defendant swore that "she does not have a relative named 'Ann Thomas' and had never received the documents in the mail." The majority in the Appellate Term reverses Civil Court's denial of defendant's motion to vacate the ensuing default, and directs a traverse hearing. The dissenter argued that "defendant's affidavit is insufficient. Here, defendant has failed to allege specific facts to rebut the statements in the affidavit of service. Defendant does not contend that the address was incorrect or that she does not know anyone fitting the description of the

person of suitable age and discretion alleged to have been served and, thus, did not rebut the *prima facie* showing that she was validly served with process."

Lancer Insurance Company v. Seltzer, N.Y.L.J., 1512521762 (Civ.Ct. Bronx Co. 2017) (Kraus, J.) – "The court cannot discern from the face of the affidavit of service if delivery was proper. In the case of a multifamily residence, process papers ordinarily must be delivered to a person residing at the defendant's own apartment [citations omitted]. However, there are instances where a process server is not permitted access to a specific apartment or is advised that the intended party is not home and delivery to a doorman has been found to satisfy the requirements of §308(2) [citation omitted]. The problem here is the affidavit seems to indicate that the person served was a security guard employed by Defendant personally, and does not indicate where in the building the person was served, and does not provide a last name for the individual served. As to the mailing, which wrongly listed the street and failed to include an apartment number, it is not clear that the mailing is sufficient. As noted above §308(2) is to be strictly construed, and a mailing to an incomplete or incorrect address may be insufficient to sustain jurisdiction [citation omitted]. 'However, a minor error in the address to which a summons is mailed will not render service of process void where "it is virtually certain that the summons will arrive" at its intended destination' [citations omitted]. In this case, the court cannot make such a determination on the papers submitted."

JPMorgan Chase Bank, National Association v. Diaz, 56 Misc 3d 1136 (Sup.Ct. Suffolk Co. 2017)(Mayer, J.) – The Court here finds that an out-of-state affidavit of service, lacking the certificate of conformity required by CPLR 2309(c), is fatally defective. "Generally, although a defective out-of-state affidavit, which is defective because it is not accompanied by a certificate of conformity, may be waived or cured under CPLR 2001, such defect waiver or cure may occur only after jurisdiction has been established."

APPEARANCE BY COUNSEL

Stegemann v. Rensselaer County Sheriff's Office, 153 A D 3d 1053 (3d Dept. 2017) – Judiciary Law §470 requires that, to appear as counsel in New York, a nonresident of the State, who is a member of the New York bar, must maintain an "office for the transaction of law business" within the State. Last year's "Update" reported on *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016), in which the Second Circuit, reversing the United States District Court for the Northern District of New York, held that the statute does not violate the Privileges and Immunities Clause of the United States Constitution. Here, in *Stegemann*, the Court denies applications for "*nunc pro tunc* waivers of the law office requirement of Judiciary Law §470 to enable [applicant attorneys] to practice before this Court." For "the Court of Appeals [has] held that, 'by its plain terms, Judiciary Law §470 requires nonresident attorneys practicing in New York to maintain a

physical law office here.'" And the requests for a waiver of the rule "'finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute' [citation omitted]. In addition to holding that no statutory authority exists for granting the waivers, we also find that creating an avenue for nonresident attorneys to obtain a waiver of the law office requirement would amount to the type of rulemaking reserved for the Court of Appeals." However, "we reject plaintiff's contention that all of the work performed by [the out-of-state attorneys] in this action should be declared void from the beginning. In reaching this conclusion, we adopt the Second Department's reasoning in *Elm Mgt. Corp. v. Sprung* (33 A D 3d 753 [2006]) that 'the fact that a party has been represented by a person who was not authorized or admitted to practice law under the Judiciary Law does not create a "nullity" or render all prior proceedings void *per se*.' [citations omitted], and we note our disagreement with the First Department's cases holding to the contrary."

Arrowhead Capital Finance, Ltd v. Cheyne Specialty Finance Fund L.P., 154 A D 3d 523 (1st Dept. 2017) – Last year's "Update" reported on the Supreme Court decision in this matter [N.Y.L.J., 1202764119157 (Sup.Ct. N.Y.Co. 2016)]. As Supreme Court described the facts, Goldin, plaintiff's attorney, "lists what he refers to as his 'main office' in Pennsylvania (PA Office). When he filed the summons and complaint in this action, on June 27, 2014, he listed his PA Office and its telephone and fax numbers, as well as an address at 240 Madison Avenue 3rd Floor, NY, NY 10016 (240 Madison)." Defendant's attorney avers that at 240 Madison Avenue, there is "no visible sign for Goldin" outside or inside, or on the 3rd floor. Also, "Goldin's stationery letterhead" only lists the PA Office. The Madison Avenue address is apparently the office of one of Goldin's clients, that he "had use of" to receive "documents, packages and boxes." The Court notes that "numerous cases in the First Department have held, before the recent *Schoenefeld* rulings [discussed above], 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 [Judiciary Law] §470." And, "receiving mail and documents is insufficient to constitute maintenance of an office." The action was therefore dismissed without prejudice. The Appellate Division has affirmed. "The record supports the court's determination that plaintiff's counsel failed to maintain an in-state office at the time he commenced this action, in violation of Judiciary Law §470 [citation omitted]. Plaintiff's subsequent retention of co-counsel with an in-state office did not cure the violation, since the commencement of the action in violation of Judiciary Law §470 was a nullity."

Law Office of Angela Barker LLC v. Broxton, 60 Misc 3d 6 (App.Term 1st Dept. 2018) – "Plaintiff's counsel's use of a 'virtual office' at a specified New York City address, instead of maintaining a physical office for the practice of law within New York at the time the action was commenced, was a violation of Judiciary Law §470, and requires dismissal of the underlying action."

Marina District Development Company v. Toledano, N.Y.L.J., 1529972484 (Sup.Ct. N.Y.Co. 2018)(Nervo, J.) – "Plaintiff's attorney, although admitted to practice in New York, does not maintain an office here within the meaning of Judiciary Law §470 [citation omitted]. In this case, plaintiff could not have commenced the action *pro se* as it is a corporation. It had to commence this action by an attorney who is competent to practice in New York. Therefore, the action is a nullity [citation omitted]. The court rejects the attorney's argument that his membership at a virtual law office at The New York City Bar [Association] qualifies as the office required by Judiciary Law §470, *supra*. By definition, a virtual office is not an actual office." And the Court was not persuaded by an affidavit from a person affiliated with the City Bar describing the services – message taking, mail forwarding, and availability of meeting rooms – the Bar offers. Plaintiff's attorney "does not assert that he has ever used the organization's physical facilities for any purpose."

DeMartino v. Golden, 150 A D 3d 1200 (2d Dept. 2017) – "A corporation and limited liability company must be represented by an attorney and cannot proceed *pro se* [citations omitted]. Here, DeMartino Building Co., Inc. and 150 Centreville, LLC, did not appear by an attorney when the summons and complaint were filed and served. Accordingly, the complaint, insofar as asserted by them, was a nullity, and the action as to them was improperly commenced."

Street Snacks, LLC v. Bridge Associates of Soho, Inc., 156 A D 3d 556 (1st Dept. 2017) – Defendants seek dismissal of the complaint under CPLR 3215(c), claiming that plaintiff took no steps to obtain a default judgment against defendants for more than a year after the default. Plaintiff responds that during complex negotiations after the action was commenced, plaintiff's counsel granted defendants "by an individual who spoke for them, many extensions of time to answer the complaint." Defendants "argue that because the individual who was in contact with plaintiff's counsel was not a lawyer, he did not have the legal capacity to bind them to the extensions of time, [and] that therefore the extensions are nullities." The Court rejects this argument. "As the motion court observed, defendants' citing of the rule that a corporation may be represented in a legal action only by an attorney is an improper attempt to use the rule as a sword, rather than the shield it was meant to be."

Hamilton Livery Leasing, LLC v. State of New York, 151 A D 3d 1358 (3d Dept. 2017) – "'The failure to strictly comply with the filing or service provisions of the Court of Claims Act divests the court [of Claims] of subject matter jurisdiction and compels dismissal of a claim.'" Here, in violation of CPLR 321(a), claimant LLC commenced the claim *pro se*. The Court "reject[s] defendant's contention that CPLR 321(a) implicates subject matter jurisdiction in this Court of Claims action." For, "defendant does not point to any service or filing provision – or any other provision – of the Court of Claims Act that prohibits claimant from *pro se* representation." Thus, "compliance with CPLR

321(a) does not implicate subject matter jurisdiction, as compliance with that provision is not a prerequisite to the waiver of sovereign immunity pursuant to the Court of Claims Act."

DEFENDANT'S RESPONSE TO BEING SERVED

Wimbledon Financing Master Fund, Ltd. v. Weston Capital Management LLC, 150 A D 3d 427 (1st Dept. 2017) – The case law is well-settled that a defendant may not appear and demand a complaint prior to being served. Here, the individual defendant was served by substituted service pursuant to CPLR 308(2). Defendant served a demand for a complaint after the summons was "left" and "mailed," but before proof of service was filed. "We agree with the motion court that under CPLR 3012(b), defendant was permitted to serve a demand for a complaint after being served, notwithstanding that service was not technically 'complete.' The time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates."

Ganchrow v. Kremer, 157 A D 3d 771 (2d Dept. 2018) – Almost a year after serving a notice of appearance and demand for complaint, defendant moves to dismiss the action for failure to serve a complaint. "To avoid dismissal for failing to timely serve a complaint after a demand has been made pursuant to CPLR 3012(b), and to be entitled to an extension of time to serve the complaint under CPLR 3012(d), a plaintiff has to demonstrate both a reasonable excuse for the delay and a potentially meritorious cause of action." Here, "the plaintiffs failed to demonstrate either that they had a reasonable excuse for the delay in serving their complaint or that their causes of action were meritorious. The excuse for the failure to serve a complaint proffered by the plaintiffs' counsel, that when the defendant's demand was received by his office on October 18, 2014, an unidentified member of his support staff 'apparently' placed the demand in the file without showing it to him, did not constitute a reasonable excuse [citation omitted]. Further, the fact that the letter memorializing the telephone conversation between the parties' attorneys was sent to the former address of the plaintiffs' counsel did not provide the plaintiffs with a reasonable excuse since their attorney never advised the Supreme Court or the defendant of his new address, and there is no requirement that a good faith letter be sent prior to moving to dismiss an action for failure to timely serve a complaint."

Capital One Bank, N.A. v. Faracco, 149 A D 3d 590 (1st Dept. 2017) – "The filing of a notice of appearance by counsel on defendant's behalf, after the time to answer had expired, and without making any objection to personal jurisdiction, waived defendant's challenge to such jurisdiction. Accordingly, the court properly denied defendant's motion, made four months after such appearance." The Court cited *Matter of Nicola v. Board of Assessors of the Town of North Elba*, 46 A D 3d 1161 (3d Dept. 2007). But that case involved an RPTL Article 7 proceeding, in which the failure to answer results

automatically in deeming the allegations of the petition denied. And, more importantly, while the *Nicola* Court quoted that "'service of process can be waived by respondent simply by appearing in the proceeding and submitting to the court's jurisdiction,'" the Court went on to accurately recite the law: "Such an appearance will operate to waive objections to the court's personal jurisdiction '*unless* an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or in the answer as provided in rule 3211'" [emphasis added].

American Home Mortgage Servicing, Inc. v. Arklis, 150 A D 3d 1180 (2d Dept. 2017) – After Supreme Court directed entry of a default judgment for defendant's failure to appear, "defendant's attorney appeared at a foreclosure settlement conference and executed a form notice of appearance, bearing the caption and index number of the action, and stating the name, address, and contact information of the attorney's firm." Almost two years later, plaintiff's assignee moved for leave to enter a judgment of foreclosure and sale, and defendant, represented by the same attorney, "cross-moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction, arguing that she did not live at the subject property at the time that service was purportedly made upon her at that address and, therefore, service was not properly made upon her." The Court holds that "the defendant waived any claim that the Supreme Court lacked jurisdiction over her. Pursuant to CPLR 320(a), 'the defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer.' Subject to certain exceptions not applicable here [citation omitted], 'an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or in the answer as provided in CPLR 3211' [citation omitted]. 'By statute, a party may appear in an action by attorney [citation omitted], and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction [citations omitted]. Here, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance on July 25, 2012, and neither the defendant nor her attorney moved to dismiss the complaint on the ground of lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading [citations omitted]. Accordingly, the defendant waived any claim that the Supreme Court lacked personal jurisdiction over her in this action [citations omitted]. To the extent that prior decisions of this Court could be interpreted to require a different result [citations omitted], they should no longer be followed."

Citimortgage, Inc. v. Lee, N.Y.L.J., 1515925075 (Sup.Ct. Nassau Co. 2018)(Whelan, J.) – "A 'defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer' [citation omitted]. Additionally, pursuant to CPLR 320(b), 'an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or in the answer as provided in CPLR 3211'

[citation omitted]. Here, although the defendant filed his notice of appearance in August 2016, he has failed to move or otherwise assert any objection to jurisdiction until over sixteen months later with the filing of the instant cross motion. Because the defendant did not timely move to dismiss on the ground of lack of jurisdiction or assert it in a responsive pleading, the defendant has waived the defense of lack of personal jurisdiction."

U.S. Bank National Association v. Pepe, 161 A D 3d 811 (2d Dept. 2018) – "The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction [citations omitted]. Here, the defendant's counsel filed a notice of appearance dated September 4, 2012. The record does not show that the defendant asserted lack of personal jurisdiction in a responsive pleading. Moreover, the defendant did not move to dismiss the complaint for lack of personal jurisdiction until almost three years after appearing in the action, after the judgment of foreclosure and sale had been issued. Under those circumstances, the defendant waived any claim that the court lacked personal jurisdiction over him in this action."

Jaramillo v. Asconcio, 151 A D 3d 947 (2d Dept. 2017) – "Dariusz Lojek, the principal of both [defendants] Inter Euro and Darek Cake, Inc., was not initially named as a defendant in the action. However, on June 20, 2012, Dariusz Lojek's attorney filed a notice of appearance on his behalf, and demanded 'that all Notices and Demands in this action be served upon the undersigned attorney at the address set forth below.' In a letter to the attorneys for the plaintiff and the defendants in the action, Dariusz Lojek's attorney asked for 'copies of any legal papers which you may have already filed in this action,' and requested to be advised of 'pending appearances.'" Thus, "under the circumstances of this case, by his appearance in June 2012 and his voluntary participation in the action, Dariusz Lojek submitted to the jurisdiction of the court and waived any defense of lack of personal jurisdiction within the applicable statute of limitations."

Clermont v. Abdelrehim, 151 A D 3d 495 (1st Dept. 2017) – Defendant "waived his lack of service defense by failing to timely move to dismiss, as required by CPLR 3211(e). If [defendant] Le had never filed an answer, CPLR 3211(e) would not have been implicated and the failure to serve him would have rendered all subsequent proceedings null and void [citations omitted]. Because he did, thereby appearing in the action, at least on a limited basis [citations omitted], he was bound to move to dismiss on the ground of lack of service within sixty days of asserting that defense in his answer."

JP Morgan Chase Bank, National Association v. Venture, 148 A D 3d 1269 (3d Dept. 2017) – "Defendant waived his affirmative defense of lack of personal jurisdiction on the basis of improper service of process, as he failed to move to dismiss the complaint on that

ground within 60 days after serving his answer [citations omitted]. This defense was likewise waived by defendant's assertion of a counterclaim unrelated to this action."

Deutsche Bank National Trust Company v. Acevedo, 157 A D 3d 859 (2d Dept. 2018) – 31 days after service of the complaint, defendant served an answer with counterclaims, and an affirmative defense of lack of jurisdiction based upon service of process, which plaintiff's counsel "rejected" as "excessively overdue and far beyond the time limits mandated by the law." But, then, represented by new counsel, plaintiff replied to the counterclaims. Thereafter, more than 60 days after serving its answer, defendant moved for judgment on its affirmative defense of lack of jurisdiction. The Appellate Division reverses the granting of that motion. "The defendant failed to move for judgment on the ground of lack of personal jurisdiction based on improper service within 60 days after his answer was served. Additionally, he failed to make an adequate showing of undue hardship that prevented the making of the motion within the requisite statutory period. Although the plaintiff, appearing by its former attorneys, wrote to the defendant's attorney, stating that the verified answer with affirmative defenses and counterclaims was rejected, this Court has indicated that a 'purported rejection of the defendants' answer did not extend the 60-day time limit.'"

STATUTE OF LIMITATIONS

CALCULATING THE STATUTORY PERIOD

Wilson v. Exigence of Team Health, 151 A D 3d 1849 (4th Dept. 2017) – "The two-year statute of limitations period ended on a Saturday and therefore was extended until 'the next succeeding business day' [citations omitted]. Because Columbus Day fell on the Monday following that Saturday [citation omitted], the next business day was [Tuesday] October 13, 2015, the date on which the action was commenced. Plaintiff's complaint therefore was timely."

Zayed v. New York City Department of Design and Construction, 157 A D 3d 410 (1st Dept. 2018) – A Court may not grant an extension of the time within which to file a notice of claim after the statute of limitations has expired. "CPLR 2004 cannot be used to extend the statute of limitations."

PROFESSIONAL MALPRACTICE

Collins Brothers Moving Corporation v. Pierleoni, 155 A D 3d 601 (2d Dept. 2017) – "A prerequisite for the application of the continuous representation doctrine is that the relationship be continuous with respect to the matter in which the malpractice was alleged, a general professional relationship involving only routine contact is not sufficient [citations omitted]. More specifically, the continuous representation doctrine 'applies

only where there is "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim"' [citations omitted]. Here, in opposition to the accounting defendants' motion to bar arbitration of claims that were untimely under the three-year limitations period provided in the letter agreements, the plaintiffs did not contend that the accounting defendants had failed to meet their *prima facie* burden. Instead, the plaintiffs relied entirely on the continuous representation doctrine. In so doing, the plaintiffs alleged, in conclusory fashion, that 'the parties mutually contemplated ongoing representation following each annual review,' and that [defendant] Anchin 'had a continuing obligation to remedy defects in any consolidated financial statements.' The plaintiffs also submitted an affidavit of [plaintiff] Webers, in which he averred, without any specificity, that 'revisions of prior years' financial statements were routinely performed.' The plaintiffs' evidence failed to raise a question of fact as to whether the limitations period contained in the letter agreements was tolled by the continuous representation doctrine."

Encalada v. McCarthy, Chachanover & Rosado, LLP, 160 A D 3d 475 (1st Dept. 2018) – The continuous representation doctrine "is limited 'to the course of representation concerning a specific legal matter,' and is not applicable to the client's 'continuing general relationship with a lawyer involving only routine contact for miscellaneous legal representation unrelated to the matter upon which the allegations of malpractice are predicated.'"

Cordero v. Koval Retjig & Dean PLLC, 151 A D 3d 587 (1st Dept. 2017) – "The evidence raised triable issues whether the [legal] malpractice statute of limitations (CPLR 214[6]) was tolled under the continuous representation doctrine. Mark Koval, an attorney formerly employed by defendant law firm, joined another law firm at or about the time plaintiff's personal injury case was transferred to such new law firm. Defendants admit that plaintiff's case was transferred to the new firm, and Koval does not deny having worked on the case at either the old or new firm [citations omitted]. Although Koval claims he subsequently left the new firm and did not take plaintiff's case with him, there is no evidence that plaintiff was ever informed of, or had objective notice of, Koval's departure such as to end the continuous representation circumstance and the tolling of the statute of limitations."

Knobel v. Wei Group, LLP, 160 A D 3d 409 (1st Dept. 2018) – In this legal malpractice action, the Court concludes that the defendant's continuous representation of plaintiff ended on Mary 12, 2012, when plaintiff sent defendant "an email directing Wei 'to cease all work'" and "shortly thereafter, Knobel sent an email to the court indicating his desire to appear *pro se*. Contrary to plaintiffs' contention, there is no indication of 'an ongoing, continuous, developing and dependent relationship between the client and the attorney' of a 'mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim' after March 12, 2012." This conclusion was not

altered by the fact that, after that date, defendant sent invoices to plaintiff "for work pertaining to communications with the court, client, and subsequent counsel," for those invoices do not indicate "any substantive legal work" or "legal advice on the matters which plaintiffs allege defendants committed malpractice."

Aaron v. Deloitte Tax LLP, 149 AD 3d 580 (1st Dept. 2017) – In this accountant's malpractice action, the engagement letter provided "that any action brought relating to the engagement must be commenced within one year of the accrual of the cause of action. The accrual of plaintiff's accounting malpractice claim was on January 21, 2009, the date decedent signed the last document that was part of the estate tax plan formulated by defendant." And, "plaintiffs may not avail themselves of the continuous representation tolling doctrine because the limitations period was contractual, not statutory, and was reasonable."

MEDICAL MALPRACTICE

Effective January 31, 2018, and applicable to all "acts, omissions or failures occurring on or after" that date, the Legislature has amended CPLR 214-a to provide that in a claim for "negligent failure to diagnose cancer or a malignant tumor," the applicable statute of limitations shall be two years and six months from the *later* of (1) the date of last treatment when there is continuous treatment or (2) "when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury," with a seven year cap running from the date of the malpractice. To be clear, the seven year cap is *only* applicable to the discovery option, *not* to the continuous treatment option.

Forbes v. Caris Life Sciences, Inc., 159 A D 3d 1569 (4th Dept. 2018) – "Although the legislature recently amended CPLR 214-a to provide, as relevant here, that an action based upon the alleged negligent failure to diagnose cancer may be commenced within 2 1/2 years of when the plaintiff knew or reasonably should have known of the alleged negligent act or omission [citation omitted], the amendment is not effective for the dates of the alleged negligent acts and omissions in this case [citation omitted]. Plaintiff was thus required to commence her medical malpractice action within 2 1/2 years of defendants' act or omission in misdiagnosing decedent's cancer in the October 4, 2010 dermatopathology report following their diagnostic examination of the first biopsy."

B.F. v. Reproductive Medicine Associates of New York, LLP, 30 N Y 3d 608 (2017) – Last year's "Update" reported on the Appellate Division decision in this action [136 A D 3d 73 (1st Dept. 2015)]. The Appellate Division noted that, in *LaBello v. Albany Medical Center Hospital*, 85 N Y 2d 701 (1995), the Court of Appeals held that an infant plaintiff's medical malpractice claim for injuries inflicted *in utero* accrue not at the time of the injury, but at birth. For, until born alive, plaintiff has no claim. However, in *Jorge*

v. New York City Health and Hospitals Corporation, 79 N Y 2d 905 (1992), the Court, in a "wrongful birth" case, held that when defendant incorrectly read a sickle cell anemia test of the fetus's father, resulting in the pregnancy being carried to term instead of aborted, the parents' claim for the expenses incurred because of the child's illness accrued at the time of the misreading, rather than at the time of birth. However, the Appellate Division here explained, in *Jorge*, the only argument apparently raised by plaintiff was the application of the "continuous treatment" doctrine. Here, the "wrongful birth" claim results from an *in vitro* procedure that resulted in a child born with a chromosomal abnormality. The Appellate Division concluded that the parents' claim for the expenses thereafter incurred accrued at the time of birth. Whether this injury "will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged. Without legally cognizable damages, there is no legal right to relief, and 'the Statute of Limitations cannot run until there is a legal right to relief.'" A divided Court of Appeals has affirmed. The majority stated that "plaintiffs allege that, by failing to take steps to detect that the egg donor was a carrier for Fragile X and therefore that the embryo may have had the Fragile X trait, defendants left the parents in an uninformed state as to whether to avert pregnancy or birth – and the associated costs resulting from birth. Given the nature of these allegations, it follows that until the alleged misconduct results in the birth of a child, there can be no extraordinary expenses claim. Moreover, we have stated that the 'legally cognizable injury' is that the parents will incur extraordinary expenses to care for and treat the child [citation omitted]. These expenses arise 'as a consequence of the birth' [citation omitted], not just the conception. Prior to a live birth, it is impossible to ascertain whether parents will bear any extraordinary expenses." Nor, rules the Court, does the language of CPLR 214-a preclude this result. "Nothing in the legislative history suggests an intent to constrict judicial authority to otherwise define when a cause of action accrues, or to mandate that the limitations period should commence prior to accrual." The dissenter argued that "by its terms, CPLR 214-a's accrual-upon-act-or-omission rule admits of only two exceptions: the 'continuous treatment' exception and the 'foreign object' exception [citations omitted]. Today, the majority creates a third exception, holding that a medical malpractice 'wrongful birth' action accrues not on the date of 'the act, omission or failure complained of' (CPLR 214-a), but rather on the date of the child's birth. Though its interpretation contravenes the statutory language, the majority authorizes this deviation in the context of so-called 'wrongful birth' actions because of the 'unique features' associated with those claims [citation omitted]. There is no 'unique circumstances' exception in statutory interpretation. Accordingly, I dissent."

Phillips v. Buffalo Heart Group, LLP, 160 A D 3d 1495 (4th Dept. 2018) – Plaintiff claims that defendant was negligent in prescribing the drug Pradaxa in combination with plaintiff's use of nonsteroidal anti-inflammatory drugs ("NSAIDs"), and for failure to

properly monitor his use of the drugs and to diagnose and treat the subsequent gastric bleeding. Defendant claims that, since the Pradaxa was prescribed more than 2 1/2 years prior to the commencement of this action, the action is time-barred. The Court holds that the action is timely. "Initially, we conclude that plaintiff's claims that defendants were negligent on January 2, 2013 [less than 2 1/2 years before the action was commenced] in failing to monitor plaintiff's use of Pradaxa in combination with NSAIDs and in failing to diagnose and treat the alleged existence of gastric bleeding at that particular visit are not time-barred. It is well settled that a physician has a duty to monitor a patient's use of medications prescribed by the physician [citation omitted]. Thus, the claims based on allegations of negligent treating during the January 2, 2013 office visit have an independent viability regardless of whether any prior alleged negligence is time-barred."

MEDICAL MALPRACTICE VS. NEGLIGENCE

Estate of Bell v. WSNCHS North, Inc., 153 A D 3d 498 (2d Dept. 2017) – "The sole issue to be determined on this appeal is whether the 2 1/2-year statute of limitations applicable to an action sounding in medical malpractice [citation omitted] or the three-year statute of limitations for an ordinary negligence action [citation omitted] is applicable. The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached. A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety [citations omitted]. 'The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts' [citations omitted]. Generally, a claim will be deemed to sound in medical malpractice 'when the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed professional"' [citations omitted]. Thus, when the complaint challenges a medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints, the action sounds in medical malpractice.'" Here, plaintiff's decedent had a "history of dementia," and was placed on defendant hospital's "Fall Prevention Protocol." Then, after "the decedent was found standing at her bedside trying to remove her foley catheter, a physician ordered that she be restrained with a vest and wrist restraints." Soon after, however, "the decedent was found sitting on the floor next to her bed [with a broken arm]. The bed's side rails were up and the decedent was not aware of how she came to be on the floor. She had apparently fallen while trying to climb out of her bed." The Court concluded that "the allegations at issue essentially challenged the defendants' assessment of the decedent's supervisory and treatment needs [citation omitted]. Thus, the conduct at issue derived from the duty owed to the decedent as a result of the physician-patient

relationship and was substantially related to her medical treatment." Accordingly, the 2 1/2-year medical malpractice statute of limitations applied.

THE FOREIGN OBJECT RULE

Leace v. Kohlroser, 151 A D 3d 707 (2d Dept. 2017) – In January 2008, during the course of treating plaintiff for Crohn's disease, defendant physician advised her to swallow a capsule camera, in order to undergo a capsule endoscopy. The camera "was expected to pass through and exit the plaintiff in the normal course of digestion. However a CAT scan taken of the plaintiff in January 2009 revealed the presence of a metallic object lodged inside her intestines." Plaintiff claimed that the moving defendants never informed her of the results of that test. "A subsequent CAT scan performed in 2011 revealed the presence of the endoscopic capsule camera inside the plaintiff's intestines. The capsule camera had to be surgically removed." This malpractice action was commenced in August 2011. The Court concludes that the "foreign object rule" does not apply. "The capsule camera at issue herein was used diagnostically to visualize the condition of the plaintiff's intestines. It was not used or even introduced into the plaintiff's body in the course of a surgical procedure. Rather, the capsule camera was knowingly and intentionally swallowed by the plaintiff with the expectation that it would travel through her digestive system until eliminated in the regular course of digestion. Thus the malpractice alleged against the moving defendants, the failure to recognize from the 2009 CT scan that the observed metallic object was a retained endoscopic capsule camera, and to advise the plaintiff of such, 'is most logically classified as one involving misdiagnosis – a category for which the benefits of the 'foreign object' discovery rule have routinely been denied.'"

CONTINUOUS TREATMENT

Murray v. Charap, 150 A D 3d 752 (2d Dept. 2017) – According to defendant, during the relevant period "he prescribed and refilled the plaintiff's prescriptions for cholesterol-lowering medications, told the plaintiff to resume his diet, explained to the plaintiff that he had elevated cholesterol and that it was a risk for heart disease, and had a conversation with the plaintiff to make sure he was taking his medication. 'The continuous treatment rule applies to the period if prescriptions are being issued by the doctor where there is a "continuing relationship" with the patient.'" Therefore, it applied here.

Lohnas v. Luzi, 30 N Y 3d 752 (2018) – Last year's "Update" reported on the Appellate Division decision in this matter [140 A D 3d 1717 (4th Dept. 2016)]. The majority of the divided Appellate Division held that "although the record contains evidence of a gap in treatment that exceeds the 2 1/2 year period of limitations, we conclude that there are issues of fact whether plaintiff and defendant 'reasonably intended plaintiff's uninterrupted reliance upon defendant's observation, directions, concern, and responsibility for overseeing plaintiff's progress.'" The majority concluded that

application of the continuous treatment doctrine was not precluded by defendant's understanding that plaintiff would return only "on an as needed basis." For, "the determination whether continuous treatment exists 'must focus on the patient' [citation omitted] and, 'in determining whether plaintiff raised an issue of fact concerning the applicability of the continuous treatment doctrine, her version of the facts must be accepted as true.'" And, here, "there is support in the record for a finding that plaintiff 'intended uninterrupted reliance'" on defendant. For, over the course of seven years, "plaintiff underwent two surgeries, saw no other physician regarding her shoulder, and returned to him for further treatment." The dissent argued that continuity was lacking, for, during a "gap of more than 2 1/2 years," plaintiff "had no scheduled return appointments, sought no patient-initiated appointments, received no treatment of any kind from defendant, and no medications were prescribed or renewed by defendant on plaintiff's behalf. Plaintiff testified at her examination before trial that the reason for such a long time between these appointments was that she 'had gotten discouraged with defendant. It was kind of learn to live with it, you're going to have problems, kind of deal with it type of thing. It was like why keep going back to him, he's going to keep telling me the same thing." A closely-divided Court of Appeals has affirmed. The majority holds that "plaintiff raised issues of fact as to whether she and defendant intended a continuous course of treatment. Plaintiff saw defendant over the course of four years, underwent two surgeries at his hand, and saw no other doctor for her shoulder during this time. She returned to him after the thirty-month gap, discussed yet a third surgery with him, and accepted his referral to his partner only because defendant was no longer performing such surgeries." In short, "her testimony reveals that she considered defendant her only doctor during this time." And, "as to the 30-month period between visits, we have previously held that a gap in treatment longer than the statute of limitations 'is not *per se* dispositive of defendant's claim that the statute has run' [citation omitted]. To the extent that lower courts have held to the contrary [citations omitted], those cases should not be followed." The dissenters argued that "the majority has confused 'continuous treatment' with a chronic condition, effectively reading 'continuous' out of the statute of limitations without regard for the plain meaning of the word or the legislature's intent." Thus, "the majority's interpretation of continuous treatment undermines our prior decisions and the purpose of the doctrine. Continuous treatment cannot mean simply a continuing diagnosis [citations omitted] nor a continuing physician-patient relationship [citations omitted], yet the majority opinion means just that. The majority relies on the facts that Ms. Lohnas had a 'chronic, long-term condition,' Dr. Luzi and Ms. Lohnas understood that Ms. Lohnas would likely need additional treatment at some undefined point in the future, and Ms. Lohnas considered Dr. Luzi her only doctor during this time. But those facts are irrelevant to whether, during the 30-month gap, Ms. Lohnas' filing a lawsuit would have interfered with her treatment. It would not have, because there was none."

Freely v. Donnenfeld, 150 A D 3d 697 (2d Dept. 2017) – Defendant doctor "testified at his deposition that when he discussed treatment options with the plaintiff, he advised the plaintiff that a new treatment process was available outside the United States and that he was cautiously optimistic that, at some time in the foreseeable future, he could offer it to the plaintiff in New York. The plaintiff, who was aware that the treatment process was the subject of a study aimed at obtaining FDA approval, testified at his deposition that he was waiting for the new treatment process to become available. After being told, in November 2008, that his only options were to wait for the new treatment or seek treatment outside the country, the plaintiff returned to the defendants for treatment of the same condition on March 9, 2011, and, in fact, received treatment for the same condition from the defendants continuing until December 2012. Under these circumstances, there are questions of fact as to whether further treatment was explicitly anticipated by both the defendants and the plaintiff after 2008, and whether, under the particular circumstances of this case, the March 9, 2011 visit constituted a timely return visit."

Jiang v. Wei, 151 A D 3d 555 (1st Dept. 2017) – "Plaintiff was discharged from an HHC hospital in November 2010 and did not return to an HHC hospital for treatment to his leg until May 8, 2012." Although "it is clear that HHC anticipated further treatment by HHC at the time of discharge in 2010, it is likewise clear that plaintiff did not [citations omitted], given his failure to show up for follow-up appointments [citations omitted] and his exclusive reliance on codefendant Xue Chao Wei (an acupuncturist who plaintiff believed to be a licensed physician) for treatment during the interim period [citations omitted]. Plaintiff's actions indicated an intention to discontinue his relationship with HHC; his return visit must therefore be deemed a 'renewal, rather than a continuation, of the physician-patient relationship.'"

Matthews v. Barrau, 150 A D 3d 836 (2d Dept. 2017) – "With respect to failure-to-diagnose cases, a physician 'cannot escape liability under the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where he or she treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition.'" Moreover, "the continuous treatment doctrine may be applied to a physician who has left a medical practice by imputing to him or her the continued treatment provided by subsequent treating physicians in that practice."

Lewis v. Rutkovsky, 153 A D 3d 450 (1st Dept. 2017) – "'Where the malpractice claim is based on an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition.'"

Clifford v. Kates, N.Y.L.J., 1202784909482 (Sup.Ct. Monroe Co. 2017)(Doyle, J.) – "Courts have held that when a plaintiff informs the defendant doctor that she is intending on initiating legal process, the continuous treatment toll ends."

PRODUCT LIABILITY

Haynes v. Williams, 162 A D 3d 1377 (3d Dept. 2018) – When a personal injury claim "is premised upon damages 'caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property,' the three-year statute of limitations runs 'from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.'" And "discovery of the injury" means "discovery of the physical condition and not the more complex concept of discovery of both the condition and the nonorganic etiology of that condition." In this lead-paint ingestion case, the record, including the deposition of the 24-year-old plaintiff, "demonstrated that plaintiff was exposed to lead as a child. Notably, according to one record, plaintiff was diagnosed with lead poisoning when he was three years old. Another record shows that plaintiff's elevated blood lead level was first recorded in 1992, when he was two years old, and ongoing follow-up testing showed that his blood level remained elevated through 1996." These submissions "'were sufficient to demonstrate that plaintiff was cognizant of his claimed injuries, or, at a minimum, reasonably should have been, such that the action is barred by the statute of limitations.'" The Court rejected plaintiff's argument that the statute did not begin to run until 2013 "when, after receiving a solicitation letter from his attorney, he became aware of his exposure to lead as a young child."

Vasilatos v. Dzamba, 148 A D 3d 1275 (3d Dept. 2017) – "The key dispute between the parties is whether the claimed injuries arising out of exposure to lead paint are patent, in which the three-year limitations applies, or latent, within the embrace of CPLR 214-c(2). We have previously recognized that 'lead poisoning itself is an actionable injury' [citation omitted], and, to that extent, a patent injury for purposes of the statute of limitations. That said, we reach a different conclusion with respect to the claimed cognitive impairments allegedly caused by the lead poisoning, which we agree are latent, while fully recognizing that such deficits may evolve over a short period of time [citation omitted]. Consequently, we conclude that CPLR 214-c(2) applies to plaintiff's cognitive impairment claim."

Sullivan v. Keyspan Corp., 155 A D 3d 804 (2d Dept. 2017) – Plaintiffs claim property damage from defendants' contamination of their property. "'For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, "the injured party discovers the primary condition on which the claim is based."'" Here, "the defendants demonstrated that they undertook extensive efforts beginning in 1999 to inform and engage with property

owners potentially affected by the contamination and remediation. These efforts included, among other things, door-to-door canvassing, mailing a survey in 2002 inquiring about observable effects of contamination on properties, testing properties for contaminant intrusion, and mailing periodic newsletters and fact sheets detailing the nature and extent of the contamination and providing updates on the remediation." Thus, "although the level of the defendants' contact with the appellants varied, the defendants satisfied their burden of establishing, *prima facie*, that each of the appellants had an objective level of awareness of the dangers and consequences of the contamination sufficient to place them on notice of the primary condition on which their claims are based."

Gordon v. ROL Realty Company, 150 A D 3d 466 (1st Dept. 2017) – "The motion court erred in dismissing plaintiff's claim for personal injury due to toxic mold. Plaintiff sufficiently pleaded that, after August 2010 (within three years of commencing this action), he suffered from 'new' symptoms and injuries, including, among other things, eczema and significant fungal growth on his tongue and throat. Accordingly, defendants failed to make a *prima facie* showing that this claim is time-barred [citation omitted]. While there are factual questions as to whether the sinus infections and related symptoms suffered prior to August 2010 were 'qualitatively different' from plaintiff's injuries after August 2010 [citation omitted], at this procedural juncture it would be improper to dismiss the claim."

FRAUD

Cronos Group Limited v. XcomIP, LLC, 156 A D 3d 54 (1st Dept. 2017) – "Cronos's fraud cause of action falls short under the principle that a fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it. This Court has held numerous times that a fraud claim that 'arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements' is subject to dismissal as 'redundant of the contract claim.'"

Head v. Emblem Health, 156 A D 3d 424 (1st Dept. 2017) – "Plaintiff's allegation that defendant entered into the insurance contract with an undisclosed intention not to perform in accordance with the contract's terms is insufficient to establish a misrepresentation or a material omission."

H&L Electric Inc. v. Midtown Equities LLC, 151 A D 3d 660 (1st Dept. 2017) – "The motion court correctly dismissed the fraud claim, as plaintiff failed to allege facts supporting an inference that defendants had no intention of fulfilling their promise to confer a future benefit at the time it was made."

Berman v. Holland & Knight, LLP, 156 A D 3d 429 (1st Dept. 2017) – "'The two-year discovery provision of CPLR 213(8) does not apply to constructive fraud.'"

BREACH OF CONTRACT

Elia v. Perla, 150 A D 3d 962 (2d Dept. 2017) – "'Where, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff 'possesses a legal right to demand payment' [citations omitted]. Since a lender who has made a loan which is repayable on demand has the immediate legal right to demand payment upon the issuance of the loan [citations omitted], courts have consistently held that 'a cause of action to recover on a note which is payable on demand accrues at the time of its execution' [citations omitted]. Notably, 'the statute of limitations in such cases is triggered when the party that was owed money had the right to demand payment, not when it actually made the demand.'"

County of Suffolk v. Suburban Housing Development & Research, Inc., 160 A D 3d 607 (2d Dept. 2018) – The agreement between the parties provided that defendant would provide emergency housing services to plaintiff, and that defendant would submit monthly claims for compensation which would be paid upon approval by the County Comptroller. The agreement further provided that all such payments were "subject to audit by the Suffolk County Comptroller." Defendant was required to "maintain full and complete records of services for a period of seven (7) years, which shall be available for audit and inspection" by the Comptroller. And, in the event "'such an audit disclosed overpayments by the County to Suburban,' Suburban 'shall repay the amount of such overpayment within 30 days after the issuance of the 'official audit report.'" The Comptroller issued an audit report on July 1, 2011, disclosing overpayments of some $885,000 for the years 2003-2007. Upon defendant's failure to pay, the County commenced this action on April 18, 2012. The Court rejects defendant's argument that the action was untimely for overpayments made earlier than April 18, 2006. For, ruled the Court, the breach did not occur upon each overpayment, but "on August 1, 2011, when Suburban allegedly failed to comply with the repayment provisions of the agreements." However, since the agreement only required Suburban to maintain records for seven years, the County "had no contractual right to conduct an audit with respect to payments for services that were provided more than seven years prior to the issuance of the comptroller's official audit report." Thus, the Court dismissed "so much of the first cause of action as sought to recover alleged overpayments made on or before July 1, 2004."

Garron v. Bristol House, Inc., 162 A D 3d 857 (2d Dept. 2018) – Plaintiff, an owner of a residential cooperative apartment, claims that renovations performed in 2004 caused structural damage to his apartment, "which persist and have not been remedied." This action was commenced in 2016. In opposition to defendant's motion to dismiss, "the plaintiff raised a question of fact as to whether the continuing wrong doctrine rendered a

portion of the subject causes of action timely. The continuing wrong doctrine 'is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act' [citations omitted]. 'In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party' [citation omitted]. Here, the plaintiff alleged that the damage to his unit persisted and had not been repaired, and that such breach constituted a continuing breach of the defendants' contractual duty to keep the building in good repair and to provide habitable premises [citations omitted]. However, where, as here, the sole remedy sought for the alleged continuing contractual breaches is monetary damages, the plaintiff's recovery must be limited to damages incurred within the six years prior to commencement of the action."

Fallati v. Concord Pools, Ltd., 151 A D 3d 1446 (3d Dept. 2017) – This is an action by a homeowner against a company that installed an allegedly defective in-ground swimming pool on plaintiff's property. Plaintiff claims a breach of warranty, arguing that there was a warranty explicitly extending to future performance of the pool, such that the breach of warranty claim accrued at the time of discovery of the breach. "'As a general rule, a breach of contract action for defective construction and design accrues upon completion of performance, i.e., the completion of the actual physical work' [citations omitted], and a motion to dismiss pursuant to CPLR 3211(a)(5) is properly granted where 'an action upon a contractual obligation or liability, express or implied,' is not commenced within six years (CPLR 213[2]). A breach of warranty claim accrues 'when tender of delivery is made' (UCC 2-725[2]) and generally 'must be commenced within four years thereafter' (UCC 2-725[1]). Contrary to plaintiff's assertion 'the transaction in this case is predominantly one for services,' i.e., the construction of a swimming pool, and any 'sale of goods is merely incidental to the services provided' by defendant [citation omitted]. Thus, plaintiff's claim is not encompassed by the four-year statute of limitations set forth in UCC 2-725 but, rather, is governed by the six-year statute of limitations set forth in CPLR 213(2)."

Deutsche Bank National Trust Company Americas v. Bernal, 56 Misc 3d 915 (Sup.Ct. Westchester Co. 2017)(Scheinkman, J.) – A lender's acceleration of a mortgage debt is not revoked by the dismissal of a prior action for foreclosure. And, here, the plaintiff's attempt to affirmatively revoke acceleration was insufficient. The attempt was made by a letter from counsel for the new holder of the note after the prior action had been dismissed for failure to prosecute. "The court is of the view that a letter from an attorney, purportedly acting as agent for either or both the servicer and the noteholder, is insufficient to constitute the affirmative act of the noteholder effective to rescind a prior acceleration where the letter was not accompanied by any evidence, or even an explanation, of: (a) when, and by what authority the noteholder acquired the note; (b) the authority by which the servicer was authorized to act for the noteholder; and (c) the authority by which counsel was authorized to act for either or both the servicer and the

noteholder." Here, since "there is no evidence that defendant was ever notified of the two subsequent alleged assignments [after the earlier action's dismissal] (Aurora to Nationstar; Nationstar to plaintiff), there is no reason why defendant should have paid any heed to a letter from an attorney and law firm with no prior connection to the just-dismissed action, especially where the attorney presented himself as 'counsel' to a previously uninvolved servicer who was purporting to act on behalf of a previously uninvolved noteholder." Moreover, "revocation is not permitted where the borrower has changed his or her position in reliance on the prior acceleration [citation omitted]. One such change in position is the borrower's reliance upon the acceleration as a basis for not paying monthly installments coming due after the acceleration."

U.S. Bank National Association v. Gordon, 158 A D 3d 832 (2d Dept. 2018) – "It is true that, under certain circumstances, the commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised [citations omitted]. Here, however, it had already been determined that the prior plaintiff in the 2007 action did not have standing to commence that action because it was not the holder of the note and mortgage at the time that the 2007 action was commenced. Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time."

Wilmington Savings Fund Society, FSB v. Gustafson, 160 A D 3d 1409 (4th Dept. 2018) – "Although another entity purported to accelerate defendants' entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt."

The Bank of New York Mellon v. Kantrow, N.Y.L.J., 1202799913597 (Sup.Ct. Suffolk Co. 2017)(Whelan, J.) – "Plaintiff actively sought to voluntarily discontinue the prior [foreclosure] action, which serves as a revocation of the prior acceleration. 'Although a court dismissal of a prior action for failure to prosecute, failure to appear at a conference or lack of personal jurisdiction or the acceptance of additional payments after acceleration do not constitute an act of revocation' [citations omitted], here, plaintiff voluntarily sought to discontinue the action before the six year statute of limitations expired. Although the July 24, 2013 *sua sponte* Order was issued purporting to dismiss the complaint without prejudice, the *sua sponte* Order was unclear in the reason for dismissal and notes that 'plaintiff has discontinued or wishes to discontinue its action.' This Court finds that the plaintiff's intention of discontinuing the prior action, coupled with the resulting *sua sponte* Order, was an affirmative act of revocation."

US Bank NA v. Ahmed, N.Y.L.J., 1533628842 (Sup.Ct. Suffolk Co. 2018)(Mayer, J.) – "While a lender may revoke its prior election to accelerate the mortgage, such revocation

can only be accomplished through an affirmative act by the lender, provided such revocation is made within the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action, and provided there is no change in the borrower's position in reliance thereon." Moreover, "to be effective in resetting the statute of limitations clock, such revocation or deceleration must satisfy a five (5)-prong test: (1) the revocation must be evidenced by an affirmative act; (2) the affirmative act must be clear and unequivocal; (3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked; (4) the affirmative act must occur before the expiration of the six (6)-year statute of limitations period; and (5) the borrower must not have changed his or her position in reliance on the acceleration." Here, "this Court finds that the mere voluntary discontinuance of a foreclosure action, standing alone and without further proof expressing plaintiff's intent, does not constitute an affirmative act revoking the acceleration of the mortgage debt."

Deutsche Bank National Trust Company v. Lee, 60 Misc 3d 171 (Sup.Ct. Westchester Co. 2018)(Ecker, J.) – "A pre-answer voluntary discontinuance [of a mortgage foreclosure action] without court action, done within the statute of limitations, constitutes a revocation of acceleration."

US Bank National Association v. Szoffer, 58 Misc 3d 1220(A), 2017 WL 7611189 (Sup.Ct. Rockland Co. 2017)(Loehr, J.) – The mortgage at issue "gives Plaintiff the right to accelerate the loan upon a default. Paragraph 19 of the Mortgage gives Defendants the right to have a foreclosure discontinued up to the entry of Judgment by paying in full the amount due prior to acceleration together with the Plaintiff's fees and expenses. Other than by such payment by Defendants, the Mortgage does not give the Plaintiff the right to unilaterally de-accelerate the loan once accelerated." Plaintiff commenced three prior foreclosure actions, and discontinued them all by stipulation. This fourth action was commenced more than six years after first. The Court holds that the mere act of discontinuing earlier foreclosure actions did not constitute a de-acceleration of the loan, and that this action is time-barred. "The mortgage allows the lender to accelerate unilaterally on default. It does not allow the lender to de-accelerate unilaterally; it is only upon agreement, explicit or implicit, such as by written agreement, written acknowledgement of the debt or by payment made and accepted."

Milone v. US Bank National Association, 145 A D 3d 145 (2d Dept. 2018) – Given the "occasion" to do so, the Second Department weighs in on several issues dealing with acceleration and de-acceleration of "note obligations underlying residential mortgage foreclosure actions." First, as to acceleration, the Court, "respectfully disagree[ing]" with the First Department, holds that a letter from a lender, stating that "if a stated amount of delinquency and fees was not paid within 30 days, the circumstances 'will result in the acceleration of your Mortgage Note,'" does *not* suffice to accelerate the debt when the borrower fails to pay within the time prescribed. For, "the notice to the plaintiff was not

clear and unequivocal, as future intentions may always be changed in the interim." As to de-acceleration, the Court holds, contrary to the decision of Supreme Court Rockland County in the *Szoffer* case directly above, that language in the agreement specifically providing the lender with the right to de-accelerate is not required. "Since the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than mandatory, U.S. Bank maintained the right to later revoke the acceleration." But, as with acceleration, the notice de-accelerating, which must be given before the statute of limitations expires, must be "clear and unambiguous to be valid and enforceable." A Court will not enforce an attempted de-acceleration which is merely pretextual, and for the purpose of avoiding the statute of limitations. "A de-acceleration letter is not pretextual if, as here, it 'contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration [citations omitted]. In contrast, a 'bare' and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations." Finally, "we hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well."

Deutsche Bank National Trust Company v. Royal Blue Realty Holdings, Inc., 148 A D 3d 529 (1st Dept. 2017) – Last year's "Update" reported on the Supreme Court decision in this case, *sub nom, Deutsche Bank National Trust Company v. Unknown Heirs of the Estate of Serge Souto*, N.Y.L.J., 1202763458396 (Sup.Ct. N.Y.Co. 2016). Plaintiff claims that Souto breached the terms of a mortgage agreement by failing to pay a June 1, 2008 installment, and subsequent installments. Plaintiff sent a notice of default on January 15, 2009, and commenced a foreclosure action on March 17, 2009, which was thereafter discontinued without prejudice. This foreclosure action was commenced on March 16, 2015. Supreme Court held that the six-year limitations period for such an action "begins to run when the lender first has the right to foreclosure on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt." This case turns on whether the January 15, 2009 default letter constituted such an acceleration. It stated: "If American Home Mortgage Servicing, Inc. is not in possession of the amount that is necessary to cure the default within 30 days of the date of this notice, American Home Mortgage Serving, Inc. *will* accelerate the Loan balance and proceed with foreclosure" [emphasis added]. "This," held Supreme Court, "is not a wishy-washy notice." There is "no indication that there will be any other notices between the letter in the borrower's hands and the

commencement of the foreclosure case. The thirty days is the last chance to cure." Thus, "this court finds that the January 15, 2009 notice was sufficient and the statute of limitations began to run on the 31st day after the notice if payment was not received. Therefore, the loan accelerated and the statute started to run on the 31st day, February 15, 2009." The Appellate Division has affirmed. "The motion court properly determined that the actions are time-barred since they were commenced more than six years from the date that all of the debt on the mortgages was accelerated [citation omitted]. The letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it 'will' accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days, all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgages pursuant to the letters. At that point, the statute of limitations began to run on the entire mortgage debt."

Puzzuoli v. JPMorgan Chase Bank, N.A., 55 Misc 3d 417 (Sup.Ct. Dutchess Co. 2017) (Forman, J.) – "A mortgage is accelerated when the lender elects to exercise its right of acceleration, not when the borrower receives notice of that election [citation omitted]. For instance, when a verified complaint contains an acceleration clause, the 'unequivocal act' of filing that document in the courthouse constitutes a valid election of the right to accelerate." The Court rejects the lender's argument here that "'it is the filing *and service* of the Complaint which accelerates the loan'" [emphasis by the Court]. For, "'to elect is to choose. The fact of election should not be confused with the notice or manifestation of such election.'" The Court thus concludes that the acceleration occurred when the complaint was verified, rather than the later dates when it was filed and served.

Nationstar Mortgage, LLC v. MacPherson, 56 Misc 3d 339 (Sup.Ct. Suffolk Co. 2017 (Whelan, J.) – The "notice to the borrower to accelerate the entire amount of the mortgage debt must be 'clear and unequivocal.'" Here, "the parties did not choose to use the statutory form of acceleration set forth in Real Property Law §258, schedule M or N." Instead, "the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause." For, "under the express wording of the mortgage document, plaintiff has no right to reject the borrower's payment of arrears in order to reinstate the mortgage, until a judgment is entered." Thus, "under the contract terms at issue, plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action. The borrower could pay the unpaid installments and the payment of same would destroy the option to accelerate." It is "a judgment that triggers the acceleration in full of the entire mortgage debt." Thus, the commencement of a prior foreclosure action did not amount to an acceleration commencing the statute of limitations on the entire debt, and plaintiff may have recovery of "those unpaid installments which accrued after September 17, 2008, that is, the six-year period immediately preceding the commencement of this action."

Affordable Housing Associates, Inc. v. Town of Brookhaven, 150 A D 3d 800 (2d Dept. 2017) – "The continuing wrong doctrine 'is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act' [citation omitted]. The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct [citations omitted]. 'In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party' [citations omitted]. Here, the alleged wrong was the Town entering into contracts with Mid-Atlantic and, contrary to the [Supreme] court's finding, there was no breach of a recurring duty imposed on the Town under the Agreement."

Henry v. Bank of America, 147 A D 3d 599 (1st Dept. 2017) – "The continuous wrong doctrine is the exception to the general rule that the statute of limitations 'runs from the time of the breach [of contract] though no damage occurs until later' [citation omitted]. The doctrine 'is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act' [citation omitted]. Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations [citations omitted]. The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs' [citations omitted]. The doctrine is inapplicable where there is one tortious act complained of since the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff and it does not change as a result of 'continuing consequential damages' [citations omitted]. In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party [citations omitted]. Thus, where a plaintiff asserts a single breach – with damages increasing as the breach continued – the continuing wrong theory does not apply."

The Bank of N.Y. Mellon v. WMC Mortgage, LLC, 151 A D 3d 72 (1st Dept. 2017) – A prior year's "Update" reported on *ACE Securities Corporation v. DB Structured Products, Inc.*, 25 N Y 3d 581 (2015), an action for breach of a contractual obligation "to repurchase certain non-conforming loans that were pooled, deposited into a trust, securitized, and sold to investors." The parties' agreement contained many warranties and representations by defendant, and provided that defendant would cure any breach of a representation within 60 days of notice, or repurchase the affected loan. The Court of Appeals held that "where, as in this case, representations and warranties concern the characteristics of their subject as of the date they are made, they are breached, if at all, on that date; DBSP's refusal to repurchase the allegedly defective mortgages did not give rise to a separate cause of action." For, defendant "represented and warranted certain facts about the loans' characteristics as of March 28, 2006, when the MLPA and PSA

were executed, and expressly stated that those representations and warranties did not survive the closing date. DBSP's cure or repurchase obligation was the Trust's remedy for a breach of *those* representations and warranties, not a promise of the loans' future performance" [emphasis by the Court]. Last year's "Update" reported on *Deutsche Bank National Trust Company v. Flagstar Capital Markets Corporation*, 143 A D 3d 15 (1st Dept. 2016), in which the facts were similar to those in *ACE Securities Corporation*, except that the agreement between the parties further "included a provision that purported to delay the accrual of a breach of contract claim until three conditions were met. The accrual provision specified that any cause of action against defendant relating to a breach of representations and warranties 'shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure, repurchase or substitute and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement.'" The Court found this provision unenforceable. "'Statutes of limitation not only save litigants from defending stale claims, but also "express a societal interest or public policy of giving repose to human affairs"' [citations omitted]. 'Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense' [citation omitted]. Although parties may agree *after* a cause of action has accrued to extend the statute of limitations, an 'agreement to extend the Statute of Limitations that is made at the inception of liability will be unenforceable because a party cannot "in advance, make a valid promise that a statute founded in public policy shall be inoperative."'" Moreover, enforcing this provision "would contravene the principle that 'New York does not apply the "discovery" rule to statutes of limitations in contract actions [citation omitted; emphasis by the Court]. The accrual provision's set of conditions creates an imprecisely ascertainable accrual date – possibly occurring decades in the future, since some of the loans extend for 30 years – which the Court of Appeals has 'repeatedly rejected in favor of a bright line approach.'" Finally, "the accrual provision's requirement that plaintiff make a demand on defendant for performance of the agreement does not constitute a substantive condition precedent that could delay accrual of the breach of contract action. As in *ACE*, plaintiff overlooks the significant distinction between substantive and procedural demand requirements [citation omitted]. A demand 'that is a condition to a party's *performance*' is a substantive condition precedent, which can delay accrual of a claim, whereas 'a demand that seeks a remedy for a preexisting wrong' is a procedural prerequisite to suit, which cannot" [emphasis by the Court]. Here, in *Bank of New York*, the Appellate Division, as here relevant, affirms the Supreme Court order reported on in last year's "Update" [50 Misc 3d 229 (Sup.Ct. N.Y.Co. 2015)], and re-affirms its decision in *Deutsche Bank National Trust Company v. Flagstar Capital Markets Corporation*, discussed above. "Statutes of limitations 'express a societal interest or public policy "of giving repose to human affairs"' [citations omitted]. Parties may therefore agree to shorten the time period within which to commence an action, but are not entirely free to waive or modify the statutory defense.

Thus, agreements made at the inception of liability to waive or extent the statute of limitations are 'unenforceable because a party cannot "in advance, make a valid promise that a statute founded in public policy shall be inoperative."'"

Federal Housing Finance Agency v. Morgan Stanley ABS Capital I, Inc., 59 Misc 3d 754 (Sup.Ct. N.Y.Co. 2018)(Friedman, J.) – The decision in *ACE Securities*, discussed above, "did not address or involve a breach of contract claim based on an RMBS securitizer's obligation to notify the trustee of breaches of representations and warranties." Some cases have "concluded that a securitizer's obligation to notify a trustee of defective loans – like its obligation to repurchase such loans – is part of the trustee's contractual remedy for breaches of representations and warranties, is 'dependent on, and indeed derivative of, the representations and warranties' [citation omitted], and is therefore not a 'separate and continuing promise of future performance' or 'an independently enforceable right' subject to its own accrual rules." But "the legal landscape regarding failure to notify claims changed abruptly" with Appellate Division decisions in *Morgan Stanley Mortgage Loan Trust 2006-13ARX v. Morgan Stanley Mortgage Capital Holdings LLC*, 143 A D 3d 1 (1st Dept. 2016); *Nomura Home Equity Loan, Inc. v. Nomura Credit and Capital, Inc.*, 133 A D 3d 96 (1st Dept. 2015); and *The Bank of N.Y. Mellon v. WMC Mortgage, LLC*, discussed directly above. Those cases made clear that "'the contractual obligation to notify is independent of the warranty obligations." Hence, the Court here holds that "a defendant does not breach its notification obligation until it discovers a breach of representations and warranties and fails to give prompt written notice to the Trustee."

INTENTIONAL TORTS

Dray v. Staten Island University Hospital, 160 A D 3d 614 (2d Dept. 2018) – Although defendant doctors insisted that delivery by c-section was necessary, plaintiff insisted upon a vaginal birth. Defendants overrode her objections and performed a c-section, during which they lacerated her bladder but repaired it. Plaintiff sues for the performance of the c-section without her consent, and for the failure to summon the hospital's patient advocate and bioethics department to assist her. Her claim for the performance of the c-section is subject to the one-year statute of limitations pursuant to CPLR 215(3). "The plaintiff's allegation that the defendants performed an unauthorized procedure upon her is an allegation of intentional conduct rather than conduct that can be construed as a deviation from a reasonable standard of care." However, the allegations that defendants "failed to provide the plaintiff with the assistance of the patient advocate group and bioethics panel are not a duplication of the allegations sounding in battery because they are not based on intentional conduct, but on negligence."

McCarthy v. Shah, 162 A D 3d 1727 (4th Dept. 2018) – "'It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided "no consent at

all."'" Here, plaintiff consented only to a flexible sigmoidoscopy, but defendants performed a colonoscopy, causing rectal bleeding. The claim sounded in battery.

Elliott v. Grant, 150 A D 3d 1080 (2d Dept. 2017) – CPLR 213-b provides that, notwithstanding other time limitations, a "crime victim" may commence an action for damages against the defendant "convicted of a crime which is the subject of such action" up to 7 years from the commission of the crime. Here, defendant "established that she was convicted of the violations of harassment and disorderly conduct in connection with the incidents at issue. Pursuant to Penal Law §10.00(6), '"crime" means a misdemeanor or a felony.' Where the defendant was not convicted of any crime in connection with the subject of the action, 'CPLR 213-b, by its plain terms, does not apply' [citation omitted]. Here, since the defendant was convicted of violations, which are not crimes, the Supreme Court properly declined to apply the seven-year statute of limitations as provided in CPLR 213-b."

Rosado v. Estime, 60 Misc 3d 443 (Sup.Ct. Kings Co. 2018)(Silber, J.) – The Court holds that CPLR 213-b applies to a claim for personal injury and wrongful death resulting from an automobile accident for which defendant was convicted of leaving the scene of an accident resulting in death [Vehicle and Traffic Law §§600(2)(a), 600(2)(c)(ii)]. The Court rejects defendant's argument that the injury and death sued upon here "did not result from the crime Estime was convicted of, leaving the scene of the accident, but from the accident itself, and that, therefore the crime is not the 'subject of the action' as is required by the statutes." The Court "finds there is the requisite 'causal connection' here, that is, the plaintiff's action for personal injuries and wrongful death does arise from the same event or occurrence as the criminal conviction." For, "this civil action is clearly based on the same conduct as the crime, and the victim of the crime, Rosado, is the same party as the plaintiff in the tort action." However as to the co-defendant owner of the car Estime drove, the Court finds CPLR 213-b inapplicable. "The statutory extensions of the statute of limitations for crime victims do not extend to a party whose liability is purely vicarious."

LIABILITY CREATED BY STATUTE

People ex rel. Schneiderman v. Credit Suisse Securities (USA) LLC, 31 N Y 3d 622 (2018) – Last year's "Update" reported on the Appellate Division decision in this action [145 A D 3d 533 (1st Dept. 2016)], and a prior year's "Update" reported on the Supreme Court decision [N.Y.L.J., 1202717344324 (Sup.Ct. N.Y.Co. 2014)]. This is an action seeking injunctive relief and damages on a claim that defendant violated the Martin Act [General Business Law §352 *et seq.*] by having "committed fraudulent and deceptive acts in connection with the creation and sale of residential mortgage-backed securities." Defendant claims that the 3-year statute of limitations provided by CPLR 214(2) governs, as the action seeks to recover on a liability created by statute. Plaintiff argues that the 6-year fraud statute of limitations, provided by CPLR 213(8) applies. Supreme Court held

that, "it is well settled that 'CPLR 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability "would not exist but for a statute"' [citations omitted]. Where the statute codifies or implements liabilities existing at common law, 'the Statute of Limitations for the statutory claim is that for the common-law cause of action.'" And, "as the Court of Appeals has made clear, where a statute does not 'make unlawful the alleged fraudulent practices, but only provides standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statute,' such a statute does 'not create or impose new obligations.'" Defendant argues that, here, the Martin Act claims are "substantially different from claims cognizable at common-law," since, under the statute, plaintiff "need not plead two of the 'hallmark' elements of common-law fraud – namely, scienter and reliance." But "the cases do not hold that liability is imposed by statute, and that application of CPLR 214(2) is required, whenever there is a divergence between the elements of a common-law claim and the elements of the statutory claim." Instead, "a court must look to the essence of the claim, and not to the form in which it is pleaded, to determine whether a liability was recognized by the common-law or is imposed by statute." Here, "the essence of plaintiff's claims" is "that defendants made false representations in order to induce investors to purchase their securities. These claims thus seek to impose liability on defendants based on the classic, longstanding common-law tort of investor fraud." Supreme Court accordingly held that, "even in the absence of allegations of scienter, the claims are subject to the six year statute of limitations." A narrowly-divided Appellate Division affirmed. The majority held that the statutes at issue do not "encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment," and that "the conduct at issue in this action was, in fact, always subject to granting of relief under the courts' equitable powers." For, the statutes "target wrongs that existed before the statutes' enactment, as opposed to targeting wrongs that were not legally cognizable before enactment." Moreover, "contrary to the dissent's conclusion, the complaint sets forth the elements of common-law fraud, including scienter or intent, reliance, and damages. The allegations in the complaint describe a specific scheme whereby Credit Suisse 'benefited itself at the expense of investors.' As the trial court correctly found, 'these claims seek to impose liability on Credit Suisse based on the classic, longstanding common-law tort of investor fraud,' thus invoking a six-year statute of limitations." The dissenters argued that the claims "as pleaded, fall within the category of claims that would not exist but for the statutes, creating a new basis for liability, not a new remedy, and the three year statute of limitations of CPLR 214(2) applies." For, "none of the allegations of the complaint accuses defendants of knowingly or recklessly misrepresenting a fact to an investor in order to deceive that investor." Thus, "the claim would not exist at common-law because it makes 'actionable conduct that does not necessarily rise to the level of fraud.'" A divided Court of Appeals has reversed. "Because the Martin Act expands liability for 'fraudulent practices' beyond that recognized under the common law, we conclude that

CPLR 214(2) – covering 'actions to recover upon a liability, penalty or forfeiture created or imposed by statute' – controls." For, "the Attorney General need not prove scienter or intentional fraud in a Martin Act enforcement proceeding." And, "it is undisputed that the Attorney General need not prove reliance on the part of any investor." Thus, "the Martin Act covers some fraudulent practices not prohibited elsewhere in statutory or common law." It "expands upon, rather than codifies, the common law of fraud." Two of the five Judges who participated in the decision concurred "on constraint of our precedents." The dissenting Judge argued that, in this case, "the defendants here are alleged to have engaged in just such practices [as constitute common law fraud], knowingly misleading investors in ways that caused tremendous harm to our financial system and the public at large."

Contact Chiropractic, P.C. v. New York City Transit Authority, 31 N Y 3d 187 (2018) – Resolving a split between the First and Second Departments, a closely-divided Court of Appeals concludes that "the three-year statute of limitations set forth in CPLR 214(2) [for actions where liability is created by statute] applies to no-fault claims against a self-insurer." The majority held that "in the absence of private law requiring defendant to pay first-party benefits (that is, in the absence of a contract for insurance), the only requirement that defendant provide such remuneration to the assignee as a result of the accident appears in relevant parts of the Vehicle and Traffic Law and the Insurance Law. Consequently, the source of this claim is wholly statutory, meaning that the three-year period of limitations in CPLR 214(2) should control this case." A concurring Judge wrote "separately to point out that, on this appeal, we do not resolve the question of whether insurance companies who issue contractual insurance policies covering no-fault claims are subject to a three-year or six-year statute of limitations, as that question is not before us." The dissent argued that, "as the majority acknowledges, the lower courts have, for decades, held that a no-fault claim against an insurance company is subject to the six-year limitation [citation omitted]. And this Court has cited to the 'applicable six-year Statute of Limitations' for such claims [citation omitted]. Despite accepting that premise, the majority holds that the *same* claim against a self-insurer – on the *same* theory of liability – is subject to the three-year statute of limitations. By electing to be self-insured, defendant stands in the same position as any other insurer under the No-Fault Law. A different statute of limitations for self-insurers, essentially providing a shorter limitations period for those who demonstrate 'financial security,' is an unfortunate result and one not required by our precedent" [emphasis by the Court].

New York State Workers' Compensation Board v. Any-Time Home Care, Inc., 156 A D 3d 1043 (3d Dept. 2017) – "Workers' Compensation Law §50(3-a)(3) provides that each member of a group self-insured trust 'shall be responsible, jointly and severally, for all liabilities of the group self-insurer occurring during the member's respective period of membership.'" Since "the provisions in the trust agreements pertaining to joint and several liability are mandated by the Workers' Compensation Law, the SL

defendants contend that the cause of action is statutory rather than contractual. However, 'CPLR 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability "would not exist but for a statute"' [citations omitted]. Here, Workers' Compensation Law §50(3-a)(3) did not create a new liability, but merely implemented the existing common-law concept of joint and several liability by requiring group self-insured trusts to include it in their contractual relationships with members. Members of the trust incurred joint and several liability for the trust's cumulative deficit by entering into agreements that imposed that liability. If they had not done so, the statute would have imposed no liability upon them. The statutory requirement to include joint and several liability provisions in the agreements 'does not alter the fact that the dispute is fundamentally contractual in nature and not a creature of statute.'"

DECLARATORY JUDGMENT ACTIONS

Village of Islandia v. County of Suffolk, 162 A D 3d 715 (2d Dept. 2018) – "While no period of limitation is specifically prescribed for a declaratory judgment action, the six-year catch-all limitation period of CPLR 213(1) does not necessarily apply to all such actions. Rather, in order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitations period is statutorily required, that limitation period governs."

Loscalzo v. 507-509 President Street Tenants Association Housing Development Fund Corporation, 153 A D 3d 614 (2d Dept. 2017) – Plaintiff, as administrator of an estate, seeks a judgment declaring that the estate is the rightful owner of a stock certificate. "The defendants established that the action was barred by the three-year statute of limitations for recovery of a chattel [citation omitted]. 'In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought"' [citations omitted]. 'If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action' [citations omitted]. Here, the plaintiff seeks to recover a stock certificate representing shares in a cooperative apartment corporation. An action to recover a stock certificate is governed by the three-year statute of limitations for recovery of a chattel [citations omitted]. 'Shares of stock issued in connection with cooperative apartments are personal property, not real property.'"

BREACH OF FIDUCIARY DUTY

Matter of Twin Bay Village, Inc., 153 A D 3d 998 (3d Dept. 2017) – New York law provides two different statutes of limitations for breach of fiduciary duty claims, depending upon the remedy sought. When the remedy sought is purely monetary in nature, courts construe the suit as alleging "injury to property" within the meaning of CPLR 214(4), which has a three-year limitations period. When, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. Here, "the gravamen of the petition is that respondents, as the majority shareholders, breached their fiduciary duties owed to petitioners, as the minority shareholders. Although the petition alleges fraudulent acts in the form of looting, the allegation of fraud is not essential to the breach of fiduciary duty claim. In light of this, and the fact that the remedy of a judicial dissolution is equitable in nature, we find that 'the six year limitations period of CPLR 213(1) applies' [citations omitted], and it does not commence 'until there has been an open repudiation by the fiduciary or the relationship has otherwise been clearly terminated.'"

Palmeri v. Willkie Farr & Gallagher LLP, 156 A D 3d 564 (1st Dept. 2017) – Plaintiff claims that defendant law firm breached its fiduciary duty to him when, after having represented both him and his employer in a Financial Industry Regulatory Authority investigation, it terminated its representation of him, but continued representing the employer in an effort to cast blame for violations upon plaintiff. "The IAS court should have permitted the breach of fiduciary duty claim to proceed. The IAS court correctly noted that the claim was subject to a three-year statute of limitations. The court was mistaken, however, in finding that the allegedly wrongful conduct ended on June 25, 2009, when defendant unilaterally terminated its representation of plaintiff. On the contrary, defendant's conduct extended through at least June 29, 2011, during which time it represented [employer] Ramius and its employees in their participation at plaintiff's FINRA hearing," since through that hearing, defendant "acted in a manner directly adverse to his interests. Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitations period until the date of the commission of the last wrongful act."

ACCRUAL AND LIMITATION PERIODS

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – "While a claim for breach of contract accrues on the date of the breach, irrespective of the plaintiff's awareness of the breach [citation omitted], a tort claim accrues only when it becomes enforceable, that is, when all the elements of the tort can be truthfully alleged in the complaint [citation omitted]. When damage is an essential element of the tort, the claim is not enforceable until damages are sustained [citation omitted]. Actual damages are an essential element of a negligence claim [citation omitted]. A cause of action

sounding in negligence, therefore, accrues not at the time of the alleged breach but only when the claimed negligence causes a plaintiff to sustain damages."

The Residential Board of Managers of Platinum v. 46th Street Development, LLC, 154 A D 3d 422 (1st Dept. 2017) – "'The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim."

Philadelphia Indemnity Insurance Co. v. Buffalo Hotel Supply Company, Inc., N.Y.L.J., 1515664336 (Sup.Ct. Tompkins Co. 2017)(Faughnan, J.) – The cause of action against construction companies for property damage resulting from a ruptured pipe negligently installed by defendants accrues "upon the completion of the work, and not when the water damage occurred."

Mogul Media, LLC v. Ramsburgh, 150 A D 3d 487 (1st Dept. 2017) – "'In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance. No matter how a claim is characterized in the complaint – negligence, malpractice, breach of contract – an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties.'"

Maestracci v. Helly Nahmad Gallery, Inc., 155 A D 3d 410 (1st Dept. 2017) – The Holocaust Expropriated Art Recovery Act of 2016 (22 U.S.C. §1621 *et seq.*), provides for a statute of limitations of "six years from the date of 'actual discovery' of 'the identity and location of the artwork' and 'a possessory interest of the claimant in the artwork.'"

Matter of Ferrara v. New York State Division of Human Rights, 154 A D 3d 715 (2d Dept. 2017) – "Executive Law 297(5) provides that 'any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.' This provision 'is in the nature of a statute of limitations and, thus, is mandatory' [citations omitted]. Moreover, the limitations period commences running on the date that the claimant receives notice of the alleged discriminatory act or practice [citations omitted]. Contrary to the petitioner's contention, the one-year period in which he was required to file a complaint with the DHR did not begin to run on his last day of employment, but on the date that he received notice of the termination of employment."

Matter of Lozada v. Elmont Hook and Ladder Company No. 1, 151 A D 3d 860 (2d Dept. 2017) – "A hostile work environment claim is subject to a one-year statute of limitations [citations omitted]. However, a hostile work environment claim, by its very nature, is predicated on a series of separate acts that collectively constitute an unlawful discriminatory practice [citation omitted]. Thus, under the 'continuing violation' doctrine, even though one of those acts might have occurred outside of the limitations period, the claim will be considered to be timely as long as one of the acts occurred

within the limitations period." And, "'once that is shown, a court may consider the entire time period of the hostile environment in determining liability.'"

Shirazi v. New York University, N.Y.L.J., 1202799801137 (Sup.Ct. N.Y.Co. 2017) (Edwards, J.) – "Pursuant to CPLR 214(2), there is a three-year statute of limitations on statutory claims [citation omitted]. However, the court can go beyond the three-year period to determine liability in hostile environment claims if the conduct is of a continuous nature and at least one discriminatory act falls within the statute of limitations [citation omitted]. A 'continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice' [citation omitted]. A properly pled continuing violation claim entitles a plaintiff to allege all conduct that was a part of that violation, even conduct that occurred outside of the limitations period."

EPK Properties, LLC v. Pfohl Brothers Landfill Site Steering Committee, 159 A D 3d 1567 (4th Dept. 2018) – "'An action to recover damages for injury to property must be commenced within three years of the date of the injury' [citations omitted], and 'the cause of action accrues "when the damage is apparent."'" Here, defendants, in the course of wetland remedial action, caused a continuous flow of water onto plaintiff's property. "Plaintiff contends that, because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff's causes of action for nuisance and trespass are not time-barred. We reject that contention. Courts will apply the continuing wrong doctrine in cases of 'nuisance or continuing trespass where the harm sustained by the complaining party *is not exclusively traced to the day when the original objectionable act was committed*' [citations omitted; emphasis by the Court]. Here, plaintiff's allegations establish that its damages may be traced to a specific, objectionable act, i.e., the implementation of the remedial plan. Where, as here, there is an original, objectionable act, 'the accrual date does not change as a result of continuing consequential damages.'"

Cruz v. City of New York, 148 A D 3d 617 (1st Dept. 2017) – "The three-year limitations period on a [42 USC] section 1983 claim based on false arrest begins to run 'when the alleged false imprisonment ends' – that is, when the arrestee becomes subject to the legal process such as being 'bound over by a magistrate or arraigned on charges.'"

Nationstar Mortgage, LLC v. Hilpertshauser, 156 A D 3d 1052 (3d Dept. 2017) – "'Reformation based upon a purported mistake is governed by a six-year statute of limitations that is generally measured from the occurrence of the mistake.'" But "the statute of limitations will not begin to run upon the mistake for those 'in possession of real property under an instrument of title.'"

CONTRACTUAL LIMITATIONS PERIOD

D&S Restoration, Inc. v. Wenger Construction Co., Inc., 160 A D 3d 924 (2d Dept. 2018) – Last year's "Update" reported on the Supreme Court decision in this action [54 Misc 3d 763 (Sup.Ct. Nassau Co. 2016)]. Plaintiff was a subcontractor, and defendant the general contractor, on a construction project for the New York City School Construction Authority ("SCA"). The contract between the parties provides that "no action or proceeding shall lie or shall be maintained by Subcontractor against Contractor, CM or Owner unless such action shall be commenced within one (1) year after Substantial Completion of Subcontractor's work herein." Plaintiff last furnished labor or material on June 11, 2012. The SCA certified the project as substantially complete as of October 5, 2012. The SCA signed off on the completed work in December 2012. But it did not sign off on the credits until June 24, 2016. Thus, payment did not become due to plaintiff until that date. Supreme Court rejected plaintiff's argument that, under the circumstances, the contractual statute of limitations was unreasonable and unenforceable. For, "what is dispositive is that plaintiff was aware, or should have been aware, meaning it was foreseeable, that final negotiations in public projects such as the one at issue here, can and typically do take an extended period of time after the certification of substantial completion." Since these conditions "were simply not unforeseeable or unanticipated," the "doctrine of impossibility simply cannot be applied here." The Appellate Division has reversed. "There is nothing inherently unreasonable about the one-year period of limitation, to which the parties here freely agreed [citations omitted]. 'The problem with the limitation period in this case is not its duration, but its accrual date' [citation omitted]. It is neither fair nor reasonable to require that an action be commenced within one year from the date of the plaintiff's substantial completion of its work on the project, while imposing a condition precedent to the action that was not within the plaintiff's control and which was not met within the limitations period. 'A "limitation period" that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim' [citation omitted]. The limitation period in the subcontract conflicts with the conditions precedent to payment becoming due to the plaintiff, which, under the circumstances of this case, acted to nullify any claim the plaintiff might have for breach of the subcontract. Therefore, interpreting the subcontract against the defendant, which drafted the agreement [citations omitted], we find that the one-year limitation period is unenforceable under the circumstances here."

Mercedes-Benz Financial Services USA, LLC v. Allstate Insurance Company, 162 A D 3d 1183 (3d Dept. 2018) – "While the statute of limitations period applicable to a breach of contract claim is ordinarily six years [citation omitted], parties to an insurance contract may agree in writing to shorten the period of time in which to commence an action against an insurer for the nonpayment of claims [citations omitted]. Here, there is no dispute that the insurance policy [covering the theft of an automobile] shortened the period of time within which plaintiff had to commence this action" to "one year after *the*

date of loss" [emphasis by the Court]. However, "the term 'date of loss' is not defined in the policy." Plaintiff "contends that the 'date of loss' is the date on which defendant denied the insurance claim, thereby giving rise to its breach of contract claim. In contrast, defendant asserts that the 'date of loss' is the date on which the vehicle was stolen. We agree with plaintiff. Generally, the statute of limitations on a breach of contract claim begins to run at the time that the breach occurs [citations omitted], which, in this case, would be the date on which defendant disclaimed coverage. Naturally, parties to an insurance contract may depart from the general rule and stipulate that the occurrence of the underlying catastrophe starts the clock for the applicable limitations period, but the agreement must include 'distinct language' demonstrating that such departure was intended by the parties [citations omitted]. In our view, the generic 'date of loss' language employed here, in the context of the policy as a whole, does not evince an unmistakable intention that the one-year limitations period be measured from the occurrence of the underlying event." Moreover, "although 'date of loss' could be reasonably interpreted to mean the date of theft, as defendant contends, ambiguities in an insurance policy must be construed against the insurer."

ACKNOWLEDGEMENT AND PART PAYMENT

McQueen v. Bank of New York, 57 Misc 3d 481 (Sup.Ct. Kings Co. 2017)(Baynes, J.) – Defendant bank claims that plaintiff's "loan modification application" constituted an acknowledgement of the debt that resurrected the expired statute of limitations. The application was "rejected by defendant. There was no agreement to pay the expired debt. Plaintiff's offer contained no specific payment amount, offered no assurances that plaintiff would pay and did not set forth the terms and conditions of payments. It did not specify the due dates of payment, the amount of principal and interest or establish a new installment agreement. Thus the request for modification is akin to an offer of settlement which does not necessarily acknowledge liability, but may be offered for many reasons, including peace of mind of the party making the offer of settlement. Such settlement offers and other efforts to reach negotiated settlements are inadmissible at trial as proof of liability."

ESTOPPEL

Huss v. Rucci Oil Co., 58 Misc 3d 21 (App.Term 2d Dept. 2017) – As part of its obligation under a contract to install a fuel storage tank at plaintiff's premises, defendant undertook to obtain the necessary permits. In this action for breach of that obligation, plaintiff argues that defendant is estopped from relying on the statute of limitations because, when plaintiff received the first of three violations for failure to obtain the permits, defendant's service manager promised to "take care" of the violation. "The doctrine of equitable estoppel will generally preclude a defendant from asserting the statute of limitations as a defense where it is a defendant's wrongdoing which produced the delay between the accrual of the cause of action and the commencement of the action

[citations omitted]. A plaintiff seeking to invoke the doctrine of equitable estoppel must establish that a subsequent specific action by the defendant induced the plaintiff to delay timely bringing suit due to the plaintiff's reasonable reliance on the defendant's misrepresentation." Here, "we need not determine whether the assurance by defendant's service manager that defendant would 'take care' of the violation was sufficient to give rise to an equitable estoppel since, in any event, plaintiff did not demonstrate the necessary due diligence. Plaintiff could have easily commenced an action within the more than three-and-one-half years remaining on the six-year statute of limitations on the breach of contract cause of action, and the four months remaining on the three-year statute of limitations on the negligence cause of action, since the issuance of a second violation in mid-August 2011, for failure to obtain the necessary permits, provided plaintiff with timely knowledge of defendant's failure to cure the violation prior to the expiration of either of the applicable statutes of limitation."

THE RELATION BACK DOCTRINE

Ortega v. New York City Transit Authority, N.Y.L.J., 1515746332 (Sup.Ct. Kings Co. 2017)(Levine, J.) – Under CPLR 203(f), "the relation-back doctrine," a plaintiff may interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original complaint "give notice of the transactions or occurrences" to be proven and the cause of action would have been timely interposed if asserted in the original complaint. Here, plaintiff's original complaint "alleging that his injuries were caused by the general negligence of defendants in the maintenance and control of the subway platform [from which he fell] and train [which struck him]," gave adequate notice of a later amendment making specific claims of "negligent failure to keep the platform and its tiles safe and free from ice, negligent hiring and supervision of employees, failure to operate the subway at a safe speed and with due regard for persons who have fallen from the platform, and failure to sound a warning, avoid colliding with plaintiff and braking efficiently." For, "defendants need not be put on notice regarding every factual allegation or legal theory upon which the amended claims are based, so long as the original complaint put them on notice of the occurrences which triggered the amended claims."

Demir v. Sandoz Inc., 155 A D 3d 464 (1st Dept. 2017) – "The court properly applied the relation back doctrine [citation omitted] to plaintiff's whistleblower claim pursuant to Labor Law §740, which requires such actions to be commenced within one year of the alleged retaliatory action [citation omitted]. Although that claim was not asserted until the Second Amended Complaint, filed on October 19, 2015, more than one year after her termination on February 4, 2014, the original complaint, filed on January 31, 2015, alleged that on February 3, 2014, plaintiff reported to the defendant's Business Practices Office defendants' improper practices regarding its procurement of chemicals to manufacture its highest grossing drug, and that those practices did not comply with FDA

regulations. It further alleged that she was terminated the next day in retaliation for that conduct. This sufficed to give defendants notice of the transactions or occurrences to be proved in asserting the Section 740 claim in the later Second Amended Complaint [citation omitted]. Nor is there any basis or sound policy reason to deem the relation back doctrine inapplicable to such whistleblower claims. The right to sue an employer for an allegedly retaliatory discharge predates enactment of that statute and thus is not the kind of 'statute of repose' to which the relation back doctrine does not apply [citation omitted], nor is the time limit 'so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all.'"

O'Halloran v. Metropolitan Transportation Authority, 154 A D 3d 83 (1st Dept. 2017) – "The narrow issue on appeal is whether the motion court providently permitted plaintiff to amend her complaint to include belated claims of discrimination on the basis of sexual orientation on the ground that those claims related back to the original pleading, which timely alleged, *inter alia*, discrimination on the basis of gender." The narrowly-divided Court concludes that "the original pleading gave defendants notice of the occurrences plaintiff seeks to prove pursuant to her amended complaint." The majority distinguished the three-part test established by the Court of Appeals for a "united in interest" addition of a party to an action after the running of the statute of limitations from the situation here, where "a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation." Here, "the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted." Here, "all of plaintiff's claims are based on the same occurrences – namely the underlying employment actions taken against her – and the original complaint put defendants on notice of those occurrences. To be sure, plaintiff's original complaint did not allege the specific facts that she is a lesbian, that defendants were aware of her sexual orientation, that defendants discriminated against her on that basis, or that another lesbian colleague was demoted for supporting her internal dispute with [her superior] Menduina. Nevertheless, the motion court correctly determined that the new claims are based on 'the same subject matter alleged in the original complaint.' Defendants need not have been put on notice of every factual allegation on which the subsequent claims depend, because the original complaint put them on notice of the occurrences that underlie those claims." Thus, "that plaintiff now seeks to include another *reason* for those occurrences and another theory of liability cannot be fairly characterized as a failure to give notice of the occurrences she seeks to prove in her amended complaint" [emphasis by the Court]. The dissent, the majority held, "mistakenly focuses its attention on whether the original complaint provided notice to defendants of plaintiff's newly added claims instead of 'whether, as the statute provides, the original pleading gives "notice of the transactions or occurrences to be proved pursuant to the amended pleading."'" The dissenters argued that "the linchpin of the relation-back exception is universally recognized to be the defendant's receipt of

notice, within the applicable limitations period, of the factual basis for any new claim." Here, the dissent argued, "although plaintiff filed a series of complaints both within her own agency and with administrative agencies and courts on both the federal and state level, she never asserted a claim of sexual orientation discrimination in any of those complaints. Neither does the record reveal any mention by her of sexual orientation discrimination in two days of deposition testimony. Thus, defendants were provided with no notice of any transactions or occurrences that plaintiff intended to use to prove the sexual orientation discrimination claims she now seeks to add by way of her proposed amended complaint." And, "as the pertinent language of both the State and City H[uman] R[ights] L[aws] makes clear, sex/gender discrimination and sexual orientation discrimination are separate and distinct categories."

California Capital Equity, LLC v. IJKG, LLC, 151 A D 3d 650 (1st Dept. 2017) – "The doctrine of equitable recoupment, as codified in CPLR 203(d), applies to IJKG's counterclaim for tortious interference with its contractual right of first offer, which otherwise would be barred under the applicable three-year statute of limitations [citation omitted]. The doctrine permits a defendant to seek equitable recoupment in an otherwise untimely defense or counterclaim, if it arises from the transactions, occurrences, or series of transactions or occurrences alleged in the complaint [citation omitted]. The counterclaims or defenses must arise from or relate to the 'same' transaction or series of transactions [citation omitted], and some courts have even required a 'tight nexus' between the claim and the counterclaim." Moreover, "if proved, the counterclaim could be used defensively as a shield for recoupment purposes, but IJKG could not obtain any affirmative relief, such as disgorgement [citations omitted]. Therefore, IJKG can assert its otherwise untimely counterclaim solely to offset any damage award or deficiency judgment that plaintiff may obtain in its favor against IJKG."

Matter of Jenkins v. Astorino, 155 A D 3d 733 (2d Dept. 2017) – "'The statute of limitations governs the commencement of an action, not the assertion of a defense' [citations omitted]. If a defense 'arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.'"

Vanyo v. Buffalo Police Benevolent Association, Inc., 159 A D 3d 1448 (4th Dept. 2018) – Plaintiff commenced an action by filing a summons and complaint, but never served defendants. Instead, three months later – and after the statute of limitations ran – plaintiff filed an "amended" summons and "amended" complaint, adding a cause of action to the original complaint, and made service of those documents. A majority of this closely-divided Court rejects application of the relation back doctrine. The majority held that since the original complaint was never served on defendants it "did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended

complaint." The dissenters argued that "the amendment of a complaint to assert a new cause of action may be allowed, even where it would be time-barred standing alone, if the new cause of action relates back to the facts, circumstances and proof underlying the original complaint." And "defendants simply assume that the *commencement* of the action by the original filing disappeared or was somehow purged by the failure to serve the original summons and complaint and the filing and service of the amended complaint. While the complaint may have been superseded by the amended complaint, the *commencement* of the action was not and clearly could not have been superseded by the amended complaint. Defendants and the majority conflate the concepts of commencement by filing with obtaining personal jurisdiction by service of process. The legislative change from a commencement-by-service system to a commencement-by-filing system segregated these concepts and made them mutually exclusive. Under the new system, problems with service no longer prevent timely *commencement* of an action" [emphasis by the Court].

DEFENDANTS "UNITED IN INTEREST"

Cancel v. Metropolitan Transportation Authority, 58 Misc 3d 1016 (Sup.Ct. Bronx Co. 2018)(Brigantti, J.) – The Courts have established a three-part test to determine if defendants are "united in interest," thereby permitting timely commencement of an action against one to be timely against the other pursuant to CPLR 203(c). The test was first enunciated in *Brock v. Bua*, 83 A D 2d 61 (2d Dept. 1981), and adopted by the Court of Appeals in *Mondello v. New York Blood Center*, 80 N Y 2d 219 (1992). To be united in interest, the parties' liability must arise out of the same conduct, the relationship between them must be such that neither has a defense the other lacks [in *Mondello*, the Court appeared to hold that this branch of the test is only met when the liability of one of the parties is vicarious], and, as modified by the Court of Appeals in *Buran v. Coupal*, 87 N Y 2d 173 (1995), the third test is that the late sued defendant knew or should have known that plaintiff only failed to timely sue it by "mistake." Here, plaintiff, having incorrectly sued the MTA instead of MTA Bus and the New York City Transit Authority, argues that an otherwise untimely addition of MTA bus and the Transit Authority should be permitted because they are united in interest with the MTA. The evidence provided by plaintiff is that "MTA, MTA Bus and NYCTA all carry the MTA logo. Plaintiff argues that all of the outward evidence including the police report, MTA bus schedule, and website all seem to indicate that MTA is the proper entity, or at least united in interest with the subsidiary entities." But "these contentions are unavailing. 'Unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other.'" And, "the ubiquitous use of the 'MTA logo' on its web site or literature, the shared mailing address, and its appearance on the police report, does not change the 'legal conclusion' that it is a separate entity."

Matter of Sullivan v. Planning Board of the Town of Mamakating, 151 A D 3d 1518 (3d Dept. 2017) – In this challenge to a special use permit, petitioner, having brought an Article 78 proceeding against the Planning Board and the applicant for the permit – AT&T – seeks belatedly to add the owner of the subject property. "Petitioners failed to establish the second prong of the relation back doctrine. White AT&T and Hart may have the same immediate purpose in opposing petitioners' CPLR article 78 petition, 'that, in and of itself, does not create a unity of interest such that an action against Hart relates back to the filing date of the petition' [citation omitted]. AT&T's interest is in its business of providing wireless coverage, whereas Hart's interest is in the use of his real property. 'Such divergent long-term interests cannot be guaranteed to protect Hart from future prejudice in the case.'"

May v. Buffalo MRI Partners, L.P., 151 A D 3d 1657 (4th Dept. 2017) – The second prong of the three-part test for united in interest "is satisfied 'when the interest of the parties in the subject-matter is such that they will stand or fall together and that judgment against one will similarly affect the other' [citation omitted]. There is unity of interest where 'the defenses available will be identical, which occurs where one is vicariously liable for the acts of the other.'" Under those circumstances, "'unity of interest does not turn upon whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first.'" With respect to the third prong of the test, "the mistake by plaintiff need not be an excusable mistake [citation omitted], inasmuch as such a requirement would deemphasize 'the "linchpin" of the relation back doctrine, i.e., notice to the defendant within the applicable period,' by shifting the focus away from this primary question [citation omitted]. The relation back doctrine is not satisfied, however, when a plaintiff 'omitted a defendant in order to obtain a tactical advantage in the litigation.'"

Branch v. Community College of the County of Sullivan, 148 A D 3d 1410 (3d Dept. 2017) – "It is not clear that the relation back doctrine, which 'allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are "united in interest,"' applies to claims asserted in a new and independent action." In any event, here, plaintiff failed to timely sue the current defendant because of a mistake of law – a "belief that defendant 'was a department of the [timely-sued] county.'" A mistake of law is "not the type of mistake contemplated by the relation back doctrine."

Perillo v. DiLamarter, 151 A D 3d 1710 (4th Dept. 2017) – In this medical malpractice action, plaintiff moves to amend the complaint to add a new defendant – a doctor employed by defendant hospital. The hospital opposed the motion on the ground that the claim against the doctor was time-barred. The Court rejects the hospital's "contention that plaintiff improperly raised the relation back doctrine for the first time in his reply papers. 'The statute of limitations is an affirmative defense that must be pleaded and

proved' and is waivable [citation omitted]. Therefore, plaintiff had no obligation to raise the relation back doctrine in his initial papers in support of his motion, and properly raised the doctrine in his reply papers in response to ECMC's opposition that the medical malpractice cause of action against Dr. Achoja would be untimely."

TOLLS GENERALLY

Billiard Balls Management, LLC v. Mintzer Sarowitz Zeris, 157 A D 3d 419 (1st Dept. 2018) – Last year's "Update" reported on Supreme Court's decision in this matter [54 Misc 3d 936 (Sup.Ct. N.Y.Co. 2016)]. Supreme Court held that, "while it is well established that a court may not extend a Statute of Limitations or invent tolling principles, some tolling provisions are based upon common-law, equitable doctrines [citations omitted]. Whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right, even though the statute makes no specific exception in his favor in such cases." In this legal malpractice action, plaintiff claims that defendant law firm permitted a default to be taken against plaintiff in an earlier action. That default was then vacated by *nisi prius*, but was restored by the Appellate Division's reversal. The Court recognizes that a cause of action for malpractice accrues at the moment of the malpractice, and that "accrual 'is not delayed until the damages develop or become quantifiable or certain.'" But, "contrary to the Firm's contention, the Statute of Limitations may be tolled as against a person unable to bring an action based on a prior ruling." Here, when the Trial Court vacated the default, plaintiff was "foreclosed from exercising any legal remedy" against defendant. "Such order excused Billiard's default, thereby eliminating any actionable injury suffered by Billiard, and suspended the statute of limitations until such injury was revived" by the Appellate Division reversal. "In other words, Billiard no longer had a claim for malpractice upon the date of the Trial Court order. The Trial Court compelled [the] plaintiff [in the underlying action] to accept Billiard's answer, thereby nullifying Billiard's default, and Billiard was restored to its pre-default position in the underlying action. At such time, and notwithstanding that the malpractice claim had already accrued, Billiard no longer had a complete cause of action. As the statute of limitations was tolled" from the Trial Court's order to the Appellate Division reversal, the instant action was timely filed. The Appellate Division has affirmed. "Billiard was prevented from exercising any legal remedy by virtue of the underlying motion court's order, which denied the underlying plaintiff's motion for a default judgment against Billiard, until that order was subsequently reversed by the Second Department."

U.S. Bank National Association v. Joseph, 159 A D 3d 968 (2d Dept. 2018) – After plaintiff had obtained a judgment of foreclosure, defendant moved to vacate the judgment, claiming lack of jurisdiction, and obtained a temporary restraining order preventing sale of the property pending the motion. The motion to vacate was granted,

and the action was dismissed. Plaintiff commenced a new action for foreclosure, arguing, in response to defendant's motion to dismiss on grounds that this second action was time-barred, that the period of time when the TRO was in effect should be a toll. The Court rejects that argument. "That order prevented the plaintiff from selling the property at auction, but only in the context of the first foreclosure action. The temporary restraining order did not prevent the plaintiff from discontinuing the first foreclosure action and commencing a new action."

HSBC Bank USA v. Kirschenbaum, 159 A D 3d 506 (1st Dept. 2018) – "We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law §1304 tolled the statute of limitations for 90 days. CPLR 204(a) authorizes tolling of a statute of limitations and provides that 'where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' Proper service of the RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action [citation omitted]. A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent."

Kulon v. Liberty Fire District, 162 A D 3d 1178 (3d Dept. 2018) – "Because plaintiff's claims against defendants, if any, arise from the fire that occurred on February 18, 2014, he was therefore required to file and serve a notice of claim by May 19, 2014 and commence any subsequent tort action by May 19, 2015. Having failed to file and serve his notice of claim by May 19, 2014, plaintiff was permitted to, and did, commence a special proceeding seeking leave to file a late notice of claim. While the applicable one year and 90-day statute of limitations began to run on February 18, 2014, upon plaintiff's commencement of the proceeding, the provisions of CPLR 204(a) operated to toll the remainder of the statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again."

THE "INSANITY" TOLL

Estate of Smulewicz v. Meltzer, Lippe, Goldstein & Breitstone, LLP, 160 A D 3d 543 (1st Dept. 2018) – The Court rejects application of the insanity toll here because "there is no evidence that the decedent suffered from such disability at the time the claim accrued (CPLR 208), or that it rendered her 'unable to protect her legal rights because of an over-all inability to function in society.'"

Liberatore v. Greuner, 55 Misc 3d 361 (Sup.Ct. N.Y.Co. 2016)(Schlesinger, J.) – The complaint alleges that defendant doctor committed malpractice by deliberately causing plaintiff to become addicted to Demerol, in effect becoming her "drug dealer." Her claim is time-barred, unless saved by the "insanity" toll provided by CPLR 208. She provided various affidavits attesting to her mental capacity during that period. But "against all of

this testimony is the fact that plaintiff was able to file for and navigate, however inexpertly, a bankruptcy proceeding during the period for which she seeks a toll. In fact, the bankruptcy judge found that Liberatore had the capacity to testify at a trial in the bankruptcy proceedings in 2013. The bankruptcy judge noted, in her memorandum opinion denying Liberatore a discharge of her debts, that 'when she testified, she was coherent and articulate.'" Courts have "long narrowly interpreted the toll for insanity under CPLR 208." And this "is not a good case to stretch the toll for insanity in CPLR 208 past its traditionally narrow construction."

Vasilatos v. Dzamba, 148 A D 3d 1275 (3d Dept. 2017) – In this lead-paint ingestion action, plaintiff simultaneously argued that she had legal capacity to sue, and that she was entitled to the "insanity" toll under CPLR 208. The Court found that she had standing, and rejected application of the insanity toll. "It is significant that at no point did plaintiff's counsel seek the appointment of a guardian *ad litem* pursuant to CPLR 1201, which mandates such appointment for 'an adult incapable of adequately prosecuting or defendant his or her rights.' Moreover, by her own submission, plaintiff has affirmatively demonstrated her ability to participate in this action. Plaintiff submitted her two sworn affidavits – asserting in one that she 'had never been adjudicated incompetent' – and she never asserted that she lacks the capacity to function in society [citation omitted]. In effect, plaintiff maintained that she has the legal capacity to pursue this action, but was otherwise insane for purposes of tolling the statute of limitations. Simply put, plaintiff cannot have it both ways, and we conclude that plaintiff's reliance on the toll provided by CPLR 208 is baseless."

CPLR 205(A)

Bachir v. Lloyds of London, 157 A D 3d 847 (2d Dept. 2018) – "The Supreme Court should not have granted the defendants' separate motions on the ground that CPLR 205(a) bars the instant action. The six-month period in CPLR 205(a) is not a limitations period but a tolling provision, which has no application where, as here, the statute of limitations had not expired at the time the second action was commenced." In other words, CPLR 205(a), like the other tolls in the statute, can only help a plaintiff, they do not limit a plaintiff.

Wells Fargo Bank, N.A. v. Eitani, 148 A D 3d 193 (2d Dept. 2017) – The issue before this narrowly-divided Court is "whether the plaintiff in this mortgage foreclosure action, which was assigned the note and mortgage during the pendency of the prior foreclosure action, is entitled to the savings provision – or grace period – of CPLR 205(a) even though the prior action was commenced by a prior holder of the note." The majority holds that plaintiff "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." The statute limits its benefits to "the plaintiff." But, since the assignment took place while the original action was pending, Wells Fargo, as assignee, "had a statutory right, pursuant to CPLR 1018, to

continue the prior action in [plaintiff] Argent's place, even in the absence of a formal substitution [citations omitted]. Since, by virtue of CPLR 1018, the prior action could have been continued by Argent's successor in interest, Wells Fargo was, in actuality, the true party plaintiff in the prior action, and is entitled to the benefit of CPLR 205(a)." The dissenters argued that "in the case at bar, the identity of the entity on whose behalf redress is sought has not remained the same. Wells Fargo is not Argent in a different capacity." Thus, "while Wells Fargo seeks the same relief that Argent sought, namely, to foreclose on the mortgage, Wells Fargo seeks not to vindicate Argent's rights but to vindicate Wells Fargo's rights."

U.S. Bank National Association v. Gordon, 158 A D 3d 832 (2d Dept. 2018) – Plaintiff commenced the original action as "U.S. Bank National Association c/o Chase Home Finance, LLC." After defendant moved to dismiss for lack of standing, plaintiff sought to amend the caption to reflect, as a successor plaintiff, "U.S. Bank National Association, as Trustee of J.P. Morgan Acquisition Corp." Supreme Court granted the motion to dismiss for lack of standing, and denied the motion to amend the caption "as academic." Within six months of the dismissal, this action, naming "U.S. Bank National Association, as Trustee of J.P. Morgan Acquisition Corp" as plaintiff, was commenced. Defendant claims that CPLR 205(a) is inapplicable because "the plaintiff in this action is not the same entity as the plaintiff in the 2007 action." The majority of this divided Court holds that, "although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce 'the rights of the plaintiff in the original action' [citations omitted]. More specifically to the facts here, this Court has recently held 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 it is the successor in interest as the current holder of the note' [citing *Wells Fargo Bank* discussed directly above]." The dissenter argued that the prior action was commenced by an entirely different entity, proclaimed to be "organized and existing under and by virtue of the laws of the State of Delaware," whereas the action here was commenced by an entity alleged to be a "national association, duly licensed, organized and existing pursuant to the laws of the United States of America, doing business in the State of New York." And the dissent argued that *Wells Fargo* was inapplicable here, since "plaintiff does not rely on a successor in interest theory."

Deadco Petroleum v. Trafigura AG, 151 A D 3d 547 (1st Dept. 2017) – "While the California action was timely commenced, the tolling provision of CPLR 205(a) does not avail plaintiff because an out-of-state action is not a 'prior action' within the meaning of that provision."

Bank of New York Mellon v. Slavin, 156 A D 3d 1073 (3d Dept. 2017) – The issue that divides the Appellate Division on this appeal is whether the 6-month do-over period under CPLR 205(a) began when the original action was dismissed upon plaintiff's default in appearance at a conference, or when the Appellate Division affirmed the denial of plaintiff's motion to vacate the default. The majority holds that the period began upon the affirmance of the motion to vacate. "The 2013 dismissal was not appealable as of right because it was based upon plaintiff's default; therefore plaintiff, as required, moved to vacate the default, which was denied, thereby permitting plaintiff to appeal such denial [citations omitted]. As such, the default order did not constitute a final termination of the action within the meaning of CPLR 205(a) because plaintiff was statutorily authorized to file a motion to vacate and to appeal from the denial of that motion." Moreover, "it is procedurally and logically unsound to deem the dismissal a 'termination' because success in the motion court or upon appeal would reinstate the original action. By contrast, an action cannot be reinstated after appeals are exhausted and, thus, an action is properly deemed terminated under those circumstances." The dissenter argued that the majority's rule precluded finality. "By having the six-month period start after an appellate court has issued an order on an appeal involving a motion to vacate a *sua sponte* dismissal of an action, a defaulting party can perpetuate the termination of an action and, with such power, also perpetuate the time within which an action must be recommenced under CPLR 205(a)." For, while "generally, a party has one year from when the order or judgment has been served with notice of entry to seek this discretionary relief" of vacatur of a default, "even after the expiration of this one-year period, however, a party may still invoke a court's inherent authority to vacate its own order or judgment in the interest of justice."

Arty v. New York City Health and Hospitals Corporation, 148 A D 3d 407 (1st Dept. 2017) – Plaintiff's original action was commenced in the United States District Court for the Southern District of New York, stating discrimination claims, and defamation. In December 2013, the Court dismissed the discrimination claims, and declined to exercise supplemental jurisdiction over the defamation claim, dismissing it without prejudice. Plaintiff then moved, under the Federal Rules of Civil Procedure and the Court's local rules, for reconsideration. That motion was granted in August 2014 to the extent only of making one of the other dismissals without prejudice. This action, restating the defamation claim, was commenced in December 2014. "The broad remedial purpose of CPLR 205(a) mandates a finding that plaintiff's defamation claim was timely filed. Under Federal Rules of Appellate Procedure rule 4(a)(4)(A)(iv), plaintiff's motion for reconsideration extended the time for him to file a nondiscretionary appeal as of right to the United States Court of Appeals for the Second Circuit until 30 days after the Federal Rules of Civil Procedure rule 59(c) motion was decided – that is, until 30 days after the August 18, 2014 order granting plaintiff's Federal Rules of Civil Procedure rule 59(c) motion." Thus, since plaintiff did not thereafter appeal to the Second Circuit, the 6-

month period to recommence, pursuant to CPLR 205(a), began on August 18, 2014, and this action is timely.

THE BORROWING STATUTE

2138747 Ontario, Inc. v. Samsung C&T Corporation, 31 N Y 3d 372 (2018) – Last year's "Update" reported on the Appellate Division decision in this action [144 A D 3d 122 (1st Dept. 2016)]. The Appellate Division noted that "on this appeal, we are called upon to decide whether a broadly drawn contractual choice-of-law provision, that provides for the agreement to be 'governed by, construed and enforced' in accordance with New York law, precludes the application of New York's borrowing statute (CPLR 202). We find that it does not. Where, as here, the plaintiff is a nonresident, alleging an economic claim that took place outside of New York, the time limitations provisions in the borrowing statute apply, regardless of whether the parties' contractual choice of law agreement can be broadly construed to include the application of New York's procedural, as well as its substantive law." For, "the borrowing statute is itself a part of New York's procedural law and is a statute of limitations in its own right, existing as a separate procedural rule within the rules of our domestic civil practice, addressing limitations of time." Thus, "applying the borrowing statute is perfectly consistent with a broad choice-of-law contract clause that requires New York procedural rules to apply to the parties' disputes." The Court noted that the agreement's choice-of-law provision "does not expressly provide that the parties agree only to apply New York's six-year statute of limitations to their contract-based disputes. In this regard, there is no need to resolve whether such a provision would be an unenforceable extension of the otherwise applicable statute of limitations." Finally, the Court rejected application of the esoteric (indeed, perhaps metaphysical) concept of *renvoi*. Thus, "we also reject plaintiff's alternative argument, that even if the New York borrowing statute applies, requiring application of Ontario law, Ontario law mandates application of New York's six-year statute of limitations because the parties have chosen New York law. It does not require that we apply the borrowing statute of a foreign jurisdiction [citation omitted]. CPLR 202 only concerns statutes of limitations, it does not require that we consider the foreign jurisdiction's borrowing law." The Court of Appeals has affirmed. "Contractual 'choice of law provisions typically apply to only substantive issues and statutes of limitations are considered "procedural" because they are deemed "as pertaining to the remedy rather than the right"' [citations omitted]. Here, however, the parties agree with the Appellate Division's determination that the contract 'should be interpreted as reflecting the parties' intent to apply both the substantive and procedural law of New York State to their disputes.'" But, "CPLR 202 is an abiding part of New York's procedural law." Thus, "the mere addition of the word 'enforced' to the NDA's choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York's six-year statute of limitations in CPLR 213(2) to the exclusion of CPLR 202. Rather, the parties have agreed that the use of the word 'enforced' evinces the parties' intent to apply New

York's procedural law. CPLR 202 is part of that procedural law, and the statute therefore applies here." Like the Appellate Division, the Court also notes that, because "the NDA did not expressly provide that disputes arising from the agreement would be governed by New York's six-year statute of limitations, or otherwise include language that expressed a clear intent to preclude application of CPLR 202," the Court has "no occasion to address whether enforcement of such a contractual provision would run afoul of CPLR 201 or General Obligations Law §17-103, or would otherwise violate New York's public policy against contractual extensions of the statute of limitations before accrual of the cause of action."

Deutsche Bank National Trust Company v. Barclay's Bank PLC, 156 A D 3d 401 (1st Dept. 2017) – In *Global Financial Corporation v. Triarc Corporation*, 93 N Y 2d 525 (1999), the Court of Appeals held that in cases where the claimed harm is purely economic, the residence of the plaintiff, for borrowing statute purposes, is the place where the cause of action accrued. Here, the plaintiff is located in California, which has a shorter limitations period than New York, and under which statute this claim would be barred. Plaintiff argues, however, that the *Global Financial* rule should not be applied here, "where plaintiff is suing solely in its capacity as trustee of the subject trusts. Rather, plaintiff argues that we should apply the multi-factor test" used in a United States District Court for the Southern District of New York case "which also dealt with a trustee-plaintiff, to determine where the injury occurred." The Court concludes that "we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context," since California's statute would apply under either.

Centre Lane Partners, LLC v. Skadden, Arps, Slate, Meagher & Flom LLP, 154 A D 3d 525 (1st Dept. 2017) – In this legal malpractice action, plaintiffs, who were investors in companies that filed for bankruptcy, were permitted by the Bankruptcy Court to sue derivatively on behalf of the bankrupt companies. For purposes of determining whether the borrowing statute applies, "where the alleged injury is economic in nature, the cause of action is generally deemed to accrue in the state 'where the plaintiff resides and sustains the economic impact of the loss' [citations omitted]. Here, the debtor's principal places of business are in Oregon, and their financial losses were allegedly incurred in that state. Contrary to plaintiffs' claim, the motion court's application of Oregon's two-year statute of limitations via New York's borrowing statute [citation omitted] in light of, *inter alia*, the situs of debtors' Oregon-based businesses, the legal relationships existing between plaintiffs, debtors and defendants, and the nature of the instant action, was proper and the result would not be 'absurd,' notwithstanding defendants' place of business being located in New York."

PARTIES TO AN ACTION

JOINDER

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – "The plaintiffs allege that all of the defendants – the manufacturers, the distributors, and the individual physicians – cooperated in an integrated scheme promoting the use of prescription opioids for chronic pain that helped give rise to the current epidemic. They allege, in part, that the defendants engaged in deceptive marketing, geared to both the medical community and the public, about the dangers and benefits of long-term opioid therapy for the treatment of chronic pain, and that the distributor defendants assisted in the unbranded marketing portion of the scheme by providing funds to front groups. Such united efforts to increase the market for prescription opioids, the plaintiffs assert, make all defendants subject to liability under the concerted action theory. 'The theory of concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act"' [citations omitted]. As explained in the Restatement (Second) of Torts §876, a defendant is liable for harm to a third person resulting from the tortious conduct of another if (1) it commits a tortious act in concert with or pursuant to a common design with the other, (2) it knows the other's conduct constitutes a breach of duty and provides substantial assistance or encouragement to the other to commit such conduct, or (3) it gives substantial assistance to the other in achieving a tortious result and its own conduct, separately considered, constitutes a breach of a duty of care owed to the third person [citations omitted]. For liability to be imposed under a concerted action theory, it is essential that each defendant charged with acting in concert acted tortiously and that at least one of the defendants 'committed an act in pursuance of the agreement which constituted a tort.'" Here, the allegations of the complaint are "sufficient for the plaintiffs to proceed against the distributor defendants for misrepresentations and deceptive marketing based on the theory of concerted action."

Perez v. CM Packinging, Inc., N.Y.L.J., 1516933896 (Sup.Ct. Bronx Co. 2018)(Ruiz, J.) – Plaintiff, injured by an allegedly defective foil pan, and unable to identify the manufacturer of the pan, seeks to sue defendants who "compose a substantial share of the market involved in the manufacturing, marketing, sale, promotion and distribution" of such pans. The Court declines to apply a "market share" theory, as the evidence demonstrates significant differences in such pans between manufacturers, and hence they are "not fungible."

Almah LLC v. AIG Employee Services, Inc., 159 A D 3d 532 (1st Dept. 2018) – The lease agreement between the parties provides that defendant/tenant would be liable for the "cost of making good any injury, damage or breakage to the Building or Premises done by *Tenant*" [emphasis by the Court]. Since, therefore, defendant would be liable for its own acts, and "it will not be liable for damage that Goldman Sachs [the prior tenant] may have caused during its earlier tenancy," Goldman Sachs was not a necessary party to this

action. Goldman Sachs will not "be inequitably affected by a judgment in this action," nor will the outcome of this action "bind its rights or interests without it having had an opportunity to be heard."

Springs Fire District v. Town of East Hampton Zoning Board of Appeals, N.Y.L.J., 1520305234 (Sup.Ct. Suffolk Co. 2018)(Farneti, J.) – "When a person who should have been joined in an action was not made a party, but is subject to the jurisdiction of the court, dismissal is not the proper remedy; rather, the court 'shall order him or her summoned' [citations omitted]. The respondents' request for dismissal based on the petitioners' alleged failure to join a necessary party is denied, as the respondents have not shown, or even alleged, that Headin East is not subject to the jurisdiction of this Court or that joinder is not possible."

Matter of Farrell v. City of Kingston, 156 A D 3d 1269 (3d Dept. 2017) – The Appellate Division reverses Supreme Court's order dismissing the proceeding for failure to join necessary parties. "CPLR 1001(b) provides that where a party or parties who should be joined have 'not been made a party and are subject to the jurisdiction of the court, the court shall order them summoned' [citations omitted]. Because Negron, Zell, Lowe, Robertson and Burkert are necessary parties and are subject to Supreme Court's jurisdiction insofar as they were employees of the City of Kingston Police Department at the time of commencement of this proceeding, the court should have ordered them joined [citations omitted]. Accordingly, we find that this matter must be remitted to Supreme Court to order Negron, Zell, Lowe, Robertson and Burkert to be joined as necessary parties."

CONSOLIDATION AND SEVERANCE

Longo v. Fogg, 150 A D 3d 724 (2d Dept. 2017) – "In view of the plaintiff's allegations in his bill of particulars that certain injuries which he sustained in the first automobile accident were exacerbated by the second automobile accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly [citations omitted]. The respondents failed to demonstrate prejudice to a substantial right if this action is tried jointly [citations omitted]. Although the plaintiff moved to consolidate the two actions, the appropriate procedure is a joint trial, particularly since each action contains a defendant not present in the other [citations omitted]. Furthermore, in the absence of special circumstances, where the actions have been commenced in different counties, the place of trial should be in the county where venue of the first action was placed."

Sargeant v. Walt Whitman Mall, N.Y.L.J., 1512096506 (Sup.Ct. Kings Co. 2017) (Rivera, J.) – "Where a defendant in an action files for bankruptcy relief, an automatic stay does not extend to the nonbankrupt defendants; therefore, in such circumstances, it is within the discretion of the trial court to direct a severance of the action as against the

bankrupt defendant [citations omitted]. Generally, the balance of the equities lies with the plaintiff when severance is sought because the case against one defendant is stayed pursuant to 11 U.S.C. §362(a), and that is particularly so in this personal injury action where a delay would be prejudicial to the plaintiff." And, "the exercise of that discretion is not limited to determining whether the bankrupt and non-bankrupt defendants share common issues of law and fact against the plaintiff, rather, it includes a balancing of the equities between the movant and the opponent of severance." Here, "other than the possibility of inconsistent verdicts, the Whitman defendants did not explain how severance of the bankrupt defendant from the main action would prejudice them in defending the personal injury action as asserted against them. Furthermore, other than the delay caused by the stay, the Whitman defendants did not explain how granting the severance would prejudice them in prosecuting their cross-claims for contribution, contractual indemnification and common law indemnification against the bankrupt defendants." Severance was granted.

Cascade Builders Corp. v. Rugar, 154 A D 3d 1152 (3d Dept. 2017) – "Generally speaking, 'even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims' [citations omitted]. Here, there is no question that, absent severance, the jury in the negligence action against Rugar will discover the existence of liability insurance as a result of the breach of contract action against Utica First. Accordingly, we find that Supreme Court improvidently denied the motion for severance."

Vargas v. 207 Sherman Associates, N.Y.L.J., 1527125645 (Sup.Ct. Kings Co. 2018) (Rivera, J.) – "The Court of Appeals held long ago, in *Kelly v. Yannotti* [4 N Y 2d 603 (1958)], that an insurer disclaiming coverage as a third party defendant in a negligence case is entitled to severance, as it would 'be subjected to *some* prejudice if both the main and third-party actions were to be tried before the *same* jury'" [emphasis in the original].

Isidore Marbgel Trust, Mitzi Zank Trustee v. Mt. Hawley Insurance Company, 155 A D 3d 618 (2d Dept. 2017) – Plaintiff leased property to defendant Laundromat. Laundromat had liability insurance with defendant Mt. Hawley. After an accident occurred on the property and plaintiff was sued, plaintiff tendered the defense to Mt. Hawley, claiming to be an "additional insured" on Laundromat's policy. When Mt. Hawley denied coverage, plaintiff sued both defendants. "In arguing that the Supreme Court improvidently exercised its discretion in denying its motion for severance, the Laundromat asserts that it is generally recognized that it is prejudicial to have the issue of insurance coverage tried before the jury that considers the underlying liability claims [citations omitted]. However, the courts have recognized such potential for prejudice where the liability claims are asserted against the party whose insurance coverage is also in question [citations omitted]. Those are not the circumstances here, where the liability issues relate to whether the Laundromat was negligent and the insurance coverage issues

relate to whether the plaintiff is covered, separately, as an additional insured. Further, there would be the potential for inconsistent verdicts on the cause of action against Mt. Hawley and the plaintiff's claim of failure to procure insurance asserted against the Laundromat if the severance motion were granted. Under these circumstances, it cannot be said that the court's exercise of discretion to deny the motion for severance was improvident."

Soto v. CBS Corporation, 157 A D 3d 740 (2d Dept. 2018) – "'CPLR 1010 provides a safety valve for cases in which the third-party claim "will unduly delay the determination of the main action or prejudice the substantial rights of any party"' [citations omitted]. Where the record indicates that a third-party plaintiff knowingly and deliberately delayed in commencing the third-party action, the Supreme Court acts within its discretion to dismiss the third-party complaint [citations omitted]. Contrary to defendants' contentions, the court correctly granted the plaintiff's motion to dismiss the third-party complaint because the defendants deliberately and intentionally delayed commencing the third-party action for more than four years."

SUBSTITUTION OF PARTIES

Devine v. Sluck, N.Y.L.J., 1519197486 (Sup.Ct. Warren Co. 2018)(Muller, J.) – Plaintiff died after commencing this breach of contract action. Defendant's counsel sent 7 unanswered letters to plaintiff's counsel requesting that the necessary steps for substitution be undertaken. Finally, more than a year after decedent's death, defendant moved to dismiss the complaint. The Court concluded that there had been a lack of diligence in making the substitution, and that the excuse, that the file "fell through the cracks" in plaintiff's attorney's office, did not qualify as law office failure. Nevertheless, the motion to dismiss was denied, for, "defendants have not suffered – nor do they claim to suffer – any prejudice as the result of plaintiff's delay in seeking substitution." And, "plaintiff's 19-month delay in filing a motion for substitution does not constitute an unreasonable length of time as a matter of law."

Vicari v. Kleinwaks, 157 A D 3d 975 (2d Dept. 2018) – After commencement of this action, one of the individual defendants died, in 2004. "Despite some belated effort by the plaintiffs' counsel, no representative of the decedent's estate has been appointed." All of the defendants then moved to dismiss the action for failure to timely substitute a representative for the deceased defendant. "Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court's lack of jurisdiction [to act following the death of a party until a representative is substituted], here, one of the motions pursuant to CPLR 1021 was made by the former attorney for the decedent purportedly on behalf of the decedent. Since the former attorney lacked the authority to act, the Supreme Court lacked jurisdiction to consider that motion to dismiss." However, "the Supreme Court had jurisdiction to consider the other defendants' separate motions to dismiss pursuant to

CPLR 1021, and to consider plaintiff's cross motion" to appoint a representative for the deceased defendant. And "Supreme Court providently exercised its discretion in determining that substitution of the decedent was not made within a reasonable time. As such, the court providently exercised its discretion in denying those branches of plaintiff's cross motion which were to appoint a representative for the decedent as a defendant. Given that substitution was not made within a reasonable time, dismissal of the complaint as against the decedent, 'the party for whom substitution should have been made' (CPLR 1021) was proper. However, contrary to the court's determination, CPLR 1021 did not authorize dismissal of the complaint as against any of the other defendants."

Snipes v. Schmidt, 161 A D 3d 670 (1st Dept. 2018) – Plaintiff died while this action was pending, leaving no surviving relatives, but four beneficiaries in her will. Although a petition was filed in Surrogate's Court seeking appointment of an executor, no appointment was made after four years. Defendants moved to dismiss the action with service made on the four beneficiaries, but none appeared. "Although the decedent's former counsel appeared in opposition to the motion, his power to act on the decedent's behalf had terminated upon her death, and he did not state the basis of his or his law firm's authority to act in the matter [citation omitted]. Counsel indicated in his opposing papers that the firm had been retained in connection with the probate proceedings, but he did not state who had retained the firm and did not purport to appear on behalf of the estate or the interested persons. Accordingly, he had no standing to appeal from the order that dismissed the complaint pursuant to CPLR 1021."

Howlader v. Lucky Star Grocery, Inc., 153 A D 3d 610 (2d Dept. 2017) – "'CPLR 1021 requires a motion for substitution to be made within a reasonable time' [citations omitted]. 'The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit' [citations omitted]. Here, the plaintiff's counsel failed to demonstrate that he made any diligent efforts to substitute a representative for the deceased plaintiff. Additionally, the plaintiff's counsel did not demonstrate a reasonable excuse for failing to seek a substitution. Further, the plaintiff's counsel failed to submit an affidavit of merit, and did not rebut the contention of the defendant 2100 White Plains Road Corp. (hereinafter 2100), joined by the defendant City of New York, that they were prejudiced in their ability to defend the case." The Appellate Division affirms the dismissal of the action.

Vello v. Liga Chilean de Futbol, 148 A D 3d 593 (1st Dept. 2017) – "The motion to substitute the Public Administrator as a defendant was properly denied because no action was ever brought against Tagle before his death [citation omitted]. Plaintiffs argue that the action against Liga Chilean should be treated as one against Tagle, but any action commenced against Tagle after his death would be a 'nullity' since 'the dead cannot be

sued' [citation omitted]. Instead, plaintiffs were required to commence a legal action naming the personal representative of the decedent's estate."

INTERVENTION

Reif v. Nagy, 149 A D 3d 532 (1st Dept. 2017) – "This action arises from two pieces by the artist Egon Schiele alleged to have been looted by the Nazis during World War II from cabaret artist Fritz Grunbaum, who, along with his wife Elisabeth, was executed during the Holocaust. The pieces came into the possession of art dealer Nagy sometime after 2013." ARIS Title Insurance Company, which has insured Nagy's title, seeks to intervene. The Court affirms the denial of that motion. While intervention is liberally granted, ARIS's interest as the title insurer to 'Woman Hiding Her Face' is purely derivative, no different from that of any insurer. And since it is entitled to approve of counsel selected by Nagy, with whom its interests are aligned, its position is well protected."

Springs Fire District v. Town of East Hampton Zoning Board of Appeals, N.Y.L.J., 1520305234 (Sup.Ct. Suffolk Co. 2018)(Farneti, J.) – "CPLR 7802(d) states that a court 'may allow other interested parties to intervene' in the proceeding [citations omitted]. This subdivision grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action [citations omitted]. However, to be an interested party, one must have more than just a general interest in the result of the proceeding."

CLASS ACTIONS

Desrosiers v. Perry Ellis Menswear, LLC, 30 N Y 3d 488 (2017) – Last year's "Update" reported on the Appellate Division decision in this action [139 A D 3d 473 (1st Dept. 2016)]. The Appellate Division held that, "although the time in which to seek class certification had expired pursuant to CPLR 902 by the time defendants sought discontinuance of this case based on the settlement, the court improperly denied plaintiff's application to send CPLR 908 notice to the putative class members." For, "CPLR 908 is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired. Notice to the putative class members of the compromise in the instant case is particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action." A narrowly-divided Court of Appeals has affirmed. The majority concluded that "the text of CPLR 908 is ambiguous with respect to this issue," and looked to both legislative history and to federal court interpretations of the virtually identical former Rule 23 of the Federal Rules of Civil Procedure. Moreover, from 1982 until the present, only one appellate decision in New York – *Avena v. Ford Motor Company*, 85 A D 2d 149 (1st Dept. 1982) – addressed the question, and concluded that notice to the putative class was required with respect to a

proposed settlement made prior to certification. The majority found that decades of inaction by the Legislature, in the face of this interpretation, "is particularly persuasive evidence that the court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted." The dissenters argued that "the majority finds ambiguity in CPLR 908 where none exists and, in my view, placed undue weight on the First Department's holding in *Avena*."

Brownyard v. County of Suffolk, N.Y.L.J., 1532661861 (Sup.Ct. Suffolk Co. 2018) (Mayer, J.) – "Where governmental operations are involved, class actions are generally not superior to other available methods of adjudication [citation omitted]. It is generally supposed that in matters involving government operations, class action relief is not necessary because similarly situated persons will be adequately protected by the *stare decisis* effect of the decision if plaintiff is successful." Moreover, "where, as here, a motion for class action status is supported merely by an attorney affirmation, the court properly exercises its discretion in denying such motion, since an attorney affirmation and exhibits annexed thereto are insufficient to sustain plaintiff's burden of establishing compliance with the statutory requirements for class action certification [citations omitted]. Since plaintiffs' motion is supported merely by an attorney's affirmation, and since the plaintiffs' pleadings are unverified by a party and consist of general and conclusory allegations, plaintiffs have failed to sustain the burden of establishing compliance with the statutory requirements for class action certification."

Matter of Stewart v. Roberts, 163 A D 3d 89 (3d Dept. 2018) – "In opposition to petitioner's motion for class certification, respondent relied primarily on the governmental operations rule, which provides that class actions are not a superior method for resolving multiple claims against administrative agencies because *stare decisis* will protect the potential class members by ensuring prospective applicants of a favorable judgment. Although that principle applies to prospective claims, petitioner also seeks retroactive benefits for prospective class members whose applications have already been denied. Where, as here, a class action provides the only mechanism available to secure retroactive benefits for potential class members, the governmental operations rule does not bar maintenance of a class action [citation omitted]. Moreover, class actions are deemed a superior method for adjudication of a controversy where, as here, the members of a proposed class are indigent individuals who seek modest benefits and for whom commencement of individual actions would be burdensome."

Onadia v. City of New York, 56 Misc 3d 309 (Sup.Ct. Bronx Co. 2017)(Danziger, J.) – Plaintiff seeks to certify a class of those "unlawfully detained" more than 48 hours after conditions for release had been satisfied, because of a "detainer" requested by United States Immigration and Customs Enforcement. The Court, applying the conditions specified in CPLR 902, grants certification. The numerosity standard is met by the conclusion of an IT consultant that upwards of 9,000 persons fall in this category. The

claims of those potential class members are essentially the same, as it is limited to "those individuals who were held beyond their release date based solely on a detainer that either (1) specifically indicated than an investigation had been commenced or was pending by ICE, or (2) failed to indicate a reason for the continued detention." The proposed class does not include "those individuals whose detainers indicated that the individual should be held based on a warrant of arrest, notice to appear, or a deportation/removal order." The named plaintiff's claim is typical of the class. "Typicality is a question of the nature of the claim and not of the damages suffered." Plaintiff is also an adequate representative of the class. And, finally, a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

Ferrari v. The National Football League, 153 A D 3d 1589 (4th Dept. 2017) – The members of a professional football cheerleading squad seeks to certify a class of members and former members on claims of hundreds of hours of unpaid wages. The Court concluded that a class action was appropriate. The 134 members of the class are sufficiently numerous. The common questions of liability predominate, even though the amount of damages may differ. For, it is "well established that 'the amount of damages suffered by each class member typically varies from individual to individual, and that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class.'" And the common law fraud claims are subject to class certification, because "plaintiffs allege that defendants made uniform misrepresentations in the contracts that plaintiffs were made to sign, and thus reliance may be inferred from the nature of the representations and the acceptance by plaintiffs." The class representatives' claims are typical of the class, as they "arose out of the same course of conduct and are based on the same theories as the other class members." The class representatives will fairly represent the class, with no showing of "potential conflicts of interest," and a showing of "the parties' familiarity with the lawsuit and financial resources, and the quality of class counsel." Although, "as defendants note, plaintiffs have waived their right to liquidated damages [citation omitted], that does not preclude class action inasmuch as putative class members who wish to pursue such damages may opt out of the class action and pursue them individually." Finally, a class action is superior, since "this is a case where the cost of prosecuting individual actions would deprive many of the putative class members of their day in court." And, "the fact that two putative class members exercised their right to pursue individual remedies does not controvert plaintiffs' position that class action is the superior vehicle for adjudicating the claims herein."

Molina v. Two Brothers Scrap Metal, Inc., N.Y.L.J., 1528858088 (Sup.Ct. Nassau Co. 2018)(Brown, J.) – Defendant moves to dismiss plaintiffs' unpaid overtime class action claims "on the grounds that the plaintiffs are unable to act as representatives for any purported class" because they are undocumented aliens. The Court concludes that the immigration status of class representatives are not "a barrier to maintaining class claims."

For, "numerous New York state and federal district court cases have found that any laborer may maintain an action pursuant to New York's Labor Law for unpaid wages, regardless of immigration status or the documentation relied on in obtaining employment." And, "'denying undocumented workers the protection of the FLSA [the federal analog to the Labor Law] would "permit abusive exploitation of workers" and "create an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them," in violation of the spirit of IRCA.'"

UNKNOWN PARTIES

Walker v. Glaxosmithkline, LLC, 161 A D 3d 1419 (3d Dept. 2018) – "A plaintiff who is unaware of the name or identity of a defendant may proceed against such defendant by designating so much of his or her name as is known (*see*, CPLR 1024) and must show that he or she made timely and diligent efforts to ascertain the identity of an unknown defendant prior to the expiration of the statute of limitations [citations omitted]. In the absence of evidence that a plaintiff made the requisite timely and diligent efforts to identify an unknown defendant, he or she may not take advantage of the procedural mechanism provided by CPLR 1024." Here, "the only action that plaintiff took was retaining counsel on August 1, 2014, three days before the statute of limitations expired. Such fact, however, does not relieve him of his obligation to exercise diligent efforts. Indeed, we note that, upon retention, counsel immediately took action by sending an investigator to the accident scene. There is no explanation as to why plaintiff waited so long to retain counsel or any indication that he was somehow precluded from doing so prior to the expiration of the statute of limitations. Moreover, contrary to plaintiff's assertion, preaction discovery under CPLR 3102(c) is not limited to those parties who appear with counsel. To that end, we reject plaintiff's assertion that whether he exercised due diligence must be measured from the point when he retained counsel."

Hormann Flexon, LLC v. Rytec Corporation, 153 A D 3d 997 (3d Dept. 2017) – "The statutory provision allowing commencement of an action against unknown parties does not toll the statute of limitations [citations omitted]. As Supreme Court held, plaintiff was required to serve all parties within 120 days of filing, or seek leave to extend the time for service 'upon good cause shown or in the interest of justice' [citations omitted]. Here, plaintiff failed to seek leave to extend the time for service prior to expiration of the statutory limitations period. Further, a party seeking to apply the relation-back doctrine under CPLR 1024 carries the burden 'of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations.'" This plaintiff failed to do.

INDEMNIFICATION AND CONTRIBUTION

Eisman v. Village of East Hills, 149 A D 3d 806 (2d Dept. 2017) – Plaintiff sues the Village of East Hills claiming that his property was damaged by flooding caused by

development of land near his property, which development was approved by the Village. The Village asserted claims for indemnification and contribution against plaintiff's architect, contractor and landscaper. First, the Court dismisses the indemnification claim. "'"Where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entre liability to the one who was negligent." Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tortfeasors is the only available remedy' [citations omitted]. 'Whether indemnity or contribution applies depends not upon the parties' designation but upon a "careful analysis of the theory of recovery against each tort-feasor"' [citations omitted] Here, since the evidence showed that the Village may not be held vicariously or statutorily liable for any negligence of any of the third-party defendants, the Supreme Court should have granted that branch of the third-party defendants' motion which was to dismiss the indemnification cause of action in the third-party complaint." As to contribution, "'purely economic loss resulting from a breach of contract does not constitute "injury to property" within the meaning of New York's contribution statute CPLR 1401' [citations omitted]. 'Accordingly, under the so-called "economic loss doctrine," "contribution under CPLR 1401 is not available where the damages sought are exclusively for breach of contract"' [citations omitted]. 'The existence of some form of tort liability is a prerequisite to application of CPLR 1401' [citations omitted]. Here, the third-party defendants claim that the only duties they owed to the plaintiffs in the main action were purely contractual. However, the plaintiffs seek to recover damages from the Village based on causes of action sounding in tort, and the Village, in its third-party complaint, alleges that the third-party defendants breached a duty of care independent of any contractual duties they owed to the plaintiffs. Even though the third-party defendants may not ultimately be held liable in tort, the Supreme Court properly denied that branch of the third-party defendants' motion which was to dismiss the contribution cause of action."

Morris v. Home Depot USA, 152 A D 3d 669 (2d Dept. 2017) – In this slip and fall on snow and ice case, defendant seeks contribution from the company it hired to clear its property after a storm. "To sustain its third-party cause of action for contribution, Home Depot was required to show that J&J owed it a duty of reasonable care independent of its contractual obligations [citations omitted], or that a duty was owed to the plaintiffs as injured parties and that a breach of this duty contributed to the alleged injuries [citations omitted]. J&J's snow and ice obligation was not a comprehensive and exclusive property maintenance obligation intended to displace Home Depot's duty to safely maintain its property [citations omitted]. Nor did Home Depot submit any evidence establishing that the plaintiffs detrimentally relied upon J&J's continued performance of its snow removal obligations or that J&J's actions advanced to such a point as to have launched a force or instrument of harm [citations omitted]. Since Home Depot failed to establish *prima facie*, an independent duty owed to it by J&J, or a duty J&J owed to the plaintiffs, the

Supreme Court properly denied that branch of Home Depot's cross motion which was for summary judgment on the third-party cause of action seeking contribution."

Live Invest, Inc. v. Morgan, 57 Misc 3d 762 (Sup.Ct. Suffolk Co. 2017)(Emerson, J.) – "The principle of equitable indemnification, also known as common-law indemnification, allows a non-culpable party who has been compelled to make a payment to shift the entire burden of loss to the liable party and obtain full reimbursement [citations omitted]. Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer [citation omitted]. The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee [citation omitted]. Thus, there is no common-law indemnification claim when, as here, the plaintiff seeks recovery from the defendant because of the latter's alleged wrongdoing, i.e., breach of contract, and does not seek to hold the defendant vicariously liable for any negligence by the third-party defendant."

GENERAL OBLIGATIONS LAW §15-108

Bloostein v. Morrison Cohen LLP, 2017 WL 2482942 (Sup.Ct. N.Y.Co. 2017)(Singh, J.) – The main action here is a claim for legal malpractice alleging that plaintiff's lawyers, defendant Morrison Cohen, failed to properly advise plaintiff concerning the relevant transaction, resulting in "significant capital gains taxes." Morrison Cohen impleaded Stonebridge, which designed the transaction, and Brown Rudnick, one of Stonebridge's lawyers. The third-party claim against Brown Rudnick sought, *inter alia*, contribution on the grounds that Brown Rudnick had been the principal drafter of the transaction, and had issued a tax opinion letter. The claims against Stonebridge were subsequently dismissed, but the contribution claim against Brown Rudnick remained extant. Brown Rudnick then commenced a fourth-party action against Stroock, Stonebridge's other counsel with respect to the transaction, seeking contribution. Stonebridge, meanwhile, had commenced an arbitration against Stroock, alleging legal malpractice with respect to the same transaction. That arbitration was resolved by a settlement agreement. By the present motion, Stroock sought dismissal of Brown Rudnick's fourth-party action for contribution, as barred by General Obligations Law §15-108. That motion is granted, the Court rejecting Brown Rudnick's claim that the injury in this action is not, in the language of the statute, for "the same injury" as that resolved by the arbitration settlement. For, "the contribution claim brought in this action by Brown Rudnick against Stroock stems from the same Transaction, Opinion Letter and losses as those addressed in the Arbitration. This action and the Arbitration is predicated upon legal malpractice. Both Brown Rudnick and Stroock may be held jointly or severally culpable to the plaintiff investors for the same injury. Accordingly, GOL §15-108 and the release bars Brown Rudnick from seeking contribution from Stroock."

McCarthy v. Kerrigan, 59 Misc 3d 872 (Sup.Ct. St. Lawrence Co. 2018)(Farley, J.) – In this medical malpractice action, one defendant – Witkop – entered into an agreement with plaintiff to discontinue the action against him, and, instead, arbitrate plaintiff's claim against him. A remaining defendant commenced a third-party action against Witkop to "preserve his rights for common-law indemnity and contribution. Witkop moved to dismiss the third-party action, claiming that his agreement with plaintiff constituted a "release," triggering General Obligations Law §15-108, and precluding a claim for contribution. The Court rejects that argument. GOL 15-108 applies only if "the plaintiff or claimant receives, as part of the agreement, *monetary consideration greater than one dollar*," and, "the release of covenant *completely or substantially terminates the dispute* between the plaintiff or claimant and the person who was claimed to be liable" [emphasis by the Court]. Neither of those requirements were met here.

PLEADINGS

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – "CPLR 3013 requires, in pertinent part, only that statements in a pleading 'be sufficiently particular to give the court and parties notice' of the transactions and occurrences to be proved. And although CPLR 3016(b) requires that a cause of action based in fraud 'must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, the mandate of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct [citation omitted]. Even in fraud, a plaintiff is not required to allege specific details of an individual defendant's participation where those details are peculiarly within the defendant's knowledge." And, "contrary to the assertions by the distributor defendants, the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action premised on General Business Law §349."

Hirsch v. Stellar Management, 148 A D 3d 588 (1st Dept. 2017) – "The motion court correctly determined that plaintiff failed to plead a fraud claim with the requisite specificity [citation omitted]. Although plaintiff alleged that defendants committed a material misrepresentation of fact, plaintiff failed to allege specific details to demonstrate that he justifiably relied on the misrepresentation to his detriment."

Wegner v. Town of Cheektowaga, 159 A D 3d 1348 (4th Dept. 2018) – CPLR 3016(a) requires that "in an action for libel or slander, the particular words complained of shall be set forth in the complaint." The complaint here alleges that "defendants made false accusations that plaintiff engaged in 'monetary waste, abuse and criminal actions in his deployment of manpower' in his role as the Highway Superintendent of the Town of Cheektowaga." The Appellate Division reverses the denial of defendants' motion to dismiss the action. "Plaintiff did not set forth in the complaint 'the particular words

complained of,' as required by CPLR 3016(a), and the complaint did not 'state the "time, place and manner of the allegedly false statements and to whom such statements were made"'" as case law requires.

Crescent Packing Corp. v. Tropical Market, Inc., N.Y.L.J., 1531212819 (App.Term 2d Dept. 2018) – "Pursuant to CPLR 3016(f), if a plaintiff seeking payment for the sale and delivery of goods sets forth in a verified complaint the items of its claim and the reasonable value or agreed price of each, the defendant is obligated in the answer, to indicate specifically the items it disputes, and whether in respect of delivery, performance, reasonable value or agreed price [citations omitted]. A copy of a writing attached to the complaint may sufficiently itemize the claim [citations omitted]. The complaint must, however, list the goods with sufficient detail so that it may be readily examined and its correctness tested entry by entry." Here, plaintiff apparently gave *too much* information in the exhibits attached to the verified complaint. "Since the itemized statement annexed to the complaint apparently included all the items plaintiff had sold to Tropical, and did not specify the items to which Tropical's payments had been applied, it was insufficient to trigger an obligation under CPLR 3016(f) for Tropical to specify which items of plaintiff's claim it disputed."

Gershman v. Ahmad, 156 A D 3d 868 (3d Dept. 2017) – "The plaintiff erroneously denominated her request for punitive damages as a separate cause of action. 'New York does not recognize an independent cause of action for punitive damages.'" However, "the plaintiff's request for punitive damages in the *ad damnum* clause of the complaint was proper."

Rudzinski v. Glashow, N.Y.L.J., 1202788193790 (Sup.Ct. Kings Co. 2017)(Rivera, J.) – "CPLR 3024(b) permits a party to make a motion to strike a scandalous or prejudicial matter unnecessarily inserted in a pleading [citation omitted]. In reviewing a motion to strike scandalous or prejudicial matter unnecessarily inserted in a pleading, the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action [citation omitted]. Striking of the entire pleading is not an available remedy under CPLR 3024(b). The movant may only strike that portion of the pleading that contains the unnecessarily scandalous and prejudicial matter. As [defendant] Carter sought only to strike the entire complaint and did not specify which paragraphs were scandalous or prejudicial the motion is denied on the merits."

Magid v. Sunrise Holdings Group, LLC, 155 A D 3d 717 (2d Dept. 2017) – Plaintiff commenced this action in his capacity as trustee of a trust. Supreme Court, "*inter alia*, *sua sponte*," awarded defendant a money judgment against Magid personally. That judgment is vacated. "'It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and

strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued.'"

Paramount Pictures Corporation v. Allianz Risk Transfer AG, 31 N Y 3d 64 (2018) – Last year's "Update" reported on the Appellate Division decision in this action [141 A D 3d 464 (1st Dept. 2016)]. In 2008, despite a contractual covenant not to sue, the defendants in this action sued the plaintiff in this action for fraud, in Federal Court, seeking to recoup losses on an investment. That Court dismissed the action, finding that fraud had not been proved. Neither side raised the covenant not to sue. In this action, plaintiff seeks damages for defendants' breach of the covenant not to sue. Defendants move to dismiss, claiming that the claim was waived by plaintiff's failure to assert it as a counterclaim in the Federal action. The Appellate Division held that "New York is a permissive counterclaim jurisdiction [citation omitted]. 'Our permissive counterclaim rule may save from the bar of *res judicata* those claims for separate or different relief that could have been, but were not interposed in the parties' prior action. It does not, however, permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action.'" Here, "while we agree with plaintiff that the relief it seeks in this action (*i.e.*, attorneys' fees incurred in the federal action) would not 'impair the rights or interests established' in the federal action, meaning that New York's permissive counterclaim rule would save it from the traditional bar of *res judicata*, the inquiry does not end there where the prior action was adjudicated in a compulsory counterclaim jurisdiction." The Appellate Division concluded that, under the Federal Rules of Civil Procedure, Rule 13(a), plaintiff's claim would have been a compulsory counterclaim in Federal Court. While noting that "there is no binding precedent which holds that state courts must apply Federal Rules of Civil Procedure rule 13(a)," the Court quoted from a Southern District opinion that "'when the forum in which the prior litigation occurred was a compulsory counterclaim jurisdiction, notions of judicial economy and fairness require that a party be precluded from bringing all claims that it earlier had the opportunity – exercised or not – to assert as counterclaims." It also cited *dicta* from the Court of Appeals decision in *Gargiulo v. Oppenheim*, 63 N Y 2d 843 (1984), in which the Court assumed "without deciding, that under the procedural compulsory counterclaim rule in the Federal Courts [citation omitted] claim and issue preclusion would extend to bar the later assertion in the present State court action of a contention which could have been raised by way of a counterclaim." Thus, the Appellate Division here concluded "that the later assertion in a state court action of a contention that constituted a compulsory counterclaim [citation omitted] in a prior federal action between the same parties is barred under the doctrine of *res judicata*." A fractured Court of Appeals has affirmed. The plurality opinion focused on United States Supreme Court jurisprudence on the interpretation of the scope of federal judgments, and concluded that "where federal preclusion principles would operate to preclude a claim – and state law principles would yield a conflicting outcome – the 'federal courts' interest in the integrity

of their own processes' justifies the displacement of New York law as the federally prescribed rule of decision." And, here, federal preclusion law – FRCP 13(a) – dictates that the failure to assert a compulsory counterclaim waives the claim under federal *res judicata* principles. The concurring Judges argued that "Paramount's claim is barred regardless of whether federal or New York State *res judicata* rules apply, because it arises out of the same transaction as the defendants' federal claim which was litigated to its conclusion in the prior federal action." The dissenter argued that the claim asserted here was not barred under either State or Federal law.

Larke v. Moore, 150 A D 3d 1620 (4th Dept. 2017) – "Plaintiffs waived any objection to the lack of verification by waiting nearly two months to reject the answer [citations omitted]. We therefore conclude that plaintiffs failed to act with 'due diligence' as required by CPLR 3022."

325 East 118th Street, LLC v. Roach Bernard, PLLC, N.Y.L.J., 1202796204026 (Sup.Ct. N.Y.Co. 2017)(Liebovits, J.) – Last year's "Update" reported on *Putrelo Construction Company v. Town of Marcy*, 137 A D 3d 1591 (4th Dept. 2016), where the Fourth Department reached the same conclusion the First Department had, in a decision reported on in the previous year's "Update" – *Medina v. City of New York*, 134 A D 3d 433 (1st Dept. 2015). In *Medina*, the First Department held that, "since the limited proposed amendments were clearly described in the moving papers, plaintiff's failure to submit proposed amended pleadings with his original moving papers (CPLR 3025[b]), was a technical defect, which the court should have overlooked [citation omitted], particularly after plaintiff provided those documents with his reply." In *Putrelo*, the Fourth Department applied a similar standard: "Plaintiff failed to include an amended pleading with its motion, as required by CPLR 3025(b). Under the circumstances of this case, however, we conclude that the error was merely a technical defect that the court should have disregarded [citation omitted], inasmuch as 'the limited proposed amendment was clearly described in the moving papers' and did not prejudice defendant or third-party defendant.'" Here, in *325 East 118th Street*, defendant's "proposed amended third-party complaint shows clearly the proposed changes and additions to the complaint. Third-party defendants' argument that the proposed amended third-party complaint does not comply with CPLR 3025(b) because it does not contain highlights, redlines, or otherwise delineating marks is unpersuasive. A plaintiff's failure to submit a proposed amended pleading with the original moving papers is a 'technical defect, which the court should overlook particularly after plaintiff provides those documents with his reply' and when 'the proposed amendments are clearly described in the moving papers' and do not prejudice the defendant."

Messersmith v. Tate, N.Y.L.J., 1518088112 (Sup.Ct. Warren Co. 2018)(Muller, J.) – "'CPLR 3025(b) requires a party moving to amend or supplement to include the entire proposed amended or supplemental pleading, and not simply those portions that are

amended or supplemented.' Here, plaintiff has submitted a proposed amended complaint which sets forth only the proposed 'sixth cause of action' and a proposed amended reply which sets forth only the proposed 'first affirmative defense.' Given the express language of CPLR 3025(b) – together with the analysis contained within the Practice Commentaries – the Court is constrained to deny plaintiff's motion for leave to amend. Plaintiff failed to submit the entire proposed amended complaint and amended reply, instead submitting only the cause of action and affirmative defense sought to be added. In this regard, it must also be noted that plaintiff could have easily corrected these defects in his reply papers. He failed to do so, however, instead submitting nothing in reply to defendant's opposition."

NYAHSA Services, Inc. v. People Care Incorporated, 156 A D 3d 99 (3d Dept. 2017) – "We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a 'sufficient evidentiary showing to support the proposed claim' [citation omitted], that is, to make an 'evidentiary showing the proposed amendments have merit' [citation omitted]. However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that 'no evidentiary showing of merit is required under CPLR 3025(b)' [citations omitted]. Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, 'in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.'"

Frangiadakis v. 51 West 81st Street Corp., 161 A D 3d 478 (1st Dept. 2018) – "To support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit 'competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff.'"

Great Lakes Motor Corp. v. Johnson, 156 A D 3d 1369 (4th Dept. 2017) – "'Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' [citations omitted]. Although defendant contends that plaintiff was required to 'make an evidentiary showing that the claims could be supported' [citations omitted], or to submit an affidavit of merit [citation omitted], plaintiff correctly relies on the more recent cases from this Court, which provide that 'a court should *not* examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face'" [emphasis by the Court].

Wojtalewski v. Central Square Central School District, 161 A D 3d 1560 (4th Dept. 2018) – "'Mere lateness is not a barrier to the amendment [of a complaint]. It must be lateness coupled with significant prejudice to the other side' [citations omitted].

Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay."

Gomez v. Buena Vida Corporation, 152 A D 3d 497 (2d Dept. 2017) – "'In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.'" And, "contrary to the hospital's contention, prejudice is more than 'the mere exposure of the defendant to greater liability.'"

Federal Insurance Company v. Lakeville Pace Mechanical, Inc., 159 A D 3d 469 (1st Dept. 2018) – "Defendant waited more than two years to move to amend its answer to include the statute of limitations defense, arguing that plaintiff's construction negligence claim, with a three-year statute of limitations [citation omitted] was untimely. Moreover, defendant made its motion almost immediately after the expiration of the six-year limitations period (by defendant's calculation) in which plaintiff could have brought the same action as a breach of contract, even though all of the facts relied upon by defendant were known to it at the time it filed its original answer. Plaintiff, relying on defendant's waiver of any statute of limitations defense [citation omitted], was prejudiced by the loss of the opportunity to interpose a timely breach of contract claim, which it could have done 'had the original pleading contained what the proposed amended one wants to add.'"

MOTION PRACTICE

MOTION PROCEDURE

People ex rel. Strong v. Griffin, 162 A D 3d 1061 (2d Dept. 2018) – "'The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with' [citations omitted]. Here, we agree with the Supreme Court's determination to dismiss the proceeding for lack of personal jurisdiction due to the petitioner's failure to follow the directive of the order to show cause to serve the respondent and the Attorney General with a copy of the papers upon which the order to show cause was based."

Woodward v. Milbrook Ventures LLC, 148 A D 3d 658 (1st Dept. 2017) – The Appellate Division affirms Supreme Court's denial of defendants' motion to change venue on the ground that it was untimely. "Having consented to electronic filing, defendants were required to serve their papers electronically [citation omitted], and indeed served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015 [citation omitted]. Having served their demand, defendants were required

to bring their motion to change venue within 15 days, or by July 29, 2015 [citation omitted]. However, defendants did not bring their motion until July 31, 2015, rendering it untimely. That defendants also elected to serve their demand via United States mail did not extend the deadline for their motion under CPLR 2103(b)(2). Because they consented to participate in Supreme Court's e-filing system, defendants were bound by the applicable rules governing service."

Keech v. 30 East 85th Street Company, LLC, 154 A D 3d 504 (1st Dept. 2017) – "CPLR 2214(c) provides that a party filing a motion in an e-filed action, such as this, need not include copies of papers that were previously filed electronically. Here, the pleadings were filed by Lululemon in connection with its renewed motion for summary judgment; thus, Company had no obligation to file them in support of its renewed motion."

The Residential Board of Managers of Platinum v. 46th Street Development, LLC, 154 A D 3d 422 (1st Dept. 2017) – "An argument that is not raised until a reply brief should not be considered."

Central Mortgage Company v. Jahnsen, 150 A D 3d 661 (2d Dept. 2017) – "Contrary to the appellant's contention, it was not error for the Supreme Court to consider the reply affidavit, which was submitted in reply to the appellant's opposition. A party moving for summary judgment generally cannot meet its *prima facie* burden by submitting evidence for the first time in reply [citations omitted]. However, there are exceptions to this general rule, including when the evidence is submitted in response to allegations raised for the first time in the opposition papers or when the other party is given an opportunity to respond to the reply papers [citations omitted]. Further, 'the function of reply papers is to address arguments made in opposition to the position taken by the movant' [citations omitted]. Here, the Supreme Court properly considered the reply affidavit because the affidavit was offered in response to the appellant's allegation in opposition to the motion that the plaintiff never had possession of the note, and merely clarified the plaintiff's initial submissions as to its possession of the note at the time of commencement."

Ferrari v. The National Football League, 153 A D 3d 1589 (4th Dept. 2017) – "Although it is generally improper for a moving party to submit evidence for the first time with its reply papers, the court may consider such evidence where the opposing party has the opportunity to submit a surreply."

Bank of New York Mellon v. Hoshmand, 158 A D 3d 600 (2d Dept. 2018) – "Contrary to the appellants' contention, the Supreme Court properly considered a renewed power of attorney submitted by the plaintiff in reply to the appellants' opposition to its motion. 'The function of reply papers is to address arguments made in opposition to the position taken by the movant' [citations omitted]. Here, the renewed power of attorney submitted by the plaintiff was offered in response to the appellants' argument made in opposition

that the plaintiff's affidavit of merit, signed by the assistant vice president of its servicing agent, was invalid because it was signed after the original power of attorney submitted by the plaintiff had expired. The renewed power of attorney merely clarified that the plaintiff's servicing agent continued to have the authority to act on behalf of the plaintiff at the time the affidavit was signed."

U.S. Bank National Association v. Ricketts, 153 A D 3d 1298 (2d Dept. 2017) – "Although the plaintiff did not raise, until its reply papers, the argument that this action was improperly dismissed pursuant to CPLR 3216 because issue had not been joined, we may consider it on appeal since the reply papers did not present new facts but only raised an issue of law which appeared on the face of the record and could not have been avoided if brought to the attention of the Supreme Court at the proper juncture."

BAC Home Loans Servicing, LP v. Uvino, 155 A D 3d 1155 (3d Dept. 2017) – "Surreply papers are not explicitly permitted by the statute that addressed motion papers. That statute provides for a notice of motion and supporting affidavits, answering affidavits and supporting papers, and any reply or responding affidavits [citation omitted]. The statute further states that 'only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct' [citation omitted]. Under the circumstances, where the record does not indicate that defendants ever sought permission from the court to submit surreply papers, we cannot conclude that the court abused its discretion in disregarding defendant's surreply papers when deciding plaintiff's motion."

U.S. Bank Trust, N.A. v. Rudick, 156 A D 3d 841 (2d Dept. 2017) – "While unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for 'good cause' [citations omitted]. Here, the Supreme Court did not improvidently exercise its discretion in determining that it would consider the supplemental evidence sought to be submitted by the plaintiff. The plaintiff proffered a valid excuse, the delay was minimal, and there was no prejudice as the court also determined that it would give the defendant a full opportunity to respond to, and submit further evidence addressing, the plaintiff's submissions."

Molina v. Two Brothers Scrap Metal, Inc., N.Y.L.J., 1528858088 (Sup.Ct. Nassau Co. 2018)(Brown, J.) – "The defendant's motion, returnable on April 27, 2018, was served on April 2, 2018 and contained the requisite 2214(b) notice for service of answering affidavits seven days before the return date, i.e., by April 20, 2018. As the cross-motion was electronically filed no earlier than the evening of April 21, 2018, it is untimely [citations omitted]. This does not preclude plaintiffs from making an appropriate motion on notice in the future, should the need arise."

KN v. LK, N.Y.L.J., 1202801060034 (Sup.Ct. N.Y.Co. 2017)(Helewitz, Sp.Ref.) – "A statement taken in a foreign country that is authenticated by a foreign notary is legally insufficient as an affidavit admissible in a New York court."

Redlich v. Stone, 152 A D 3d 432 (1st Dept. 2017) – "Although it was notarized in Florida and lacked a certificate of conformity pursuant to CPLR 2309(c), the motion court properly considered plaintiff's affidavit in opposition."

Donsimoni v. Fall, 154 A D 3d 467 (1st Dept. 2017) – "The fact that plaintiff's lone affidavit of merit in opposition to defendant's summary judgment was acknowledged by a vice-consul in the U.S. Embassy in Paris, France, yet was submitted without a requisite certificate of conformity [citations omitted], constituted an irregularity that could be corrected *nunc pro tunc*, if necessary."

Matter of Etna Prestige Technology, Inc. v. Long Island Railroad Company, 148 A D 3d 885 (2d Dept. 2017) – Last year's "Update" reported on *Matter of Meighan v. Ponte*, 144 A D 3d 917 (2d Dept. 2016), in which the Second Department re-emphasized the holding of its earlier decision in *Rosenblatt v. St. George Health and Racquetball Associates, LLC*, 119 A D 3d 45 (2d Dept. 2014), which had, in turn, distinguished its earlier decision in *Tirado v. Miller*, 75 A D 3d 153 (2d Dept. 2010). To take these decisions in order, in *Tirado*, defendant moved to quash a third-party subpoena. *Nisi prius* granted the motion, but on grounds different from those urged by defendant. The Appellate Division held that, "trial courts are not necessarily limited by the specific arguments raised by parties in their submissions," although "a court typically lacks the jurisdiction to grant relief that is not requested in the moving papers." However, "the presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced." In *Tirado*, "the relief granted, of quashing the plaintiff's subpoena and, in effect, granting a protective order, is not only similar, but in fact identical, to the ultimate relief demanded in the notice of motion, albeit on a different basis. We find that the general relief clause in the notice of motion permitted the court to consider an alternative ground for granting the motion, consistent with the ultimate relief that was requested, and which was based upon material contained in the court's own file." The Court rejected the argument that the Trial Court improperly acted *sua sponte*. "There is a critical distinction between *sua sponte* relief not requested by any party, and *sua sponte* reasoning in granting or denying nondispositive discovery relief that has been requested by a party." Then, in *Rosenblatt*, on defendant's motion for summary judgment, it relied upon plaintiff's unsigned and uncertified deposition transcript. Plaintiff argued that the transcript could not be relied upon because it was "*unverified*." Supreme Court, apparently recognizing that verification was unnecessary, nonetheless, *sua sponte*, concluded that, because the transcript was *uncertified*, the motion must be denied. The Appellate Division reversed, distinguishing *Tirado*. "The

motion at issue in *Tirado*, which related to discovery, did not have 'dispositive import' to that action [citation omitted]. By contrast, [defendant's] motion for summary judgment is dispositive in nature. Thus, *Tirado* is distinguishable from the instant case. Here, the Supreme Court denied the subject motion for summary judgment on a ground that the parties did not litigate. The parties did not have an opportunity to address the issue relating to the certification of the plaintiff's deposition transcript, relied upon by the Supreme Court in denying that dispositive motion. The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process." For, "'we are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.'" In *Meighan*, the decision reported on last year, respondent moved to dismiss an Article 78 proceeding on the ground that the petition failed to state a cause of action. Supreme Court dismissed the proceeding on the ground that petitioner had failed to file proof of service of the notice of petition and petition. The Appellate Division reversed. First, "'the failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or *sua sponte* by the court in its discretion pursuant to CPLR 2004.'" Moreover, respondent never contended "that the proceeding should be dismissed for failure to file proof of service. As such, the parties did not have an opportunity to address the purported failure to file proof of service, the ground upon which the Supreme Court relied in denying the petition and dismissing the proceeding, even though such defect is readily curable [citations omitted]. 'The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process.'" Last year's "Update" also reported on *Mew Equity, LLC v. Sutton Land Services, LLC*, 144 A D 3d 874 (2d Dept. 2016). There, on a motion for summary judgment, moving defendants "submitted the complaint and their answer, but did not submit the answers of the other defendants. The Mew plaintiffs, in opposition, did not contend that this branch of the Sutton defendants' motion should be denied due to the Sutton defendants' failure to fully comply with CPLR 3212(b). Consequently, the court should not have raised the issue on the Mew plaintiffs' behalf." Here, in *Matter of Etna*, the Court reached a similar result. "The LIRR did not seek dismissal of the petition on the ground that the petitioner failed to exhaust its administrative remedies and, thus, the denial of the petition on that ground was not warranted."

North Oyster Bay Baymen's Association v. Town of Oyster Bay, 150 A D 3d 865 (2d Dept. 2017) – "Although a court 'is generally limited to the issues or defenses that are the subject of the motion' if the motion is dispositive of the underlying action [citations, including to *Rosenblatt v. St. George Health and Racquetball Associates, LLC*, discussed above, omitted], a court may decide a nondispositive motion 'upon grounds other than those argued by the parties in their submissions' where 'the court's grant or denial of relief is confined to the specific family of relief sought in the motion' [citing to *Tirado v. Miller*, discussed above]."

The Meadow at Clarke Hollow Bay, LLC v. White, 155 A D 3d 1325 (3d Dept. 2017) – Plaintiffs sought a declaration that defendants did not possess a right-of-way. Defendants answered and moved for summary judgment declaring an easement. The Court granted the easement and "fixed its location and width." On appeal, plaintiffs urge that Supreme Court erred in declaring the width. "Although defendants' motion papers did not specifically seek a determination as to the width of the easement, they each contained a general prayer for such other and further relief as the court deems proper, which 'enables the court to grant relief that is not too dramatically unlike that which is actually sought' [citations, including to the Second Department's *Tirado* decision discussed above, omitted]. Supreme Court informed the parties that it was inclined to determine and declare the dimensions of the easement, which relief was plainly related to the main relief sought, and the parties were afforded an opportunity to submit additional evidence on that issue [citations omitted]. Thus, we find no procedural bar to Supreme Court's consideration of the issue."

RENEWAL, REARGUMENT AND RESETTLEMENT

Matter of Quattrone v. Erie 2-Chautauqua-Cattaraugus Board of Cooperative Educational Services, 148 A D 3d 1553 (4th Dept. 2017) – "As a general rule, any motion affecting a prior order, including a motion for leave to reargue a prior motion, must be made 'to the judge who signed' the prior order, 'unless he or she is for any reason unable to hear it' [citations omitted]. However, an exception to that statutory mandate 'exists where the Rules of the Chief Administrator of the Courts provide otherwise [citations omitted], including those rules establishing and implementing the IAS system. The IAS rules provide that 'all motions,' including those governed by CPLR 2221, 'shall be returnable before the assignment judge' [citation omitted]. Thus, 'by adoption of the IAS "the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the IAS that all motions in a case shall be addressed to the assigned Judge."'"

One Westbank, FSB v. Rodriguez, 57 Misc 3d 756 (Sup.Ct. Bronx Co. 2017) (González, J.) – "A motion to reargue must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry [citation omitted]. On June 2, 2016, defendants e-filed a copy of the May 24, 2016 Order with Notice of Entry. Plaintiff e-filed a motion for reargument on July 5, 2016. Defendants contend that plaintiff's summary judgment is untimely because its 30-day period for reargument expired on July 2, 2016. Plaintiff contends that the 30-day period was extended pursuant to General Construction Law §20-a because July 2, 2016 was a Saturday, the following Monday was July 4th, a holiday. General Construction Law §20-a(1) provides that when any period of time falls on a Saturday, Sunday or public holiday, such act may be done on the next succeeding business day. Defendants argue that no such extension is

available since Uniform Rule 202.5(d)(3)(i) provides that electronically filed documents may be transmitted at any time of night or day to the NYCEF site. No citation is proffered to buttress their argument. The court accordingly declines to adopt defendants' narrow construct. Plaintiff's motion to reargue is deemed timely filed."

Manufacturers and Traders Trust Company v. Client Server Direct, Inc., 156 A D 3d 1364 (4th Dept. 2017) – "In issuing that part of its prior order sealing the record in response to a motion to compel and a cross motion for a protective order, the court, without notice to the parties, granted relief that was not requested and, therefore, that part of the prior order was issued *sua sponte* [citations omitted]. Inasmuch as there was no prior motion to seal the record, the Drilling Parties' subsequent motion seeking to unseal the record cannot be construed as a motion for leave to reargue and, indeed, the Drilling Parties appropriately did not identify it as such [citation omitted]. We therefore conclude that the court erred in determining that the Drilling Parties' motion was an untimely motion for leave to reargue."

Lewis v. Rutkovsky, 153 A D 3d 450 (1st Dept. 2017) – "In general, an order denying a motion for reargument is not appealable [citations omitted]. Here, however, although the motion court purported to deny the motion to reargue, it nonetheless considered the merits of defendants' argument that the inclement weather on the motion's due date provided good cause for the delay. As a result, the court, in effect, granted reargument, then adhered to the original decision [citation omitted]. The April 18, 2016 order is therefore appealable."

Redeye v. Progressive Insurance Company, 158 A D 3d 1208 (4th Dept. 2018) – Prior to the 1999 amendment of CPLR 2221, there was a split in the Courts as to whether a motion based upon a change in the law was appropriately a motion to reargue – and hence subject to a 30-day limitation – or a motion to renew – which has no such limitation. The statute now specifically provides that such a motion is a motion to renew. But, "courts have nevertheless properly continued to impose a time limit on motions based on a change in law." For, "'there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments' [citation omitted]. Here, the case was no longer pending when plaintiff made his motion for leave to renew based on a change in the law, and we therefore conclude that the motion insofar as it sought leave to renew was untimely."

Lockwood v. City of Yonkers, 57 Misc 3d 728 (Sup.Ct. Westchester Co. 2017)(Giacomo, J.) – "Absent circumstances set forth in CPLR 5015, which are inapplicable here, a motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired [citations omitted]. Here, although this Court's December 11, 2014 decision and order was served with notice of entry and petitioner did not file a notice of appeal therefrom, a final judgment has not

been entered in this proceeding. Neither party has submitted a final judgment with their motion papers. Therefore, since petitioner has made the instant motion to renew prior to the entry of a final judgment, the motion is timely."

Hernandez v. Nwaishienyi, 148 A D 3d 684 (2d Dept. 2017) – "'A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion' [citations omitted]. The new or additional facts presented 'either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion' [citations omitted]. 'However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented' [citations omitted]. 'Although the requirement that a motion for renewal must be based on new facts is a flexible one, a motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' [citations omitted]. Accordingly, 'the 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.'"

Chu v. Kerrigan, 154 A D 3d 731 (2d Dept. 2017) – "While it may be within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the prior motion [citations omitted], a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation."

Armstrong v. Armstrong, 162 A D 3d 621 (2d Dept. 2018) – "A motion for leave to renew must be based upon new facts, not offered on the original motion 'that would change the prior determination' [citations omitted]. 'The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion' [citations omitted]. 'However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented' [citations omitted]. 'The 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.'"

Madison Park Development Associates LLC v. Febbraro, 159 A D 3d 569 (1st Dept. 2018) – "We have previously held that Supreme Court lacks discretion to grant leave to renew 'where the moving party omitted a reasonable justification for failing to present the new facts on the original motion' [citations omitted]. For this reason, Supreme Court should have refused to grant defendants leave to make the motion."

Trigoso v. Correa, 150 A D 3d 1041 (2d Dept. 2017) – "'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' [citation omitted]. Here, Danu's failure to provide signed copies of the deposition transcripts with the original summary judgment motion was tantamount to law office failure, which constituted a reasonable justification [citations omitted]. Thus, the Supreme Court properly granted that branch of Danu's motion which was for leave to renew."

SANCTIONS

CONTEMPT

Board of Directors of Windsor Owners Corp. v. Platt, 148 A D 3d 645 (1st Dept. 2017) – "The validity of an order underlying a contempt proceeding may not be attacked except on the ground that the court entering it was without jurisdiction to do so or that the order had been stayed [citations omitted]. Accordingly, defendant's arguments designed to collaterally attack the preliminary injunction order will not be entertained."

Kozel v.Kozel, 161 A D 3d 700 (1st Dept. 2018) – The non-party witness "was properly served via email with plaintiff's order to show cause. While a criminal contempt proceeding requires personal service on the contemnor [citation omitted], CPLR 308(5) permits a court to direct another manner of service if the methods set forth in the statute prove impracticable. Here, Inga [the contemnor] left the jurisdiction after the same court and Justice found her in contempt, and offers no evidence that she was at either her residence in London or Lithuania. Under these circumstances, the court properly directed that she be served via email [citation omitted]. Since Inga was properly served with the contempt motion, and had knowledge of the terms of the subject orders of which she was in violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding."

People v. John, 150 A D 3d 889 (2d Dept. 2017) – "'"To sustain a finding of criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect" and the order was disobeyed by a person having knowledge of the order' [citations omitted]. The defendant's knowledge of the terms of the order, as opposed to mere issuance of the order, is an essential element of the crime [citation omitted]. Here, the People presented evidence that the defendant had knowledge of the issuance of the order of protection, and was told generally by the Supreme Court: 'You're getting a full order of protection; no contact with the complaining witness.' However, there was no evidence that the order of protection, which was not signed by the defendant, was ever actually given to him, or that

he was orally advised as to the contents of the order, including a handwritten condition that he would be in violation of the order if he came within 100 yards of the complainant, even if invited by her. Under these circumstances, viewing the evidence in the light most favorable to the People [citation omitted], there was insufficient evidence from which a rational jury could conclude that the defendant had written or oral notice of the contents of the order of protection and the conduct it prohibited."

Great Wall Medical, P.C. v. Levine, N.Y.L.J., 1534835742 (Sup.Ct. N.Y.Co. 2018) (Goetz, J.) – In this defamation action, based on a negative Yelp review, plaintiff and defendant entered into a "so-ordered" stipulation agreeing that, pending the action, neither would publicly comment about the other. Plaintiff moves for both criminal and civil contempt, demonstrating that defendant had violated the stipulation. The Court denies the motion for criminal contempt, because the motion papers were not properly served. "'A proceeding to punish for criminal contempt arising out of a civil action is considered separate from the civil action and must be properly commenced by personal service upon the alleged contemnor' [citation omitted]. 'Failure to personally serve the alleged contemnor constitutes a jurisdictional defect requiring dismissal' [citation omitted]. Here, the order to show cause authorized service on counsel for defendant and on the return date counsel for plaintiffs did not submit an affidavit of personal service upon the defendant nor was one e-filed. Therefore, because defendant was not personally served with the order to show cause, plaintiff's application to hold her in criminal contempt must be denied." As for civil contempt, the Court concluded that defendant had disobeyed a "lawful order of the court, clearly expressing an unequivocal mandate," that she had knowledge of the order, and that her conduct prejudiced "the rights of a party to the litigation." For, "a 'so-ordered' stipulation qualifies as a lawful order of the court." And, "if defendant no longer wished to be bound by the Order based on her theory that the order was conditional and plaintiffs were no longer complying then her remedy was to move pursuant to CPLR 2221(a) to vacate the Order, not ignore it." The remedy is "for defendant to turn over to plaintiffs all the proceeds from her GoFundMe page (and delete the page) as well as pay plaintiffs costs, expenses and attorneys' fees incurred in connection with bringing their contempt order to show cause. Defendant should not be permitted to profit from her disobedience of the Order."

OTHER SANCTIONS

Torain v. AG-Metropolitan 711 Stewart Avenue, LLC, 58 Misc 3d 408 (Sup.Ct. Nassau Co. 2017)(Palmieri, J.) – After a slip and fall, plaintiff's counsel sent a demand letter to defendant. Defendant wrote back, enclosing relevant documents, showing that defendant did not own the property at the time of the accident. Nonetheless, plaintiff sued. Defendant's counsel called plaintiff's lawyer, and made several other attempts to get plaintiff to discontinue the action. None were heeded, forcing defendant to move to dismiss the action. Only thereafter did plaintiff offer to stipulate to discontinuance. The

Court awards sanctions pursuant to Part 130, to compensate defendant for the costs of motion practice.

Divito v. Fiandach, 160 A D 3d 1404 (4th Dept. 2018) – "It is well established that a party's abuse of the judicial process is frivolous conduct supporting an award of costs or the imposition of sanctions." Here, "the court properly exercised its discretion in finding that service of the income execution was made for the purpose of harassing defendant and thus constituted frivolous conduct. There was no arguably legitimate basis for the income execution because defendant was not in default and no default judgment had been entered against him."

SEALING THE FILE

Manufacturers and Traders Trust Company v. Client Server Direct, Inc., 156 A D 3d 1364 (4th Dept. 2017) – "It is well established that 'there is a presumption that the public has a right of access to the courts to ensure the actual and perceived fairness of the judicial system, as "the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud"' [citations omitted]. Inasmuch as 'confidentiality is the exception and not the rule, "the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access"' [citation omitted]. In conformance with those principles, the Uniform Rules for Trial Courts provide, in relevant part, that 'a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public as well as of the parties' [citations omitted]. Although the term 'good cause' is not defined in the rule, courts have held that 'a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action.'" Here, "in its written finding of good cause, the court found that the documents produced by M&T during discovery that the Drilling Parties sought to unseal included Whipple's entire email account, which contained thousands of confidential customer documents unrelated to the scheme underlying the claims in this action; bank account statements, financial statements, and loan and credit files of the bank's customers; and confidential credit analyses of such customers. In considering the interests of the bank, the court properly noted that, where, as here, third-party bank customer information is at issue, sealing orders are appropriate inasmuch as 'there is a compelling interest in sealing third-party financial information since disclosure could impinge on the privacy rights of third parties who clearly are not litigants.'"

Massel v. Gibbins, 59 Misc 3d 952 (Sup.Ct. N.Y.Co. 2018)(Jaffe, J.) – In 2016 defendant commenced an action in England against plaintiff, seeking to enjoin her from publishing

"false claims" about him, including that he transmitted a venereal disease to her. He obtained an order from the British Court granting a "complete sealing of the action." In this New York action, plaintiff seeks damages for negligence and infliction of emotional distress arising from the alleged transmission of venereal disease. Defendant seeks enforcement of the British Court's sealing order. "The First Department 'has consistently held' that the extension of comity is 'normally not extended by New York Courts to non-final, non-merit orders.'" But, "even if the British orders are deemed final and on the merits, if repugnant to the first and sixth amendments to the United States Constitution, and as applied to the states by the fourteenth amendment, they would not be entitled to recognition [citations omitted]. The right to an open courtroom and a free press are essential components of our constitutional tradition, so much so that parties cannot even stipulate to sealing a court record without a court's written finding of good cause.'" Under our law, "'the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.'" And, "here, having failed to explain or address the British Court's reliance on his 'Article 8 right to respect for private and family life and the Article 10 right of freedom of expression,' defendant provides no basis for a determination that British law, as applied in the two orders, is not repugnant to our law."

Matter of Hayes, 59 Misc 3d 543 (Surr.Ct. Essex Co. 2018)(Meyer, J.) – In settling the estate's wrongful death claim against General Motors, apparently resulting from an ignition switch defect, the petitioner administratrix seeks to seal the "confidential settlement agreement." The grounds urged "rest upon the confidentiality agreement the administratrix executed with GM, two orders of the MDL court, and the assertions that sealing 'is necessary to preserve Petitioner's privacy and obligation of confidentiality, and to facilitate the settlement of other claims against GM in connection with the ignition switch defect." The Court denies the application. "'The public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute [citation omitted], about which secrecy, then, may well provide the greater detriment to the public [citations omitted].' Due to the widespread public knowledge of the GM ignition switch defect, and the lack of compelling evidence of any harm or disadvantage to GM from disclosure of the settlement here, the presumption of openness of public court records has not been overcome."

Doe v. Spencer Cox Clinic, N.Y.L.J., 1523603470 (Sup.Ct. N.Y.Co. 2018)(Reed, J.) – This is an action against a hospital for "improper public disclosure of certain protected patient health information, including, among other things, plaintiff's HIV status, history of STDs, history of sexual abuse and/or assault, and use of treatment-related prescription drugs." Plaintiff seeks to maintain the action under a pseudonym, and to seal the file. To balance the interests of the plaintiff and those of the public, "the court considers the following factors: '(1) whether the justification asserted is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a

sensitive and highly personal nature; (2) whether the party seeking anonymity has an illegitimate ulterior motive; (3) the extent to which the identity of the litigant has been kept confidential; (4) whether identification poses a risk of mental or physical harm, harassment, ridicule, or personal embarrassment; (5) whether the case involves information of the utmost intimacy; (6) whether the action is against a governmental or private entity; (7) the magnitude of the public interest in maintaining confidentiality or knowing the party's identity; (8) whether revealing the identity of the party will dissuade the party from bringing the lawsuit; (9) whether the opposition to anonymity has an illegitimate basis; and (10) whether the other side will be prejudiced by use of the pseudonym." Weighing these factors here "supports a determination allowing plaintiff's use of a pseudonym" and sealing the file.

People ex rel. Qui Tam "The Bayrock Qui Tam Litigation Partnership" v. Bayrock Group LLC, N.Y.L.J., 1202780892800 (Sup.Ct. N.Y.Co. 2017)(Singh, J.) – Individual defendants seek an order permitting them to file their tax return documents in this action under seal. The motion is granted. "Uniform Rules for Trial Courts (22 NYCRR) section 216.1(a) provides that 'a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof.'" And, "'although the term "good cause" is not defined, a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action' [citation omitted]. 'A finding of "good cause" presupposes that public access to the documents will likely result in harm to a compelling interest of the movant' [citation omitted]. Courts have consistently granted sealing orders when the information sought to be sealed touches on a matter traditionally treated confidentially, such as personal medical records [citation omitted]. Like medical records, tax returns contain confidential, sensitive information. Medical records contain private information about our personal health. Likewise, tax records contain private information about our personal finances. Here, defendants maintain that: a) many of the underlying tax return documents are jointly-filed returns; and b) the privacy interests of spouses who are not parties to this litigation are in jeopardy. Accordingly, we find that defendants have a legitimate expectation of privacy. By contrast, the plaintiff/relator has not adequately identified any genuine, substantial public interest that would be served by public access to the non-public information of the defendants. Where, as here, a sealing order preserves the confidentiality of materials involving the internal finances of a party and are of minimal public interest, good cause has been shown for documents to be filed under seal."

State ex rel. Banerjee v. Moody's Corporation, 54 Misc 3d 705 (Sup.Ct. N.Y.Co. 2017) (d'Auguste, J.) – A *qui tam* action is "placed under seal at its inception" under State Finance Law §190(2)(b). But "the law requires that a *qui tam* complaint be unsealed if the State has decided to participate in the *qui tam* action [citation omitted] or if the plaintiff relator intends to proceed with the action, after the State and, if applicable, local

municipality, decline to participate." Here, "because the State and City have both declined to participate, the issue of whether the instant matter should be under seal is governed by the same laws as with any other action – specifically, 22 NYCRR 216.1(a)." Under that provision, "'confidentiality is clearly the exception, not the rule, and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.'" While anonymity of a *qui tam* plaintiff may be "justified in 'compelling situations involving "highly sensitive matters" including "social stigmatization," real danger of "physical harm," or "where the injury litigated against would occur as a result of the disclosure of the plaintiff's identity,"'" no such showing has been made here.

STAYING AN ACTION

Gluick v. Frank's Restaurant, Inc., N.Y.L.J., 1510023486 (Sup.Ct. Nassau Co. 2017) (Feinman, J.) – "'The law is clear that a court is not required to stay a civil action until a pending related criminal prosecution has been terminated so that a party can avoid the difficulty of choosing between presenting evidence in his or her own behalf and asserting his or her Fifth Amendment rights' [citations omitted]. 'In the context of civil litigation, a discretionary stay pending resolution of a related criminal action is appropriate to avoid prejudice to another party that would result from the assertion of the privilege against self-incrimination by a witness; however, no such accommodation need be extended to the party who invokes the constitutional privilege.'" Of course, "the fact that a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege does not, however, mean that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to a judgment." Here, "the defendant was convicted prior to the plaintiff bringing the instant action. The defendant has been deposed, albeit, he invoked his Fifth Amendment rights to certain questions. The action has been certified, and almost three years have elapsed during the pendency of this action prior to the defendant moving to stay the action, on the grounds that he has appealed the conviction." The motion for a stay was denied.

PROVISIONAL REMEDIES

ATTACHMENT

JSC VTB Bank v. Mavlyanov, 154 A D 3d 560 (1st Dept. 2017) – "The court should not have ordered attachment of real estate located in California, i.e., outside its jurisdiction."

Citibank, N.A. v. Keenan Powers & Andrews PC, 149 A D 3d 484 (1st Dept. 2017) – Having succeeded on the merits of the action, defendant "is entitled to the damages it

suffered as a result of the wrongful attachment [citation omitted]. A finding of fault is not required to recover damages under this provision, as plaintiffs are 'strictly liable' for the damages they caused [citation omitted]. Under the circumstances, we find that the full amount of defense costs incurred by Secure Title in the underlying litigation was recoverable as damages for plaintiffs' wrongful attachment under CPLR 6212(e)."

PRELIMINARY INJUNCTION

Matter of Lauder v. Pellegrino, 57 Misc 3d 233 (Sup.Ct. Albany Co. 2017)(Mackey, J.) – "Because preliminary injunctions prevent litigants from taking actions that they are otherwise legally entitled to take in advance of adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards [citations omitted]. Courts do not have 'inherent authority' to issue preliminary injunctions either to protect the jurisdiction of an administrative agency adjudicating a dispute or to prevent actions which could render the agency's determination moot."

Lynn v. Sterling National Bank, 151 A D 3d 1049 (2d Dept. 2017) – "CPLR 6301 provides, in relevant part, that a plaintiff may obtain a preliminary injunction in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action [citation omitted]. However, as the plain language of CPLR 6301 makes clear, 'the pendency of an action is an indispensable prerequisite to the granting of a preliminary or temporary injunction' [citations omitted]. Here, the plaintiff moved for a preliminary injunction against the defendants when there was no judicial action pending between the parties. As a result, the Supreme Court lacked the authority to grant a preliminary injunction pursuant to CPLR 6301."

JSC VTB Bank v. Mavlyanov, 154 A D 3d 560 (1st Dept. 2017) – "The court should not have granted a preliminary injunction, because the primary relief sought in this action is money damages [citation omitted]. Plaintiff has no specific right to the properties at issue; it seeks to enjoin defendants from transferring, encumbering, or otherwise disposing of their properties so that it will be able to satisfy the judgments it obtained in Russia on defendant Igor Mavlyanov's guarantees."

Punwaney v. Punwaney, 148 A D 3d 489 (1st Dept. 2017) – "This action concerns the disposition of assets held in several foreign bank accounts after the death of the primary account holder." Plaintiff "seeks to enjoin defendants from withdrawing or transferring funds from the accounts." CPLR 6301 "authorizes preliminary injunctive relief enjoining violations of the plaintiff's rights 'respecting the subject of the action.' The 'subject of the action' requirement is satisfied here, because plaintiff claims entitlement to a specific fund – namely the foreign bank accounts."

Herczl v. Feinsilver, 153 A D 3d 1338 (2d Dept. 2017) – In an action for breach of a contract for the sale of real property, plaintiff sought a preliminary injunction to prevent sales of the property. "Supreme Court declined to enjoin the sales, but directed that all net proceeds of any sale of the properties be held in an escrow account until further order of the court." That was error. Upon properly denying the motion for an injunction, the Court should not have directed that any proceeds be held in escrow.

Long Island Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hospital, ___ A D 3d ___, 2018 WL 3748225 (2d Dept. 2018) – "'Agreements restricting an individual's right to work or complete are not favored and thus are strictly construed' [citations omitted]. 'A restrictive covenant will only be subject to specific enforcement [usually via preliminary injunction] to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'" Here, "the defendants made a *prima facie* showing that the provision of the covenant prohibiting Andrade for a period of two years from practicing surgery of any kind, within a 10-mile radius of all of the plaintiff's offices and affiliated hospitals, even those at which he had never worked, was geographically unreasonable, because it effectively barred him from performing surgery, his chosen field of medicine, in the New York metropolitan area [citation omitted]. In opposition, the plaintiff failed to raise a triable issue of fact as to whether imposing such a broad geographical restriction was necessary to protect its interests."

Rakosi v. Sidney Rubell Company, LLC, 155 A D 3d 564 (1st Dept. 2017) – In this action by owners of real property against the company managing the property, the Court affirms the granting of a preliminary injunction which enforced their termination of defendant as managing agent. "Plaintiffs have shown irreparable injury to the extent the properties continue to be managed by an agent they do not desire [citations omitted]. Further, given that defendants have been on notice, since 2009, that, by the settlement agreements' plain terms, their tenure as managing agent could expire as early as May 2016, and given they do not show why, if their termination by plaintiffs is ultimately deemed valid, they cannot seek management work elsewhere, the balance of equities weighs in plaintiffs' favor."

Spectrum Stamford LLC v. 400 Atlantic Title, LLC, 162 A D 3d 615 (1st Dept. 2018) – The Court here distinguishes the *Rakosi* case discussed directly above, in denying a preliminary injunction on similar facts. Here, "there is no 'imperative, urgent, or grave necessity' that the current property manager be replaced with CBRE at this time." For, unlike the situation in *Rakosi*, "plaintiff is merely an assignee of the lender and has solely an economic interest," whereas the plaintiffs in *Rakosi* "were owners of the properties with concerns about title and entered directly into property management agreements with the defendants." Moreover, since the relief requested "is primarily mandatory in nature," by which "the movant would receive some form of the ultimate relief sought as a final judgment," that relief is granted "only in 'unusual' situations, 'where the granting of the

relief is essential to maintain the *status quo* pending trial of the action.'" For, "'a mandatory injunction should not be granted, absent extraordinary circumstances, where the *status quo* would be disturbed and the plaintiff would receive the ultimate relief sought, *pendente lite*.'"

Mobstub, Inc. v. www.staytrendy.com, 153 A D 3d 809 (2d Dept. 2017) – "Upon the granting of a preliminary injunction, a plaintiff '*shall* give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction'" [emphasis by the Court]. Thus, here, where no undertaking was ordered at Supreme Court, the Appellate Division remits the matter "for the fixing of an appropriate amount of the undertaking."

Vassenelli v. City of Syracuse, 160 A D 3d 1412 (4th Dept. 2018) – "Plaintiff contends that the court erred in denying that part of his application seeking a waiver of the undertaking pursuant to CPLR 6312(b). We reject that contention. CPLR 6312(b) directs a court to fix an undertaking in an amount that will compensate a defendant for damages incurred by reason of the granting of a preliminary injunction in the event that it is finally determined that a plaintiff was not entitled to the injunction. Plaintiff, as the party herein who sought a preliminary injunction, was clearly and unequivocally required to post an undertaking [citations omitted]. Contrary to plaintiff's contention, the court had 'no power to dispense with the undertaking required by CPLR 6312(b).'"

Slifka v. Slifka, 162 A D 3d 530 (1st Dept. 2018) – "The court erred in enjoining the sale of property at issue pending the decision by the Surrogate pursuant to a temporary restraining order, which does not require an undertaking [citation omitted]. The TRO is merely a provisional remedy pending a hearing on a motion for a preliminary injunction [citation omitted], and the court did not schedule a hearing on plaintiffs' motion. However, it issued the 'stay/TRO' after allowing both sides an opportunity to be heard. Thus, the relief is in fact a preliminary injunction, and plaintiffs are required to post an undertaking [citation omitted]. We remand to Supreme Court to fix the amount of the undertaking."

19 Patchen LLC v. Rodriguez, 153 A D 3d 1382 (2d Dept. 2017) – "Supreme Court providently exercised its discretion in denying the plaintiff's motion for a preliminary injunction. While disputed issues of fact alone will not justify the denial of a motion for a preliminary injunction [citation omitted], the plaintiff failed to establish a likelihood of ultimate success on the merits [citation omitted]. The plaintiff also failed to establish irreparable injury absent the grant of the injunction, or that a balance of the equities was in its favor."

Riesenburger Properties, LLLP v. Pi Associates, LLC, 155 A D 3d 984 (2d Dept. 2017) – A *Yellowstone* injunction [*see*, *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N Y 2d 630 (1968)] maintains the *status quo* so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture of the lease. To obtain *Yellowstone* relief a tenant need not show a likelihood of success on the merits. It can simply deny the alleged breach of its lease. *Yellowstone* relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligations under a lease. Here, the Court holds that "'an application for *Yellowstone* relief must be made not only before the termination of the subject lease but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure' [citations omitted]. 'Where a tenant fails to make a timely request for a temporary restraining order, a court is divested of its power to grant a *Yellowstone* injunction.'"

The Art Factory Corp. v. 740-748 Hicks Realty, N.Y.L.J., 1511173005 (Sup.Ct. Kings Co. 2017)(King, J.) – "At least three of the defaults under the lease are incurable due to the Tenant's failure to obtain prior written approval from the Landlord pursuant to the lease." Thus, "Tenant performed construction work in the Demised Premises which deviated from the project plans previously submitted to the Landlord." Moreover, "Tenant does not dispute that it failed to obtain insurance coverage as set forth in the Third Default in the Notice to Cure." Those defaults are "incurable." Accordingly, the motion for a *Yellowstone* injunction is denied.

159 MP Corp. v. Redbridge Bedford, LLC, 160 A D 3d 176 (2d Dept. 2018) – A divided Court holds that "the right to a declaratory judgment, inclusive of the *Yellowstone* relief sought here, is not so vaulted as to be incapable of self-alienation." Thus, at least under the circumstances here, in which "the parties were sophisticated entities that negotiated at arm's length and entered into lengthy and detailed leases defining each party's rights and obligations with great apparent care and specificity," the Court holds that a tenant's waiver in a lease of the right to seek *Yellowstone* relief is enforceable, and not a violation of public policy. The dissenter argued that "a broad provision in a commercial lease providing that the tenant waives its right to seek declaratory relief with respect to any provision of the lease, or with respect to any notice sent pursuant to the provisions of the lease, violates public policy and is, therefore, unenforceable."

Serpin International Gourmet Foods v. Brooklyn Kings Plaza LLC, N.Y.L.J., 1517162372 (Sup.Ct. Kings Co. 2018)(Ash, J.) – A *Yellowstone* injunction is not available when the agreement between the parties is a license rather than a lease. "'The central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental' [citation omitted]. A

license, in contrast, gives no interest in land and confers only the nonexclusive revocable right to enter the land of the licensor to perform an act." The agreement between the parties here, "under which FunAddict sells merchandise from a moveable cart/kiosk within Queens Center's mall, constitutes a license agreement and not a lease."

NOTICE OF PENDENCY

Stout Street Fund I, L.P. v. Halifax Group, LLC, 148 A D 3d 749 (2d Dept. 2017) – "'Pursuant to CPLR 6501, the filing of a notice of pendency provides constructive notice of an action in which the judgment demanded may affect the title to real property' [citation omitted]. 'The statute further provides that a person whose conveyance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party' [citations omitted]. 'A person holding an interest that accrued prior to the filing of a notice of pendency, but not recorded until after the filing of the notice, is still so bound' [citation omitted]. 'In order to cut off a prior lien, such as a mortgage, the purchaser or encumbrancer must have no knowledge of the outstanding lien and must win the race to the recording office.'"

Matter of F.C.I.C. LLC v. Hatzlucha Houses, N.Y.L.J., 1523613221 (Sup.Ct. Richmond Co. 2018)(Garvey, J.) – "In considering a motion for cancellation of a notice of pendency on the ground that the action does not fall within the scope of CPLR 6501 the court must limit their review to the face of the complaint filed in the action [citation omitted]. An amended complaint cannot be used to supplement an insufficient complaint and notice of pendency [citation omitted]. A complaint that is devoid of any cause of action seeking judgment which would 'affect the title to, or the possession, use or enjoyment of real property' is insufficient to support a filing of a notice of pendency [citation omitted]. In a shareholder derivative action the courts have held that where property is a corporate asset or is allegedly purchased with funds fraudulently removed from the corporation and the movant requests a judgment that would affect the title, possession or use and enjoyment of that property, then a notice of pendency is appropriate [citations omitted]. Additionally, the likelihood of success on the merits is an irrelevant factor in determining the validity of the notice of pendency [citation omitted]." Here, "the petitioner's action is one that is requesting dissolution of a limited liability company, whose sole asset is real property and they are seeking to assign a receiver to manage the properties owned by the company and sell the same. The Petitioner's request is clearly one that will affect the title to, or possession or use or enjoyment of the real property owned by AKW corporation."

Sudit v. Labin, 148 A D 3d 1077 (2d Dept. 2017) – "CPLR 6513 provides that a notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods 'for good cause shown.' The general rule is that the extension must be requested, and the extension order 'filed, recorded and indexed,' before expiration of the prior notice [citation omitted]. 'This is an exacting rule; a notice

of pendency that has expired without extension is a nullity' [citations omitted]. The general rule does not apply, however, to an action to foreclose a mortgage on real property. Instead, CPLR 6516(a) specifically provides, in pertinent part, as follows": 'In a foreclosure action, a successive notice of pendency may be filed to comply with section thirteen hundred thirty-one of the real property actions and proceedings law, notwithstanding that a previously filed notice of pendency in such action or in a previous foreclosure action has expired pursuant to section 6513 of this article.'"

Deutsche Bank National Trust Company v. Daw, 57 Misc 3d 828 (Sup.Ct. Queens Co. 2017)(Butler, J.) – Even though a belated second notice of pendency is permitted in a foreclosure action by CPLR 6516(a), that notice may not be given *nunc pro tunc* effect. "*Nunc pro tunc* treatment is generally reserved for 'correcting irregularities in the entry of judicial mandates or like procedural errors,' and it may not be used to record a fact as of a prior date when it did not then exist."

ACCELERATED JUDGMENT

CPLR 3211

Ray v. Chen, 148 A D 3d 568 (1st Dept. 2017) – "'The power of a *nisi prius* court to dismiss an action *sua sponte* should be used sparingly and only in extraordinary circumstances' [citation omitted]. No such circumstances are present here. In the absence of notice that plaintiffs would be required to respond to a motion to dismiss, 'the court was virtually without jurisdiction to grant the relief afforded to defendant.'"

Matter of Associated General Contractors of NYS, LLC v. New York State Thruway Authority, 159 A D 3d 1560 (4th Dept. 2018) – "Contrary to the [Supreme] Court's determination, 'a party's lack of standing does not constitute a jurisdictional defect and does not warrant *sua sponte* dismissal of a complaint.'"

LVNV Funding, LLC v. Sengillo, 60 Misc 3d 571 (Sup.Ct. Monroe Co. 2018)(Stander, J.) – Whether by pre-answer motion to dismiss, or a post-answer for summary judgment, based on a claim of lack of standing "the burden is initially on the defendant to establish plaintiff's lack of standing, 'rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied.'"

RCI Plumbing Corp. v. Turner Towers Tenant Corp., 152 A D 3d 723 (2d Dept. 2017) – "The Supreme Court has broad discretion is determining whether an action should be dismissed on the ground that there is another action pending [citation omitted]. Under the circumstances of this case, the court providently exercised its discretion in denying that branch of the defendant's motion which was pursuant to CPLR 3211(a)(4) to dismiss

the complaint insofar as asserted against it, and joining this action with a previously commenced action for discovery and trial."

American Home Buyers Consulting Services, Inc. v. Feican, N.Y.L.J., 1535013968 (Sup.Ct. Richmond Co. 2018)(Ozzi, J.) – On a motion to dismiss under CPLR 3211(a)(4) on grounds of another action pending, "generally, New York courts follow the first-in-time rule, meaning that 'the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." To warrant dismissal on these grounds, "the two actions must be 'sufficiently similar' and the relief sought must be 'the same of substantially the same' [citation omitted]. It is not necessary that the precise legal theories presented in the first proceeding be presented in the second proceeding [citation omitted]. The critical element is that both suits must 'arise out of the same subject matter or series of alleged wrongs.'"

Lash Affair by J. Paris LLC v. Mediaspa LLC, N.Y.L.J., 1512010023 (Sup.Ct. Westchester Co. 2017)(Ruderman, J.) – "The so-called 'first to file' rule, regarding which court should determine an action where the parties filed their actions in two separate courts [citation omitted], is not applicable here. While Mediaspa commenced its New York County action by filing on May 26, 2017, five days before Lash Affair commenced this Westchester County action by filing on May 31, 2017, that race-to-the-courthouse victory is immaterial. Indeed, 'courts have often deviated from the first-in-time rule where one party files the first action preemptively, after learning of the opposing party's intent to commence litigation' [citations omitted]. Here, Lash Affair informed Mediaspa by its May 1, 2017 letter of its intent to sue should the parties be unable to settle, which tends to indicate that Mediaspa's prior filing was preemptive in nature. Moreover, following its May 26, 2017 New York County filing, Mediaspa took no steps in that action. Indeed, Mediaspa did not even serve Lash Affair until several months later. Where a complaint was not served in the 'prior' action, 'it did not constitute a prior pending action for the purposes of CPLR 3211(a)(4).'"

IRX Therapeutics, Inc. v. Landry, 150 A D 3d 446 (1st Dept. 2017) – The Appellate Division affirms Supreme Court's dismissal of this action "based on the pendency of an action in federal court in Texas concerning the same alleged contract." Although this action was filed first, "chronology is not dispositive, particularly since both actions are at the earliest stages of litigation [citation omitted], and since the format of this action (i.e., a declaratory judgment action) suggests that it was responsive to defendant's threat of litigation [citation omitted]. The record also suggests that plaintiff commenced this action preemptively in an effort to gain a tactical advantage and deprive defendant of his choice of forum."

Quatro Consulting Group, LLC v. Buffalo Hotel Supply Company, Inc., 55 Misc 3d 615 (Sup.Ct. Monroe Co. 2017)(Rosenbaum, J.) – "BHS commenced its action by filing the

summons with notice in Erie County at least six days prior to Quatro commencing its action in Monroe County. The belated verification and assignment of an index number by the Erie County Clerk through its efiling systems should not disrupt the first-in-time rule." The Court rejects Quatro's argument that "the Erie County filing was actually not the 'first-in-time' since the filing of a summons with notice only, and not the complaint does not constitute 'another action pending,'" even though Quatro "cites several cases from the First and Second Departments which held that CPLR 304 does not mandate dismissal as a 'prior action pending' where a complaint has not been served." For, "in review of those cases, it is unclear why the appellate courts did not follow the clear statutory language, that 'an action is commenced by filing a summons and complaint or *summons with notice*' [citation omitted; emphasis by the Court]. The statute is clear that commencement occurs with either the filing of the summons and complaint, or the filing of a summons with notice. The Fourth Department in a factually similar case and filing scenario made such a determination that the filing of a summons with notice was commencement."

Carlson v. American International Group, Inc., 30 N Y 3d 288 (2017) – Back in the mid-1970's, the Court of Appeals decided two important – and perhaps contradictory – cases setting out the standards for the use of extrinsic material submitted on motions to dismiss for failure to state a cause of action under CPLR 3211(a)(7). In *Rovello v. Orofino Realty Co., Inc.*, 40 N Y 2d 633 (1976), the Court, split 5-2, held that, when a motion to dismiss is not converted into a summary judgment motion pursuant to CPLR 3211(c), "affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems that after the amendment of 1973 [adding CPLR 3211(c), and the opportunity to convert a motion to dismiss into a summary judgment motion], affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits *establish conclusively* that plaintiff has no cause of action" [emphasis added]. The dissenters characterized the majority as having "ruled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (sub. (a), par. 7), the trial court may not dismiss as long as the complaint and the plaintiff's affidavit, if there be any, state all the elements of a cause of action, and that a defendant's affidavit, clearly showing the absence of one of these essential elements, is of no avail. In essence, the majority has abrogated the statute and has revitalized the common law demurrer." The following year, in *Guggenheimer v. Ginzburg*, 43 N Y 2d 268 (1977), the Court – now with both *Rovello* dissenters joining a unanimous decision – stated the test somewhat differently: "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail [citations, which did *not* include *Rovello*, omitted]. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact

as claimed by the pleader to be one is not a fact at all and unless it can be said that *no significant dispute exists* regarding it, again dismissal should not eventuate [citations, which again did *not* include *Rovello*, omitted; emphasis added]." Since those decisions, there has been much confusion in the lower Courts as to the proper use to which extrinsic evidence may be put in an unconverted motion to dismiss. Then, some 30 years later, in *Nonnon v. City of New York*, 9 N Y 3d 825 (2007), in the course of a brief Memorandum Opinion, the Court stated that, "while affidavits may be considered, if the motion has not been converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims [citation omitted; emphasis added]. By contrast, a motion for summary judgment, which seeks a determination that there are no material issues of fact for trial, assumes a complete evidentiary record." The Court cited *Rovello* for this proposition, but did not cite *Guggenheimer*. Then, in *Lawrence v. Graubard Miller*, 11 N Y 3d 588 (2008), the Court of Appeals, citing *Rovello*, but neither *Guggenheimer* nor *Nonnon*, held that, "affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 *unless* they 'establish conclusively that petitioner has no claim or cause of action'" [emphasis by the Court]. More recently, in *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N Y 3d 342 (2013), the Court of Appeals held that "Bally has moved to dismiss under CPLR 3211(a)(7), which limits us 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, as Supreme Court observed, plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face [citing *Rovello*]. For, "this matter comes to us on a motion to dismiss, not a motion for summary judgment. As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and Miglino has at least pleaded a viable cause of action at common law." In *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A D 3d 128 (1st Dept. 2014), also reported on in a prior year's "Update," the issue that divided the Court was the impact of *Miglino*. The majority held that "what the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading 'will seldom if ever warrant the relief the defendant seeks *unless such evidence establishes conclusively that plaintiff has no cause of action*' [citations omitted; emphasis by the Court]." And, "the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim [citations omitted]. When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one' [citations omitted]. As alleged here, if the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate." The concurring Justice argued that "CPLR 3211(a)(1) may be invoked where it is claimed that 'documentary evidence utterly refutes plaintiff's factual allegations,

conclusively establishing a defense as a matter of law' [citation omitted]. On the other hand, as recently stated by the Court of Appeals, a motion under CPLR 3211(a)(7) 'limits us to an examination of the pleadings to determine whether they state a cause of action' [citing *Miglino*]. Therefore, contrary to what the majority holds today, the disclaimers and disclosures in the offering circulars and other documents [defendant] relies upon are of no moment for purposes of this CPLR 3211(a)(7) motion. As [plaintiff] aptly argued below, there was no basis for the motion court to consider documents outside the complaint at this stage of the proceeding." That same year's "Update" also reported on the Fourth Department's decision in *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 A D 3d 85 (4th Dept. 2015). There, the Court , agreeing with the First Department majority in *Basis Yield*, concluded that *Miglino* does *not* bar "the consideration of any evidentiary submissions outside the four corners of the complaint." For, "given its unqualified citation to *Rovello*, *Miglino* is properly understood as a straightforward application of *Rovello*'s longstanding framework. *Miglino* was 'not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits' [citation omitted] because the evidentiary submissions were insufficiently conclusive, not because they were categorically inadmissible in the context of a CPLR 3211(a)(7) motion." And, in *Clarke v. Laidlaw Transit, Inc.*, 125 A D 3d 920 (2d Dept. 2015), the Second Department also assessed the impact of *Miglino*. "The plaintiff 'may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face' [citations omitted]. The plaintiff may stand on his or her pleading alone to state all of the necessary elements of a cognizable cause of action, and, unless the motion to dismiss is converted by the court to a motion for summary judgment, the plaintiff will not be penalized because he or she has not made an evidentiary showing in support of the complaint [citation omitted]. In light of these standards, it is clear that the defendant's motion should have been denied. The complaint stated a cause of action, and the defendant's submissions did not 'establish conclusively that the plaintiff has no cause of action.'" Here, in *Carlson*, the Court of Appeals, in a brief comment made in the course of a lengthy opinion on a different issue, noted that "in assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'"

Gawrych v. Astoria Federal Savings and Loan, 148 A D 3d 681 (2d Dept. 2017) – "On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail' [citations omitted]. 'The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference' [citations omitted]. 'A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint' [citations omitted], and upon considering such an affidavit, the facts

alleged therein must also be assumed to be true [citation omitted]. Nevertheless, 'bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true' [citations omitted]. Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material facts as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate."

Mid-Hudson Valley Federal Credit Union v. Quartararo & Lois PLLC, 155 A D 3d 1218 (3d Dept. 2017) – "When assessing a pre-answer motion to dismiss for failure to state a cause of action, we accept the allegations in the complaint as true and accord the plaintiff every favorable inference [citations omitted]. Such favorable treatment, however, 'is not limitless' [citation omitted]. Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss [citations omitted]. 'Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.'"

Garcia v. Polsky, Shouldice & Rosen, P.C., 161 A D 3d 828 (2d Dept. 2018) – In opposition to a motion to dismiss pursuant to CPLR 3211(a)(7), "'a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims' [citations omitted]. 'Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate' [citations, including to *Guggenheimer*, omitted]. 'Whether the complaint will later survive a motion for summary judgment or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of the pre-discovery CPLR 3211 motion to dismiss.'"

McCarthy v. Shah, 162 A D 3d 1727 (4th Dept. 2018) – "'Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate' [citations omitted]. Above all, the issue 'whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'"

Board of Managers of 100 Congress Condominium v. SDS Congress LLC, 152 A D 3d 478 (2d Dept. 2017) – "'When evidentiary material outside the pleading's four corners is considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.'"

Christ the Rock World Restoration Church International, Inc. v. Evangelical Christian Credit Union, 153 A D 3d 1226 (2d Dept. 2017) – "While a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) [citation omitted], it must be kept in mind that a motion pursuant to CPLR 3211(a)(7) is not a motion for summary judgment unless the court elects to so treat it under CPLR 3211(c), after giving adequate notice to the parties [citation to *Rovello* omitted]. 'Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate'" [citations, including to *Guggenheimer*, omitted].

Nestor v. Putney Twombly Hall & Hirson, LLP, 153 A D 3d 840 (2d Dept. 2017) – "'When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" [citation to *Guggenheimer* omitted].

Pesce v. Leimsider, 59 Misc 3d 23 (App.Term 2d Dept. 2018) – "A plaintiff 'may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face' [citations omitted]; rather, a plaintiff may stand on its pleading alone to state all the necessary elements of a cognizable cause of action [citation omitted]. 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'"

Wells Fargo Bank, N.A. v. Cajas, 159 A D 3d 977 (2d Dept. 2018) – "The Supreme Court erred in *sua sponte* raising and considering the defense of lack of personal jurisdiction [based on improper service of process]. The homeowner waived this defense by failing to move to dismiss the complaint on this ground within 60 days of serving his answer," pursuant to CPLR 3211(e). "As the homeowner waived this defense, it was error for the court, *sua sponte*, to direct dismissal of the complaint on this basis."

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TIMING OF MOTIONS FOR SUMMARY JUDGMENT

Rubino v. 330 Madison Company, LLC, 150 A D 3d 603 (1st Dept. 2017) – In *Brill v. City of New York*, 2 N Y 3d 648 (2004), the Court of Appeals held that the Legislature meant what it said when it amended CPLR 3212(a) to provide a time limit for summary judgment motions. That statute provides that, unless the Court sets a different date (which may not be earlier than 30 days after Note of Issue is filed), the last date to make a dispositive motion is 120 days after filing of the Note of Issue, unless the Court extends the time "for good cause shown." In *Brill*, the Court of Appeals held: "We conclude that 'good cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy." Berating the "sloppy practice threatening the integrity of our judicial system," the Court declined to permit a violation of the statutory deadlines. Soon after, in *Miceli v. State Farm Mutual Automobile Insurance Company*, 3 N Y 3d 725 (2004) the Court re-affirmed its holding. "As we made clear in *Brill*, and underscore here, statutory time frames – like court-ordered time frames [citation omitted] – are not options, they are requirements, to be taken seriously by the parties." A prior year's "Update" reported on *Kershaw v. Hospital for Special Surgery*, 114 A D 3d 75 (1st Dept. 2013), in which the narrowly-divided Appellate Division disagreed about the application of the rule of *Brill* to a medical malpractice case in which plaintiff had sued two different hospitals that treated him at different times, claiming that both failed to advise and perform necessary surgery. One timely moved for summary judgment; the other belatedly "cross-moved" for summary judgment. The majority affirmed Supreme Court's denial of the untimely "cross-motion," rejecting the argument that "there is an exception to *Brill* for cases where a late motion or cross motion is essentially duplicative of a timely motion." For, "the Court of Appeals intended no such exception, and to the extent this Court has created one, it did so, whether knowingly or unwittingly, by relying on precedents which predate *Brill* and which, if followed, will continue to perpetuate a culture of delay." Thus, "it is true that since *Brill* was decided, this Court has held, on many occasions, that an untimely but correctly labeled cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause [citations omitted]. Some decisions also reason that because CPLR 3212(b) gives the court the power to search the record and grant summary judgment to any party without the necessity of a cross motion, the court may address an untimely cross motion at least as to the causes of action or issues that are the subject of the timely motion." But in *Kershaw*, the "cross-motion," in addition to being untimely, "is not a true cross motion." A cross-motion, made pursuant to CPLR 2215, is "'a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.'" But this "cross-motion" was directed at the complaint, as opposed to any cross claims, and was not made returnable the same day as the original motion. So, "it was not a cross motion as defined in CPLR 2215." And, "allowing movants to file untimely, mislabeled 'cross

motions' without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay." Finally, "we are concerned that the respect for court orders and statutory mandates and the authoritative voice of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a 'cross motion' notwithstanding the absence of a reasonable explanation for its untimeliness." The *Kershaw* dissenters agreed with the majority that the "cross-motion" was mislabeled a cross-motion, and was untimely pursuant to CPLR 2215. "But to reject the motion on that ground, under the facts herein, ignores the adverse consequences of imposing an overly restrictive rule, specifically, consequences that are especially adverse to the courts." For, no prejudice was shown, and "the majority thereby dispenses with the salutary aspects of summary disposition acknowledged in *Brill* for no apparent purpose." Accordingly, the dissent would hold that "a late motion filing is properly entertained when it raises nearly identical issues to one timely made." And, here, both the motion and the "cross-motion" "seek dismissal of the complaint on the identical ground – that it was not a departure from good and accepted medical practice to forego surgery in favor of a conservative treatment plan." By contrast, that year's "Update" also reported on *Derrick v. North Star Orthopedics, PLLC*, 121 A D 3d 741 (2d Dept. 2014), in which one defendant timely moved for summary judgment, and another defendant untimely "cross-moved" for summary judgment. The latter "was improperly designated a cross motion [citation omitted] and was, in fact, an untimely motion for summary judgment [citation omitted]. However, 'an untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds.'" Later, in *Ezzard v. One East River Place Realty Company, LLC*, 129 A D 3d 159 (1st Dept. 2015), the First Department, despite its earlier holding in *Kershaw*, held that "although untimely, NYE&E's motion should have been considered insofar as it presents nearly identical issues and proof as those raised by the owner and Solow in their joint summary judgment motion." Last year's "Update" reported on *Reutzel v. Hunter Yes, Inc.*, 135 A D 3d 1123 (3d Dept. 2016), in which the Third Department entered the fray, and held that, "'a cross motion for summary judgment made after the expiration of the deadline for making dispositive motions may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion.'" Here, in *Rubino*, the First Department holds that "the court should have denied as untimely Waldorf's cross motion for summary judgment dismissing appellants' contractual indemnification claim against it without considering the merits, since the motion was filed after the applicable deadline and Waldorf failed to show good cause for the delay [citation omitted]. Waldorf's purported cross motion against appellants, nonmoving parties, was not a true cross motion [citing *Kershaw*], and did not merely raise issues 'nearly identical' to those raised by plaintiffs and Mazzeo in their timely motions."

Jarama v. 902 Liberty Avenue Housing Development Fund Corp., 161 A D 3d 691 (1st Dept. 2018) – "This Court may consider the merits of defendants' untimely cross motion for summary judgment dismissing the complaint to the extent it sought dismissal of the Labor Law §240(1) claim, because it is based on the same issues raised in plaintiff's motion [citation omitted]. However, the remainder of the motion, seeking dismissal of Labor Law §§241(6) and 200 and common-law negligence claims cannot be considered because it does not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay."

Fomina v. DUB Realty, LLC, 156 A D 3d 539 (1st Dept. 2017) – "In assessing the timeliness of a motion for summary judgment, the proper measure is whether the motion is served within 120 days of the filing of the note of issue, not whether the motion is filed within that time frame."

Lewis v. Rutkovsky, 153 A D 3d 450 (1st Dept. 2017) – Under the Court's Preliminary Conference Order, the last day for a summary judgment motion was January 26, 2015. "Dr. Rutkovsky filed his OSC with the clerk's office on January 26, 2015; the court signed it on January 29, 2015 and Dr. Rutkovsky served it on January 30, 2015. LHHN filed its OSC on January 23, 2015; the court signed it on January 28, 2015 and LHHN served it on February 2, 2015. No party disputes that, on the day the orders would usually have been processed and timely signed, inclement weather from Winter Storm Juno created a 'state of emergency' and caused the early closure of the courts; indeed because of the storm, the Governor signed an executive order suspending legal deadlines. Indeed, even if we were to find that the orders were untimely, the weather conditions and resulting court closing provides 'good cause' for the *de minimis* delay. Under these circumstances, the motion court should have considered defendants' motions for summary judgment on the merits."

Mitchell v. City of Geneva, 158 A D 3d 1169 (4th Dept. 2018) – "Defendants' summary judgment motion was made 618 days after the deadline set forth in the court's scheduling order and 204 days after the filing of the note of issue." And, "it is well settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first time in reply papers [citations omitted]. Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely [citation omitted], and the court should have declined to reach the merits."

Reeps v. BMW of North America, LLC, 160 A D 3d 603 (1st Dept. 2018) – "Prior court orders and stipulations between the parties show that the parties, with the court's consent, charted a procedural course that deviated from the path established by the CPLR and allowed for defendants' filing of this round of summary judgment motions more than 120 days after the filing of the note of issue [citation omitted]. Thus, the motions were

timely, and we remand the matter to the motion court for a full consideration of their merits."

Zarnoch v. Luckina, 148 A D 3d 1615 (4th Dept. 2017) – "We agree with plaintiff that the court erred in denying his pretrial cross motion to dismiss the special employment affirmative defense as untimely under CPLR 3212(a) [citation omitted]. To the extent that the cross motion sought relief pursuant to CPLR 3211(b), it was not subject to the time limit for summary judgment motions under CPLR 3212(a)."

Casalini v. Alexander Wolf & Son, 157 A D 3d 528 (1st Dept. 2018) – Labelling as a "motion *in limine*" what is in fact a motion for summary judgment will not avoid the time limits of CPLR 3212(a).

157 Milton LLC v. Sheydvesser, N.Y.L.J., 1535091580 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – "The moment of joinder of issue continues to be the earliest time for the making of a motion for summary judgment on the claim involved. If the motion is made against the plaintiff's cause of action, the service of the defendant's answer marks the joinder of issue; if its subject is a counterclaim, the service of the plaintiff's reply is the moment of joinder." And, "the Supreme Court is powerless to grant summary judgment prior to joinder of issue." Moreover, "a motion for summary judgment shall be supported by a copy of the pleadings [citation omitted]. 'The pleadings' means 'a complete set of the pleadings.'" Here, plaintiff's motion papers "are silent on whether any of the defendants have answered the complaint, and no copy of an answer is attached. Thus, either the motion is premature, or plaintiff has failed to supply "a copy of the pleadings." In either event, "the motion should be denied on this basis alone."

SUMMARY JUDGMENT

Outdoors Clothing Corp. v. Schneider, 153 A D 3d 717 (2d Dept. 2017) – "As with the other defenses and objections listed in CPLR 3211(a)(5), the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading [citations omitted]. Here, the defendants avoided waiving the affirmative defense of release by raising it in their pre-answer motion to dismiss, and they were thereafter entitled to seek summary judgment based on that defense despite its absence from the answer."

Ingvarsdottir v. Bedi, N.Y.L.J., 1202785146664 (Sup.Ct. N.Y.Co. 2017)(Edmead, J.) – "Plaintiff's motion for summary judgment pursuant to CPLR 3212 is not barred by her previous motion brought pursuant to CPLR 3213. CPLR 3213 provides that 'When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.' Inasmuch as summary relief pursuant to CPLR 3213 is limited to an 'instrument for the payment of money only' whereas

summary relief pursuant to CPLR 3212 requires a searching of an entire record after the joinder of issue, it cannot be said that this Court's previous denial of plaintiff's motion under CPLR 3213 precludes or bears on the merits of plaintiff's instant motion under CPLR 3212."

Rodriguez v. City of New York, 31 N Y 3d 312 (2018) – Last year's "Update" reported on the Appellate Division decision in this action [142 A D 3d 778 (1st Dept. 2016)]. As the Appellate Division put it, "in this case, we are revisiting a vexing issue regarding comparative fault: whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault. This issue has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this Department." The narrowly-divided Appellate Division concluded that "the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a *prima facie* showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one." The dissenters argued that plaintiff's comparative negligence, unless enough to exonerate defendant entirely, is irrelevant on this motion. For, "the comparative negligence doctrine does not bear upon *whether* a defendant is liable; rather, it bears upon the extent of the defendant's liability, where both the defendant and the plaintiff engaged in culpable conduct resulting in the injury" [emphasis by the Court]. Thus, "where a defendant fails to raise issues of fact as to his or her own negligence, but succeeds in raising issues of fact as to the plaintiff's comparative negligence, partial summary judgment on liability with respect to *defendant's* negligence is warranted, because the defendant will be liable to the extent his or her misconduct proximately caused the injury" [emphasis by the Court]. The Court of Appeals, narrowly-divided, has now resolved the split among the Departments and within the First Department, reversing the Appellate Division here, and holding that plaintiffs do *not* bear the burden of establishing the absence of their own comparative negligence to obtain partial summary judgment as to defendant's liability. Such a burden, the majority rules, "is inconsistent with the plain language of CPLR 1412," because "it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a *prima facie* case on the issue of defendant's liability." And, "defendant's approach would have us consider comparative fault a defense. But, comparative negligence is *not* a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's *prima facie* cause of action for negligence, and as CPLR 1411 plainly states, is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages." The dissent argued that "determinations of degrees of fault should be made as a whole, and assessing one party's fault with a preconceived idea of the other party's liability is inherently unfair; or, as the Appellate Division characterized it, a defendant would 'enter the batter's box with two strikes already called.'" For, "the issues of defendant's liability

and plaintiff's comparative fault are intertwined. A jury cannot fairly and properly assess plaintiff's comparative fault without considering defendant's actions."

Derix v. The Port Authority of New York & New Jersey, 162 A D 3d 522 (1st Dept. 2018) – "Plaintiff was not required to demonstrate his own freedom from comparative negligence to be entitled to summary judgment as to defendant's liability [citing *Rodriguez*, reported on directly above]. For this reason, we also reject defendant's argument that the chain on which plaintiff tripped was open and obvious, since that issue too is relevant to comparative fault and does not preclude summary resolution of the issue of defendant's liability."

Fargione v. Chance, 154 A D 3d 713 (2d Dept. 2017) – "Defendants moving for summary judgment in a personal injury action must demonstrate, *prima facie*, that they did not proximately cause the plaintiff's injuries. Since, however, there can be more than one proximate cause of a plaintiff's injuries, defendants do not carry their burden simply by establishing that another party's actions were a proximate cause; they must establish their own freedom from comparative fault."

Hairston v. Liberty Behavioral Management Corporation, 157 A D 3d 404 (1st Dept. 2018) – Plaintiff's decedent voluntarily entered defendant's detoxification facility, but made no progress in treatment. He suffered hallucinations and was disoriented. Three days after entering, he walked out of the facility but was returned in a confused state. Thereafter, he walked out again, and his body was subsequently discovered in the woods about a mile from the facility. Defendant moves for summary judgment in the ensuing wrongful death action, arguing that plaintiff cannot prove causation. However, "it is well settled that a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment [citation omitted]. Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden." Thus, "defendants argued that the record was devoid of evidence as to what happened after DeJesus left Arms Acres, and what caused his death. Defendants, however, failed to submit affirmative evidence establishing that their alleged negligence did not, as a matter of law, proximately cause DeJesus's death."

Lindsay-Thompson v. Montefiore Medical Center, 147 A D 3d 638 (1st Dept. 2017) – In a concurring opinion in *Pullman v. Silverman*, 28 N Y 3d 1060 (2016), Judge Fahey noted that "First Department jurisprudence" – conflicting with that of the Second Department – provides that "if a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing *either* that he or she did not depart from good and accepted medical practice *or* that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing 'with medical evidence that defendant departed from accepted medical practice *and* that such departure was a proximate cause of the injuries alleged'" [emphasis by the

Court]. Here, in *Lindsay-Thompson*, the First Department, citing the seminal Second Department case with approval, holds that "because defendants failed to establish the absence of a departure from the standard of care, plaintiffs were not required to raise a triable issue of fact as to whether there was a departure."

Yampolskiy v. Baron, 150 A D 3d 795 (2d Dept. 2017) – Back in 2008, the Appellate Division, Second Department, held, in *Construction by Singletree, Inc. v. Lowe*, 55 A D 3d 861 (2d Dept. 2008), that when a party had failed to comply with a demand for expert disclosure pursuant to CPLR 3101(d)(1)(i), that party could not submit an expert affidavit in opposition to a motion for summary judgment. *Singletree* was a quite controversial decision. After commentators had commentated at great length about it, and after both lower Courts and the Second Department itself had applied it in all sorts of conflicting ways, the Second Department undertook to "clarify" *Singletree*, by essentially overruling it, in *Rivers v. Birnbaum*, 102 A D 3d 26 (2d Dept. 2012). The Court there ultimately concluded that accepting or rejecting the expert affidavit was a matter for the trial court's sound discretion. And, after *Rivers*, the Second Department seems to have suggested that the best use of that discretion was to accept the affidavit [*Begley v. City of New York*, 111 A D 3d 5 (2d Dept. 2013)]. But, just as the Second Department was moving away from *Singletree*, the First Department appeared to be adopting it, although without citing it [*Scott v. Westmore Fuel Company, Inc.*, 96 A D 3d 520 (1st Dept. 2012); *Garcia v. City of New York*, 98 A D 3d 857 (1st Dept. 2012)]. The issue has, at last, been settled. Effective December 11, 2015, the Legislature amended CPLR 3212(b), adding the following language to the statute: "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit." Here, in *Yampolskiy*, the Court holds that "'a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment' [citation omitted]. Under the circumstances of this case, the Supreme Court properly denied the plaintiff's cross motion to preclude the expert materials submitted by the defendants in support of their motion for summary judgment, as there was no evidence that the failure to disclose the experts was intentional or willful, and there was no showing of prejudice to the plaintiff."

Luna v. CEC Entertainment, Inc., 159 A D 3d 445 (1st Dept. 2018) – "Plaintiff's affidavit in opposition [to defendant's motion for summary judgment], wherein she claimed that she tried to reach for a handrail when she fell, raised only feigned issues of fact, as it directly contradicted, and appears to have been tailored to avoid the consequence of, her earlier [deposition] testimony" that she was "using both hands to carry her daughter down the steps when she fell, without any indication that she reached for a handrail."

Matadin v. Bank of America Corporation, ___ A D 3d ___, 2018 WL 3450152 (2d Dept. 2018) – In this slip and fall case, plaintiff testified at her deposition that "she was unable to identify the cause of her fall." In this subsequent motion by defendant for summary judgment, the Court concluded that "the defendant established its *prima facie* entitlement to judgment as a matter of law through the deposition testimony of plaintiff." However, "in opposition to the defendant's *prima facie* showing on this ground, the plaintiff raised a triable issue of fact through her affidavit, in which she averred that when she stood up after falling, she put her hands on the back of her coat to straighten it and felt that the coat was wet. This, coupled with the fact that it had been snowing, led her to believe that she slipped on snow that had been tracked into the bank." The Court concluded that there were triable issues of fact, and denied summary judgment.

Mogul v. Baptiste, 161 A D 3d 847 (2d Dept. 2018) – "'Any party may move for summary judgment in any action, after issue has been joined' [citation omitted]. A grant of summary judgment is not premature merely because discovery has not been completed [citations omitted]. In order for a motion for summary judgment to be denied as premature, the opposing party must 'provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party' [citations omitted]. Here, since the defendant did not oppose the plaintiff's motion for summary judgment, she failed to meet her burden of demonstrating that it should be denied as premature."

CPLR 3211(C) CONVERSION

Pesce v. Leimsider, N.Y.L.J., 1521175441 (App.Term 2d Dept. 2018) – CPLR 3211(c) provides that "whether or not issue has been joined, the court, after adequate notice to the parties, may treat the [CPLR 3211] motion [to dismiss] as a motion for summary judgment." There are, however, Court-made exceptions to the notice requirement. The notice may be dispensed with when the case presents only legal issues fully appreciated by both sides, both parties ask the Court to treat the motion as one for summary judgment, or it is evident that the parties have laid bare their proofs on the motion. The "exception to the notice requirement is not applicable here because the parties' evidentiary submissions were not so extensive as to indicate that they were laying bare their proof [citation omitted]. Plaintiffs 'were not put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered' [citation omitted]. Indeed, had plaintiffs been given notice that the motion to dismiss was going to be treated as a summary judgment motion, they might have asked for an opportunity to depose defendants [citation omitted], or secured an affidavit from the engineer who had conducted the postclosing inspection, rather than submitting his unsworn report, as they did in opposition to the CPLR 3211 motion."

Corle v. Allstate Insurance Company, 162 A D 3d 1489 (4th Dept. 2018) – Although the court was authorized to treat the motion [to dismiss] as one for summary judgment upon 'adequate notice to the parties' [citation omitted], no such notice was given. Further, recognized exceptions to the notice requirement are inapplicable here inasmuch as neither party made a specific request for summary judgment, and the record does not establish that they deliberately charted a summary judgment course."

DEFAULTS

OBTAINING A DEFAULT JUDGMENT

3021 Briggs Realty LLC v. Reynoso, N.Y.L.J., 1535090617 (Civ.Ct. Bronx Co. 2018) (Rivera, J.) – A default judgment against an individual may not be obtained without an "affidavit of military investigation," demonstrating that plaintiff has sufficiently investigated whether defendant is a currently active member of the military. Here, despite plaintiff's attorney's contention that it is "the practice in the courts" to allow the affidavit to be filed after the Court renders the judgment, the Court holds that, in accordance with the language of the Service Members Civil Relief Act [50 USC §3901 *et seq.*], "before entering judgment for the plaintiff" the Court shall "require the plaintiff to file" the affidavit.

Cukierwar v. College Central Network, Inc., 148 A D 3d 983 (2d Dept. 2017) – "'A default judgment may not award relief of a different kind than that demanded in the complaint' [citation omitted]. Moreover, 'at an inquest, the court may not permit amendments of the pleadings which would broaden the scope of the inquest and increase the amount of damages provable by the plaintiff.'"

Andrade v. Perez, 159 A D 3d 593 (1st Dept. 2018) – A defendant who has defaulted is "not entitled to any further discovery, including discovery in preparation for an inquest."

Baldwin Route 6, LLC v. Bernad Creations, Ltd., 158 A D 3d 659 (2d Dept. 2018) – "CPLR 2004 provides that, 'except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.' Given the strong public policy favoring the resolution of cases on the merits, 'the Supreme Court may compel a plaintiff to accept an untimely answer [citations omitted] where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists.'"

Naber Electric v. Triton Structural Concrete, Inc., 160 A D 3d 507 (1st Dept. 2018) – Supreme Court denied plaintiffs' motion to enter a default judgment, and granted

defendants' cross-motion to compel acceptance of its late answer. The Appellate Division affirms. "Although the affidavit of merit provided by defendants' executive lacked any detail concerning their potential defenses to plaintiffs' claims for payment for work performed on three subcontracts, an affidavit of merit is 'not essential to the relief sought' by defendants before entry of a default order or judgment [citations omitted]. Accordingly, given the shortness of the delay and absence of evidence of willfulness or prejudice to plaintiffs, as well as the State's policy of resolving disputes on the merits, defendants were properly granted an opportunity to defend plaintiffs' claims on the merits."

Bank of New York v. Kushnir, 150 A D 3d 946 (2d Dept. 2017) – "CPLR 3215(c) provides, with regard to default judgments, in pertinent part, that 'if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' 'The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts "shall" dismiss claims [citation omitted] for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned' [citations omitted]. 'The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if "sufficient cause is shown why the complaint should not be dismissed"' [citations omitted]. 'This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious.'"

HSBC Bank USA, N.A. v. Reynolds, N.Y.L.J., 1533021122 (Sup.Ct. Suffolk Co. 2018) (Whalen, J.) – In order to avoid dismissal for failure to take proceedings for the entry of judgment within one year after the default, "plaintiff need not actually obtain nor specifically seek the default judgment within one year [citations omitted]. As long as 'proceedings' are being taken that manifest 'an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal." Here, plaintiff took proceedings by moving "for an order of reference by mailing same to the office of defendant's counsel," a "mere" two months after the expiration of the one year time-frame. But other activity during that period persuaded the Court that plaintiff had a "reasonable excuse" for the two-month delay. Accordingly, plaintiff's motion for a default judgment was granted.

Ibrahim v. Nablus Sweets Corp., 161 A D 3d 961 (2d Dept. 2018) – Here, the Court rejects plaintiff's argument of a reasonable excuse for his failure to take proceedings for the entry of judgment within one year after the default. "The excuse was contained in a brief paragraph in the supporting affirmation of an associate [at plaintiff's counsel] who

stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff's file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm, and no indication in the associate's affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto."

Bank of America, N.A. v. Rice, 155 A D 3d 593 (2d Dept. 2017) – "A defendant may waive the right to seek dismissal pursuant to CPLR 3215(c) by serving an answer or taking 'any other steps which may be viewed as a formal or informal appearance' [citations omitted]. Here, the defendant, Gustavia Home, LLC, waived its right to seek dismissal of the complaint insofar as asserted against it pursuant to CPLR 3215(c) by filing a notice of appearance."

VACATING A DEFAULT

Cach, LLC v. Ryan, 158 A D 3d 1193 (4th Dept. 2018) – "In denying the motion to vacate, the court determined that defendant lacked standing to challenge the default judgment because the judgment had been satisfied in June 2016. That was error. Where, as here, a defendant moves to vacate a default judgment on the ground that the court that rendered the judgment lacked personal jurisdiction over the defendant [citation omitted], a finding in favor of the defendant would mean that the judgment was 'a nullity' [citations omitted]. It necessarily follows that, 'if a judgment is a nullity, it never legally existed so as to become extinguished by payment' [citation omitted]. Plaintiff cites various cases for the proposition that 'a judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder,' thereby depriving a court of jurisdiction to vacate the judgment' [citations omitted]. Those cases, however, are not applicable where, as here, a defendant disputes whether the court that rendered the judgment lacked personal jurisdiction over the defendant in the first instance."

Wexler v. Kinder Stuff 2010 LLC, 151 A D 3d 909 (2d Dept. 2017) – "The decision as to whether to set aside a default is generally left to the sound discretion of the trial court [citations omitted]. The court 'should also consider potential prejudice to the opposing party, whether the default was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the public policy of resolving actions on their merits.'"

Kirk v. Gupta, N.Y.L.J., 1510647195 (Sup.Ct. N.Y.Co. 2017)(Shulman, J.) – Although plaintiff's counsel's excuse for the default is "somewhat weak, this court may consider other factors, including 'whether the default prejudiced the opposing party, whether it

was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the strong public policy of resolving cases on their merits when possible' [citations omitted]. Here, plaintiff's counsel's mistake was inadvertent. He filed this motion within three days of the dismissal order's entry and therefore does not evince an intent to abandon the action. Vacating the default also serves the strong public policy of resolving cases on their merits, and as discussed below, plaintiff's cause of action is potentially meritorious. Finally, there is little to no prejudice to defendant in that any delay resulting from the instant defaults was brief."

Hutchinson Burger, Inc. v. Bradshaw, 149 A D 3d 545 (1st Dept. 2017) – "The proper vehicle for defendant to challenge the October 2012 order, which was granted on her default, was a motion to vacate a default order under CPLR 5015(a)(1), and not a motion for renewal or reargument under CPLR 2221(d) and (e)."

Henderson-Jones v. City of New York, 55 Misc 3d 401 (Sup.Ct. N.Y.Co. 2016)(Billings, J.) – Because the individual defendant appeared and opposed the motion for leave to enter a default judgment against him, "CPLR 5015(a)(1) is unavailable to him as a basis for vacating the judgment. Van Orden needed to avail himself of CPLR 5015(a)(2), (3), (4) or (5) or to appeal the judgment."

Colebrooke Theatrical LLP v. Bibeau, 155 A D 3d 581 (1st Dept. 2017) – Vacatur of defendant's default is denied. "Bibeau's opinion that he had not been properly served, and was thus free to ignore the suit, a copy of which he received in the mail, was not reasonable."

Smolen v. Hernandez, N.Y.L.J., 1202797095642 (Sup.Ct. N.Y.Co. 2017)(Goetz, J.) – Plaintiff, relying upon *Helfer v. Dan's Supreme Supermarket, Inc.*, 92 A D 2d 561 (2d Dept. 1983), argues that "law office failure" cannot constitute "good cause" for a default. That case, rules the Court, is no longer good law. "Other than a 1985 case from the Third Department [citation omitted], no other case cites to *Helfer* and it is now well established that law office failure may constitute a reasonable excuse."

Top Notch Drywall Corp. v. All Mine of Orange, Inc., 55 Misc 3d 25 (App.Term 2d Dept. 2017) – "While there is no *per se* rule under CPLR 5015 which precludes a corporation from establishing, as its reasonable excuse for defaulting in an action, its failure to keep current its address on file with the Secretary of State [citation omitted], courts should consider, as one factor in determining whether such an excuse is reasonable, 'the length of time for which the address had not been kept current' [citation omitted]. Since defendant failed to update its address on file with the Secretary of State for over 12 years, we find that defendant has not demonstrated a reasonable excuse for its default [citations omitted]. While relief from a default judgment may be obtained pursuant to CPLR 317 where service was made in a manner other than by personal delivery and the defaulting

party did not receive actual notice of the summons in time to defend [citations omitted], here, the fact that the incorrect address remained on file with the Secretary of State for over 12 years, without any explanation by defendant as to why it had not provided the Secretary of State with its changed address, should be deemed 'a deliberate attempt to avoid notice' [citation omitted]. Consequently, defendant's motion to vacate the default judgment was properly denied."

Benchmark Farm, Inc. v. Red Horse Farm, LLC, 162 A D 3d 836 (2d Dept. 2018) – Pursuant to CPLR 317, "a defendant who has been served with a summons other than by personal delivery may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense." Here, defendant was served by service upon the Secretary of State, but did not learn about the action in time to defend because an old address was on file with the Secretary of State. "Although the defendant did not explain why it failed to update its address with the Secretary of State, 'there is no necessity for a defendant moving pursuant to CPLR 317 to show a "reasonable excuse" for its delay' [citations omitted], and there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had knowledge of the defendant's actual business address and had written to the defendant at that address regarding the dispute that gave rise to the plaintiff's complaint."

CPLR 3216

U.S. Bank National Association v. Ricketts, 153 A D 3d 1298 (2d Dept. 2017) – "CPLR 3216 authorizes the dismissal of a complaint for neglect to prosecute provided that certain statutory conditions precedent are met, such as issue having been joined in the action [citations omitted]. Here, dismissal of the action pursuant to the March 2014 conditional order was improper, as issue was never joined inasmuch as none of the defendants served an answer to the complaint."

Atmara, Inc. v. Panoramic Ace Properties, Inc., 151 A D 3d 922 (2d Dept. 2017) – "In a compliance conference order dated July 11, 2012, the Supreme Court directed the plaintiffs to file a note of issue on or before November 15, 2012. The order contained language warning that the failure to file the note of issue by November 15, 2012, would serve as a basis for dismissal pursuant to CPLR 3216. However, the plaintiffs' deadline to file the note of issue was extended by a series of stipulations, including a so-ordered stipulation dated November 3, 2014, which did not advise the plaintiffs that the failure to file a note of issue by the deadline set forth therein would serve as a basis for dismissal pursuant to CPLR 3216." The Court holds that, "'while the failure to comply with a court order directing the filing of a note of issue can, in the proper circumstances, provide the basis for the dismissal of a complaint under CPLR 3216, courts are prohibited from dismissing an action based on neglect to prosecute unless the CPLR 3216 statutory

preconditions to dismissal are met' [citations omitted]. 'A 90-day demand to file a note of issue is one of the statutory preconditions.'" And, "contrary to the defendants' contentions, the so-ordered stipulation dated November 3, 2014, which extended the plaintiffs' time to file the note of issue until January 8, 2015, superseded the compliance conference order dated July 11, 2012. As the so-ordered stipulation dated November 3, 2014, did not advise the plaintiffs that the failure to comply with that deadline would serve as a basis for a motion to dismiss the action, it cannot be deemed a 90-day demand."

Rhodehouse v. CVS Pharmacy, Inc., 151 A D 3d 771 (2d Dept. 2017) – "'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' [citations omitted]. Effective January 1, 2015, the legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216. One such precondition is that where a written demand to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand is served by the court, as here, 'the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' [citation omitted]. Here, the certification order did not set forth any specific conduct constituting neglect by the plaintiff. Another precondition to dismissal is that where the court, on its own initiative, seeks to dismiss an action pursuant to CPLR 3216, it must first give the parties notice of its intention to do so [citation omitted]. Such notice is meant to provide the parties with an opportunity to be heard prior to the issuance of an order dismissing the action [citation omitted]. Here, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to considering whether to dismiss the action pursuant to CPLR 3216. Since the statutory preconditions to dismissal were not met, the court erred in directing the dismissal of the action pursuant to CPLR 3216."

US Bank, National Association v. Mizrahi, 156 A D 3d 661 (2d Dept. 2017) – In an order issued *sua sponte* after a status conference, Supreme Court "directed US Bank to file a motion for summary judgment within 60 days or face dismissal of the complaint." Upon plaintiff's failure to timely move, the Court, again *sua sponte*, directed dismissal. The Appellate Division reverses. "'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' [citations omitted]. The September order could not be deemed a 90-day demand pursuant to CPLR 3216 because it gave US Bank only 60 days within which to file a motion for summary judgment." Thus "Supreme Court was not authorized to dismiss the action on its own motion."

Stroll v. Long Island Jewish Medical Center, 151 A D 3d 789 (2d Dept. 2017) – "Contrary to the plaintiff's contention, the Supreme Court's so-ordered demand pursuant to CPLR 3216 had the same effect as a 90-day notice pursuant to CPLR 3216 [citations

omitted]. Nor can there be any doubt that the plaintiff's counsel, who signed the demand, actually received a copy of it [citations omitted]. Therefore, the plaintiff was required either to timely file a note of issue or move, before the default date, for an extension of time pursuant to CPLR 2004. Since the plaintiff did neither, the action was properly dismissed pursuant to CPLR 3216 on the Supreme Court's own initiative."

Kamensky v. Savage, 55 Misc 3d 20 (App.Term 2d Dept. 2017) – District Court issued a "Notice of CPLR 3216 Dismissal," which provided: "Please be advised that more than one year has elapsed since the joinder of issue in the above entitled action. Pursuant to CPLR 3216, you are required to serve and file a notice of trial within ninety days of receipt of this demand. Failure to timely comply with this demand will result in the dismissal of the action by the Court." Nine months later, no notice of trial having been served or filed, the action was dismissed by the Clerk's Office. The Appellate Term reverses the denial of the motion to vacate the dismissal and restore the action to the calendar. "District Court's 90-day demand was not followed by any notice to the parties or a formal order of dismissal." And defendants' motion to dismiss the action for failure to comply with the 90-day demand should also be denied. "A condition precedent to making a motion to dismiss on this basis is the service of a 90-day demand 'by the party' who 'served said demand for dismissal.'" Since defendants did not serve the demand, "they have failed to satisfy the precondition and, therefore, are not entitled to the dismissal of the complaint."

Deutsche Bank National Trust Company v. Inga, 156 A D 3d 760 (2d Dept. 2017) – "Under the circumstances of this case, the Supreme Court providently exercised its discretion in granting the defendant's motion pursuant to CPLR 3216 to dismiss the action insofar as asserted against him. The plaintiff took no action whatsoever in the five years from the time the case was released from the foreclosure settlement part on October 15, 2009, until the defendant served his 90-day demand on October 10, 2014. Moreover, after failing to comply with the 90-day deadline, the plaintiff took no action for five months before belatedly filing a note of issue. The plaintiff failed to provide a justifiable excuse for its delay in filing a note of issue and failed to demonstrate a potentially meritorious cause of action. The plaintiff's further contention that dismissal was too harsh a sanction, and that a lesser sanction was more appropriate under the circumstances is unavailing, given the plaintiff's 'pattern of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution and lack of any tenable excuse for such delay.'"

Erinna v. Ofodile, 59 Misc 3d 723 (Civ.Ct. N.Y.Co. 2018)(Ramseur, J.) – The Court here holds that CPLR 3216 is inapplicable to an action brought in Civil Court by an unrepresented plaintiff. "New York City Civil Court Act (CCA) §1301 explicitly treats unrepresented and represented parties disparately with respect to trial readiness by requiring the Clerk of Court, not the parties, to file a notice of trial when at least one

party is unrepresented." Thus, "because CCA §1301 requires the Clerk of Court to calendar the matter for trial rather than requiring unrepresented litigants to file a notice of trial, it would have been unjustified, in this instance, to require Plaintiff to file a notice of trial in response to Defendant's 90-day demand. Thus, Plaintiff has satisfied CPLR 3216(e) by demonstrating a justifiable excuse for a delayed response."

JUDGMENT BY CONFESSION

123 Bail Bonds Services v. Sanchez, N.Y.L.J., 1513846454 (Civ.Ct. Bronx Co. 2017) (Kraus, J.) – "If the defendant's statement of county residence in the affidavit [of confession], as required by CPLR 3218(a), is one of the counties in New York City, the confession may be filed with the clerk of the civil court in that county. If the defendant is a nonresident, then the confession is to be filed with the clerk of the civil court in the county designated in the affidavit [citations omitted]. In this case, Defendant stated her residence was in Queens County. This is stated in the indemnity agreement signed by Defendant which listed her residence as being in Jamaica New York, as well as each affidavit which specifies her address is in Jamaica New York. As such the provision providing for the designation of a county for nonresidents in inapplicable, and the judgment should have been filed in Queens County Civil Court. The specification of county is important because it will of course dictate the venue of the confessed judgment." Thus the judgment, filed in Bronx County, is vacated.

Cash and Carry Filing Service, LLC v. Perveez, 149 A D 3d 578 (1st Dept. 2017) – "Defendants may challenge the judgment by confession only by trial in a plenary action, and not by motion [citation omitted]. Moreover, defendants lack standing to challenge the affidavit of confession of judgment. An affidavit of confession of judgment pursuant to CPLR 3218 'is intended to protect creditors of a defendant,' not the defendant itself."

Merchant Funding Services, LLC v. Volunteer Pharmacy, Inc., 55 Misc 3d 316 (Sup.Ct. Westchester Co. 2016)(Everett, J.) – The Court here permits defendant to challenge a judgment by confession by motion rather than requiring a separate plenary action. "While cases dating back at least 65 years have held that a motion by 'a judgment debtor who seeks to set aside a judgment entered by confession, on grounds of fraud or misconduct, must proceed by plenary action, not by motion,' those cases 'have so held, on the grounds that sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action' [citation omitted]. In the instant case, however, the submitted affidavits and exhibits clearly and unequivocally demonstrate that the agreement is criminally usurious on its face, obviating the need for a superfluous plenary action." In particular, "by recognizing the lack of necessity for a plenary action in cases where criminal usury is clear from the submissions attendant to a motion under CPLR 5015(a)(3), the victims of predatory lending though such illegal loan agreements are spared the needless cost in time and money of pursuing a plenary action, the outcome of which would be the same."

OFFER TO COMPROMISE OR LIQUIDATE DAMAGES

Free People of PA LLC v. Delshah 60 Ninth LLC, N.Y.L.J., 1511769826 (Sup.Ct. N.Y.Co. 2017)(Ostrager, J.) – "Defendant made two timely offers under CPLR 3220, the first offer was for $1 million and a subsequent offer was for $1.5 million. Neither offer was accepted. The issue thus presented is whether successive CPLR 3220 offers can be made. CPLR 3220 does not explicitly state whether a party can make multiple offers for conditional liquidated damages, and the Court is unable to find case law to provide clarity on the issue. However, the purpose of CPLR 3220 – to narrow the issues before trial and to provide a pathway to possible consensual resolution of the matter – is best served by allowing parties to make successive offers to liquidate damages conditionally." Thus, here, the second, higher, offer, "expressly providing that it superseded the prior offer to liquidate damages conditionally," became "the operative offer for purposes of calculating costs and attorney's fees in the event that plaintiff failed to obtain a judgment, including attorneys' fees, greater than $1.5 million."

VOLUNTARY DISCONTINUANCE

Harris v. Ward Greenberg Heller & Reidy LLP, 151 A D 3d 1808 (4th Dept. 2017) – "CPLR 3217 provides, in relevant part, that 'any party asserting a claim may discontinue it without an order by serving upon all parties to the action a notice of discontinuance at any time *before a responsive pleading* is served, or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court'" [emphasis by the Court]. Thus, "the statute provides a plaintiff with 'an "absolute and unconditional" right to discontinue an action prior to the service of a responsive pleading.'" Here, "we conclude that the notices of discontinuance were not untimely because a motion to dismiss pursuant to CPLR 3211 is not a 'responsive pleading' for purposes of CPLR 3217(a)(1)."

A.K. v. T.K., 150 A D 3d 1091 (2d Dept. 2017) – "Under CPLR 3217(a), a party may voluntarily discontinue an action without a court order by 'serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim' [citation omitted]. 'Where no pleadings have been served the plaintiff has the "absolute and unconditional right" to discontinue the action by serving a notice of discontinuance upon the defendant without seeking judicial permission' [citations omitted]. Here, neither a complaint nor a responsive pleading was ever served in the third action, thereby preserving the absolute and unconditional right to discontinue by serving notice."

BILL OF PARTICULARS

Schonbrun v. DeLuke, 160 A D 3d 1100 (3d Dept. 2018) – "'It is well settled that a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial, and it may not be used to allege a new theory not originally asserted in the complaint." Thus, plaintiff was not entitled to discovery on a theory of recovery mentioned only in his bill of particulars.

Flores v. New York City Housing Authority, 151 A D 3d 695 (2d Dept. 2017) – "'A bill of particulars is intended to amplify the pleading, limit the proof, and prevent surprise at trial. Whatever the pleading pleads, the bill must particularize since the bill is intended to afford the adverse party a more detailed picture of the claim being particularized' [citation omitted]. The CPLR sections governing bills of particulars are found in article 30, relating to remedies and pleading, not in article 31, relating to disclosure. The Court of Appeals has stated that 'some jurisdictions, including the Federal courts, have abolished the bill, concluding that broad disclosure statutes render it superfluous. The drafters of the CPLR also recommended its abolishment in conjunction with the expansion of the disclosure statutes now found in article 31. However, the Legislature retained the bill of particulars, not as a disclosure device (CPLR art 31), but in its traditional and limited role as a means of amplifying a pleading (CPLR 3041 *et seq.*)' [citation omitted]. Since a bill of particulars is not a disclosure device but a means of amplifying a pleading [citation omitted], the present dispute over the contents of the plaintiff's bill of particulars is not 'part of any disclosure procedure' (CPLR 3104[a]) that CPLR 3104 authorizes a referee to supervise."

Khostrova v. Hampton Bays Union Free School District, 151 A D 3d 953 (2d Dept. 2017) – "Pursuant to CPLR 3043(b), a plaintiff in a personal injury action may serve a supplemental bill of particulars containing 'continuing special damages and disabilities,' without leave of court at any time, but not less than 30 days prior to trial, if it alleges 'no new cause of action' or claims 'no new injury.' Here, the plaintiffs sought to allege continuing consequences of the injuries suffered and described in the original bill of particulars, rather than new and unrelated injuries [citations omitted]. Since the contested bill of particulars is a supplemental bill of particulars, rather than an amended bill of particulars, and was served more than 30 days prior to trial, leave of court was not required."

DISCLOSURE

MOTION PRACTICE

Jackson v. Hunter Roberts Construction Group, L.L.C., 139 A D 3d 429 (1st Dept. 2016) – "The motion court improvidently exercised its discretion in striking the answer. Plaintiffs' motion was procedurally deficient, since it was not supported by an

affirmation of good faith [citation omitted]. Nor did the record show that 'any further attempt to resolve the dispute nonjudicially would have been futile' [citation omitted]. Plaintiffs failed to identify any recent meaningful attempts to resolve the parties' discovery disputes before raising them for the first time in their motion."

Robins v. Procure Treatment Centers, Inc., N.Y.L.J., 1202785146388 (Sup.Ct. N.Y.Co. 2017)(Silver, J.) – "A party moving to compel discovery is required to submit an affirmation that counsel for the moving party has made 'a good faith effort to resolve the issues raised by the motion' with opposing party's counsel [citation omitted]. To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to resolve the issue with opposing counsel [citations omitted]. Here, Plaintiff's affirmation of good faith effort to resolve the dispute with Defendants does not substantively comply with the requirements of 22 NYCRR 202.7 [citations omitted]. In the affirmation in support of the motion, Plaintiff's counsel stated there were good faith efforts to proceed with disclosure, and highlighted a letter requesting discovery that was sent to defense counsel for IBA and Procure. However, there is nothing in the letter indicating the Plaintiff's counsel actually conferred with defense counsel in a good faith attempt to resolve the dispute [citations omitted]. Accordingly, the motion to compel discovery is denied."

SCOPE OF DISCLOSURE

Slomczewski v. Ross, 148 A D 3d 1648 (4th Dept. 2017) – "CPLR 3101(a) provides that, 'generally, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' 'Although the CPLR does not specifically mention the names and addresses of witnesses or create any disclosure device for obtaining such information, it is within a court's discretion to require a party to disclose the names and addresses of witnesses to transactions, occurrences, admissions and the like. Thus, a party may reasonably be required to disclose the name and address of a witness whose identity it has learned in investigating a case but of whom the opposing party is ignorant' [citation omitted]. Here, in view of defendants' prolonged and almost complete disregard of their pretrial disclosure obligations with regard to the identity of a known fact witness, it was reasonable for the court to preclude the individual from testifying as a fact witness."

LIMITATIONS ON DISCOVERY

Pinnacle Sports Media & Entertainment, LLC v. Greene, 154 A D 3d 601 (1st Dept. 2017) – "Disclosure of tax returns is generally disfavored due to their confidential and private nature [citation omitted], and Greene has not made a sufficiently particularized showing that the information contained in Pinnacle's tax returns, even if redacted to only reveal Pinnacle's revenue, is necessary to prove his claims [citation omitted]. Moreover,

he does not address why other sources are inadequate, inaccessible, or unlikely to be productive."

PRE-ACTION DISCLOSURE

Matter of Leff v. Our Lady of Mercy Academy, 150 A D 3d 1239 (2d Dept. 2017) – "'Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order' [citations omitted]. 'Disclosure to aid in bringing an action' CPLR 3102(c) authorizes discovery to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants' [citations omitted]. However, pre-action disclosure 'may not be used to determine whether the plaintiff has a cause of action' [citations omitted]. This limitation is 'designed to prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party' [citations omitted]. 'Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate' [citations omitted]. Accordingly, 'a petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action.'"

Matter of Saloman v. Porter, N.Y.L.J., 1523612959 (Sup.Ct. Westchester Co. 2018) (Ecker, J.) – "'It is well established that disclosure "to aid in bringing an action" [citation omitted] authorizes discovery to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants. Of particular importance, however, is the caveat that pre-action disclosure under CPLR 3102(c) is not available to the would-be plaintiff to determine if he has a cause of action. This limitation is designed to prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party. Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate.'"

NON-PARTY DISCLOSURE

Alumil Fabrication, Inc. v. F.A. Alpine Window Manufacturing Corporation, 151 A D 3d 667 (2d Dept. 2017) – Defendant here seeks disclosure from plaintiff's counsel as a non-party witness. Therefore, "in order to compel a deposition, the defendant was required to show that the disclosure sought was 'material and necessary,'" and was required "to provide notice of the 'circumstances or reasons' why the disclosure was 'sought or required' from the nonparty witness." Defendant met those requirements, and, "in opposition to the defendant's motion and in support of its cross motion for a protective

order, the plaintiff failed to establish that the deposition testimony sought was irrelevant to this action." Accordingly the order directing the deposition was affirmed.

Harden Street Medical, P.C. v. The Charter Oak Fire Insurance Company, N.Y.L.J., 1202790388772 (Dist.Ct. Suffolk Co. 2017)(Mathews, J.) – A party to an action may not seek to quash a subpoena served upon a non-party on the grounds of improper service, when the non-party "accepted service of the subpoena without objection."

EXPERT DISCLOSURE

Schmitt v. Oneonta City School District, 151 A D 3d 1254 (3d Dept. 2017) – "Unlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as 'requiring disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony.'" And, "contrary to plaintiffs' assertion, the transcript of [the treating physician's] videotaped testimony cannot serve as a substitute for the required statutory notice. Simply put, the burden of providing expert witness disclosure and setting forth the particular details required by the statute lies with the party seeking to utilize the expert; it is not opposing counsel's responsibility to cull through examination before trial testimony or, in this case, the transcript of videotaped trial testimony to ferret out the qualifications of the subject expert, the facts or opinions that will form the basis for his or her testimony at trial and/or the grounds upon which the resulting opinion will be based."

Harris v. Campbell, 155 A D 3d 1622 (4th Dept. 2017) – "'CPLR 3101(d)(1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses' [citation omitted]. 'Where a plaintiff's intended expert medical witness is a treating physician whose records and reports have been fully disclosed a failure to serve a CPLR 3101(d) notice regarding that doctor does not warrant preclusion of that expert's testimony on causation, since the defendant has sufficient notice of the proposed testimony to negate any claim of surprise or prejudice' [citation omitted]. Here, one of plaintiff's treating physicians did not provide any expert disclosure, and during trial he indicated that, in addition to being a medical doctor, he received a Ph.D. in biomechanical engineering and he often relies on his engineering background in his medical practice. Subsequently, that treating physician was asked some questions pertaining to biomechanics, and specifically was asked about the amount of force needed to cause a lumbar injury. We conclude that defendant's objections to that line of questioning were properly sustained inasmuch as defendant did not receive sufficient notice that the treating physician relied on his engineering background to support his opinions and conclusions about plaintiff's injuries."

Kanaly v. DeMartino, 162 A D 3d 142 (3d Dept. 2018) – CPLR 3101(d)(1), enacted in 1985, "provides that each party 'shall identify' the people it intends to call as expert witnesses at trial and 'shall disclose in reasonable detail the qualifications of each expert

witness' [citation omitted]. The use of the verb 'shall' indicates the mandatory nature of the obligations [citation omitted]. The statute creates an exception permitting, but not requiring, the omission of the expert's name in medical, dental and podiatric malpractice cases." The question of how much – if at all – to limit disclosure of the "qualifications" of an expert in a medical malpractice case in order to enforce plaintiff's right to withhold the expert's name, has bedeviled the Courts ever since. The earliest appellate attempt to deal with the issue was the Second Department's decision in *Jasopersaud v. Rho*, 169 A D 2d 184 (2d Dept. 1991). There, the Court concluded that, in each case, there must be a balance drawn between the competing interests of full disclosure, and anonymity of medical experts in medical malpractice cases, and appeared to set down specific items that must be disclosed – such as the expert's board certifications, state of licensure, medical school attended, areas of expertise, and institutions of internship, residency or fellowship. But, said the Court, such clearly identifying facts as "the dates associated with the attainment of the foregoing qualifications" or present hospital affiliation need not be provided, "since we are of the view that under the circumstances, the disclosure of such information would tend to reveal the identity of the plaintiff's expert." The advances in computer technology in the decade after *Jasopersaud* was decided led Courts to revisit the issue. Several concluded that, given the statutory preference for anonymity, and the ease with which the particular information which *Jasopersaud* directed disclosed could now be used by readily available softwear to identify any expert, the "spirit" rather than the "letter" of *Jasopersaud* should be used to further limit disclosure. Thus, in *Engel v. Defeo*, 189 Misc 2d 673 (Sup.Ct. Nassau Co. 2001), the Court held that "in today's context, ten years after *Jasopersaud*, computer technology and expertise has outstripped the plaintiff's attorney's ability to conceal his expert's identity, and for this Court to blindly apply the directive in that case of *Jasopersaud*," would "fly in the face of the statutory mandate that the plaintiff can omit and withhold her expert's identity. While *Jasopersaud* (*supra*) has set up a viable balancing test to be used in determining this issue of expert disclosure, technology has rendered the fulcrum of that balance inoperable." Thus, more general disclosure was all that the Court required [*see*, *also*, *Duran v. New York City Health & Hospitals Corp*., 182 Misc 2d 232 (Sup.Ct. Bronx Co. 1999)(in light of the fact that the expert's identity is otherwise readily obtainable with a *Lexis-Nexis* search, plaintiff need only provide "the expert's state of licensure and board certification"); *Deitch v. May*, 185 Misc 2d 484 (Sup.Ct. Rockland Co. 2000)(for the same reasons, it was sufficient for plaintiff to tell that the expert is "licensed to practice medicine in New York State and board certified in neurosurgery"); *Brosnan v. Shaffron*, N.Y.L.J., May 3, 2001, p. 23, col. 6 (Sup.Ct. Richmond Co.)]. On the other hand, there were cases which embraced *Jasopersaud*. For example, in *Esquilin v. The Brooklyn Hospital Center Downtown Campus*, 190 Misc 2d 753 (Sup.Ct. Kings Co. 2002), the Court emphasized that CPLR 3101(d)(1)(i) makes an attempt to balance plaintiff's need to protect a medical expert in a medical malpractice case from peer pressure, against a defendant's need for adequate discovery. And, "while computer technology and

accessible information has expanded greatly in the 10 1/2 years since *Jasopersaud*, so has the willingness and availability of medical 'experts' to come forward and testify against the interests of their colleagues." The Court concluded that "these are matters best addressed by the Legislature since it seems clear to this Court that providing the information which one party seeks as essential to its ability to properly prepare for trial or move for summary judgment could lead to disclosure of the opposing expert's name if one is prepared to engage in the necessary 'detective' work. This Court, in any event, still regards *Jasopersaud* as prevailing and controlling authority which, even now, properly 'harmonizes and effectuates the objectives sought to be achieved by the competing provisions'" of the statute. Then, in *Thomas v. Alleyne*, 302 A D 2d 36 (2d Dept. 2002), the Second Department re-visited *Jasopersaud*, and concluded "that the holding of that case was, if anything, unduly restrictive of the discovery authorized under New York law in respect to the qualifications of the experts proposed to be called at trial by the various parties." Agreeing with plaintiffs that the balancing test of *Jasopersaud* has become unworkable in light of technological advances, the Court determined to "abandon" the balancing approach of that decision "as being both unworkable and inconsistent with the terms of the governing statute." Thus, the Court held "that defendants in medical malpractice actions are presumptively entitled to a statement of the plaintiff's expert's qualifications 'in reasonable detail' (CPLR 3101[d][1][i]), as the statute commands, and that the plaintiffs in such cases may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, *and* (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' (CPLR 3103[a])" [emphasis added]. The Court concluded that the original concern – that medical experts might be pressured by their peers not to testify in medical malpractice cases, and that the medical profession was unique in that regard – even if it "has a rational basis at all," is "certainly not such a forceful one as to warrant, for reasons of 'policy,' a departure from a literal construction of CPLR 3101(d)(1)(i)." Thus, even when "full disclosure of the qualifications of a plaintiff's expert" will permit ready discernment of the expert's identity, plaintiff will be required to disclose, unless plaintiff is able to make "a factual showing that there exists a concrete risk, under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial." At the same time, in *Thompson v. Swiantek*, 291 A D 2d 884 (4th Dept. 2002), the Appellate Division, Fourth Department, reached the opposite result. Plaintiff revealed only that his medical expert in this medical malpractice case, "is a 'board certified urologist' who is 'licensed to practice in both New Jersey and Pennsylvania and is a professor of urology in Pennsylvania.'" The Court denied the request for more detailed disclosures. "It is undisputed that disclosure of the additional information sought, i.e., the medical school that the expert attended and the

location of that expert's internships, residencies and fellowships, would enable defendants to ascertain the identity of the expert [citations omitted]. Because disclosure of that additional information would 'effectively lead to disclosure of the expert's identity,' the request for such disclosure is 'palpably improper.'" Lower Courts in the First Department were divided on whether to follow *Thomas* or *Thompson.* In *Scher v. St. Luke's-Roosevelt Hospital*, N.Y.L.J., January 28, 2003, p. 18, col. 4 (Sup.Ct. N.Y.Co.)(Bransten, J.) and *Muniz v. Our Lady of Mercy Medical Center*, N.Y.L.J., May 1, 2003, p. 22, col. 1 (Sup.Ct. Bronx Co.)(Renwick, J.), the Courts held that, in the absence of authority from the Appellate Division, First Department, they would follow the holding in *Thomas* rather than *Thompson*. But, in *Hara v. Levin*, N.Y.L.J., January 30, 2003, p. 23, col. 1 (Sup.Ct. Bronx Co.)(Manzanet-Daniels, J.), the Court, citing *Thompson* with approval, found that the sketchy background information offered by plaintiff was sufficient to avoid disclosure of the expert's identity. Now, 16 years later, in *Kanaly*, the Third Department weighs in, and adopts the Second Department's reasoning in *Thomas*. For, "inasmuch as this state's expert disclosure statute is already the most restrictive in the nation, there is no reason for this Court to continue to interpret the statute in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses." Thus, "like the Second Department held in *Thomas v. Alleyne* [*supra*], we conclude that our current standard is not only impractical, but contrary to the statutory language and 'the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth' [citation omitted]. Accordingly, we adopt that Court's rule that parties in medical malpractice cases 'will ordinarily be entitled to full disclosure of the qualifications of an opponent's expert, except for the expert's name, notwithstanding that such disclosure may permit such expert's identification,' but a party may obtain a protective order under CPLR 3103(a) by making a factual showing that there exists a reasonable probability, 'under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial.'"

Cordts v. Fiege, 60 Misc 3d 617 (Sup.Ct. Monroe Co. 2018)(Frazee, J.) – The Fourth Department has permitted discovery "of physicians conducting independent medical examinations [IME] at the request of defendants' insurance carriers to determine if there is any bias, interest or financial motivation that could influence their reports." That is because "the nature of the relationship" between the physician and the insurer "raises impartiality into question." At issue in this case is whether to extend that rule to treating physicians. The Court suggests that, generally, no such discovery should be permitted, for, unlike the IME physician, "a treating physician is hired by an injured party to take care of his/her medical needs without regard to any litigation that might ensue or be pending." And, "as a matter of policy, treating physicians should be allowed to devote their time to the treatment of patients and not to have their time unnecessarily taken up with the litigation process. Further, physicians should not be discouraged from taking as

patients those individuals who may have been injured in an accident by potential involvement in the litigation process." But, here, the evidence shows a significant relationship between the treating physician and plaintiff's attorney. He has treated "dozens" of counsel's clients, counsel does legal work for the doctor's practice, and the doctor has patients sign a "doctor's lien," allowing payment of fees from any sums recovered in a lawsuit. Under these circumstances, the Court finds that the doctor's "bias, motive or interest" are relevant. Thus, discovery should be permitted where, as here, there has been "an initial showing that a treating physician may not be retained by the patient principally to treat but also for his/her assistance with litigation." However, the Court quashes the subpoena for deposition testimony, with leave to seek less intrusive discovery of the physician.

PRIVILEGES

IN GENERAL

Matter of People v. PriceWaterhouseCoopers, LLP, 150 A D 3d 578 (1st Dept. 2017) – "In this proceeding arising from an underlying investigation by the N[ew] Y[ork] A[ttorney] G[eneral] into alleged fraud by respondent Exxon concerning its published climate change information, the motion court properly found that the New York law on privilege, rather than Texas law, applies, and that New York law does not recognize an accountant-client privilege. We reject Exxon's argument that an interest-balancing analysis is required to decide which state's choice of law should govern the evidentiary privilege. Our current case law requires than when we are deciding privilege issues, we apply the law of the place where the evidence will be introduced at trial, or the place where the discovery proceeding is located [citations omitted]. In light of our conclusion that New York law applies, we need not decide how this issue would be decided under Texas law."

ATTORNEY-CLIENT PRIVILEGE

ACE Securities Corp. v. DB Structured Products, Inc., 55 Misc 3d 544 (Sup.Ct. N.Y.Co. 2016)(Bransten, J.) – "'To the extent that the request for [legal] advice attaches business records created in the ordinary course of business, those business records do not become privileged because copies are also sent to counsel in connection with a request for advice.'"

JBGR LLC v. Chicago Title Insurance Company, N.Y.L.J., 1202795866350 (Sup.Ct. Suffolk Co. 2017)(Emerson, J.) – "The attorney-client privilege may extend to the agent of a client when the communications are intended to facilitate the provision of legal services to the client [citation omitted]. For the agency exception to apply, it must be shown that the client (1) had a reasonable expectation of confidentiality under the circumstances and (2) that disclosure to the third party was necessary for the client to

obtain informed legal advice [citation omitted]. To the extent that the advice sought is that of a non-lawyer service provider, the privilege does not protect the communication [citation omitted]. The privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client [citation omitted]. The party asserting the privilege bears the burden of establishing its essential elements based on competent evidence, usually through affidavits, deposition testimony, or other admissible evidence."

Gottwald v. Sebert, 58 Misc 3d 625 (Sup.Ct. N.Y.Co. 2017)(Kornreich, J.) – The issue here is whether communications between a party's attorney and that party's public relations firm is privileged. The privilege "'is not intended to obscure what is essentially a lobbying and political effort, even one undertaken by a lawyer' [citation omitted]. Thus, 'if a lawyer happens to act as a lobbyist or in some other capacity, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist or other role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of lobbying or other non-legal efforts.'" Courts "that apply New York privilege law appear to approach attorney communications with public relations firms within the framework of the agency exception to the general rule that communications with non-parties waives the privilege." And, "in order for the agency exception to apply, the party claiming privilege must demonstrate that the client: (1) had a reasonable expectation of confidentiality under the circumstances, and (2) *that disclosure to the third party was necessary for the client to obtain informed legal advice*. The 'necessity' element means more than just useful and convenient, but rather requires that *the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications*. Thus, where the third party's presence is merely useful but not necessary, the privilege is lost" [emphasis by the Court]. Accordingly, "*if public relations support is merely helpful, but not necessary to the provision of legal advice, the agency exception does not apply*" [emphasis by the Court].

ATTORNEY WORK PRODUCT

ACE Securities Corp. v. DB Structured Products, Inc., 55 Misc 3d 544 (Sup.Ct. N.Y.Co. 2016)(Bransten, J.) – To establish that documents are protected attorney work product, the party seeking protection "must demonstrate that the documents were 'primarily prepared in anticipation of litigation and are, thus privileged matter.'" Here, defendant's "breach analysis" was not protected, even after counsel provided advice with respect to it, because that was, "in effect, giving advice 'about how to conduct the ordinary course of defendant's business,'" since defendant was contractually obligated to perform such analyses. Thus, "neither the introduction of lawyers nor the fear of imminent litigation converted that business function into work product."

Matter of Peerenboom v. Marvel Entertainment, LLC, 160 A D 3d 439 (1st Dept. 2018) – "Some of the disputed documents contain draft pleadings or emails discussing changes to such pleadings, which constitute material protected by the work product privilege [citations omitted]. In addition, several documents containing discussions between attorneys regarding topics related to the pending Florida action between petitioner and Perlmutter constitute attorney work product as they reflect 'an attorney's legal research, analysis, conclusions, legal theory or strategy' [citation omitted]. The detailed invoices prepared by Perlmutter's attorneys are also protected as work product since they contain summaries of their 'legal research, analysis, conclusions, legal theory or strategy.'"

Miller v. Zara USA, Inc., 151 A D 3d 462 (1st Dept. 2017) – "Plaintiff lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, Inc. (Zara), his employer, and thus lacked the reasonable assurance of confidentiality that is fundamental to attorney-client privilege [citations omitted]. Among other factors, Zara's employee handbook, of which plaintiff, Zara's general counsel, had at least constructive knowledge [citations omitted], restricted use of company-owned electronic resources, including computers, to 'business purposes' and proscribed offensive uses. The handbook specified that 'any data collected, downloaded and/or created' on its electronic resources was 'the exclusive property of Zara,' emphasized that 'employees should expect that all information created, transmitted, downloaded, received or stored in Zara's electronic communications resources may be accessed by Zara at any time, without prior notice,' and added that employees 'do not have an expectation of privacy or confidentiality in any information transmitted or stored in Zara's electronic communication resources (whether or not such information is password-protected).' Plaintiff avers, and defendant does not dispute, however, that, while reserving a right of access, Zara in fact never exercised that right as to plaintiff's laptop and never actually viewed any of the documents stored on that laptop. Given the lack of any 'actual disclosure to a third party, plaintiff's use of Zara's computer for personal purposes does not, standing alone, constitute a waiver of attorney work product protections.'"

MATERIAL CREATED FOR LITIGATION

Advanced Chimney, Inc. v. Graziano, 153 A D 3d 478 (2d Dept. 2017) – "'The payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding whether to pay or reject a claim are made in the regular course of business' [citations omitted]. Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured."

Curci v. Foley, 149 A D 3d 1388 (3d Dept. 2017) – Five days after the accident at issue, defendant's insurer's claims representative contacted defendant, had a taped phone conversation with him, and thereafter provided him with a transcript of that conversation. The Appellate Division reverses the denial of defendant's motion for a protective order with respect to the transcript. "'The purpose of liability insurance is the defense and settlement of claims and, once an accident has arisen, there is little or nothing that the insurer or its employees do with respect to accident reports except in preparation for eventual litigation or for a settlement which may avoid litigation.' [citation omitted]. As such, an insurer's file is generally protected by 'a conditional immunity as material prepared for litigation.'" Of course, "accident reports prepared with a mixed purpose, however, are not exempt from disclosure." But, here, there was "no indication that the statement was taken for some purpose other than preparing for litigation."

Celani v. Allstate Indemnity Company, 155 A D 3d 1524 (4th Dept. 2017) – "It is well settled that 'there must be full disclosure of accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation' [citations omitted]. Here, the father [of the infant plaintiff injured by the father's gun] made his statements to defendant's investigators before defendant made the decision to disclaim, and there is no dispute that defendant's employees relied on those statements in making that decision." However, the legal opinion written by defendant's attorney with respect to disclaimer are privileged. "Documents prepared by an attorney that are 'primarily and predominantly of a legal character,' and made to furnish legal services, are absolutely privileged and not discoverable, regardless of whether there was pending litigation at the time they were prepared."

Matter of Peerenboom v. Marvel Entertainment, LLC, 160 A D 3d 439 (1st Dept. 2018) – "Documents concerning an investigation undertaken by Kroll Advisory Solutions are entitled to the qualified protection provided by CPLR 3101(d)(2) for materials prepared in anticipation of litigation. The record shows that Kroll was hired by Perlmutter's attorney to conduct an investigation in connection with the pending Florida action, which includes claims of defamation broadly implicating petitioner's reputation. Petitioner has not asserted that the investigation firm was retained for other purposes [citation omitted]. As such, emails between and among Kroll and the attorneys discussing the investigation and Kroll's findings are protected, and petitioner has not made any showing of substantial need and inability to obtain this information without undue hardship."

THE COMMON INTEREST "PRIVILEGE"

Saint Annes Development Company v. Russ, 157 A D 3d 919 (2d Dept. 2018) – "The common-interest privilege is an exception to the traditional rule that the presence of a third party waives the attorney-client privilege [citations omitted]. To fall within that

exception the privileged communication must be for the purpose of furthering a legal, as opposed to a commercial, interest common to the client and the third party [citations omitted]. 'The legal interest that those parties have in common must be identical (or nearly identical), as opposed to merely similar' [citations omitted]. Moreover, the communication must 'relate to litigation, either pending or anticipated, in order for the exception to apply.'"

ACE Securities Corp. v. DB Structured Products, Inc., 55 Misc 3d 544 (Sup.Ct. N.Y.Co. 2016)(Bransten, J.) – "The common interest privilege has protected documents shared by parties 'facing common problems in pending or threatened civil litigation' [citations omitted]. The determination of whether two parties share a common legal interest cannot be made categorically [citations omitted]. Indeed, the privilege may exist despite an adversarial relationship between the two parties asserting it [citations omitted]. 'What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal.'"

OTHER PRIVILEGES

Carothers v. Progressive Insurance Company, 150 A D 3d 192 (2d Dept. 2017) – "While a party's invocation of the privilege against self-incrimination can generally be used to draw an adverse inference against that party in a civil action [citations omitted], no such inference may be drawn when, as here, the privilege is invoked by a nonparty witness."

Arger-Medina v. Port Authority of New York and New Jersey, 57 Misc 3d 902 (Sup.Ct. Bronx Co. 2017)(Montano, J.) – Plaintiff, injured in an automobile accident with defendant police officer, seeks his deposition. Defendant moves to stay the action pending the departmental disciplinary proceeding against him resulting from the accident, arguing that "a deposition in the instant civil action may produce 'self-incriminatory' evidence, which will then be used against him by the Port Authority in the pending disciplinary proceeding." But, "'the assertion of the privilege against self-incrimination is an insufficient basis for precluding discovery in a civil action' [citation omitted]. In the instant matter, there is no criminal action pending. In fact, it appears unlikely that Officer Speciale will face criminal prosecution in light of the fact that the New York County District Attorney's Office already conducted an investigation and decided to not prosecute the matter." Moreover, "a stay in this matter would cause undue prejudice to the plaintiffs, who are not parties to or in any way involved with the pending disciplinary proceeding." Thus, the request for a stay is denied, and defendant is directed to appear for a deposition. Of course, "Officer Speciale is entitled to rely on the privilege against self-incrimination and to refuse on that ground to answer questions put to him where the danger of self-incrimination exists [citations omitted]. However, this court emphasizes that Officer Speciale may only assert the privilege when he *reasonably* perceives a risk

from answering a particular question posed during the deposition" [emphasis by the Court].

Prag v. Prag, 161 A D 3d 1364 (3d Dept. 2018) – "By 'providing for the sealing of records of a criminal proceeding which terminates in favor of the accused' [citation omitted], CPL 160.50 'serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his or her having once been the object of an unsustained accusation' [citations omitted]. It is undisputed that the charges against the husband related to the December 2015 incident [of an alleged assault] were 'deemed dismissed as a result of an adjournment in contemplation of dismissal and, therefore, the records of that criminal prosecution were sealed' [citations omitted]. The wife does not claim that any statutory exception entitled her to the records. Her primary contention is instead that the husband, by denying the alleged behavior that led to the charges, waived the statutory bulwark against disclosure by 'commencing a civil action and affirmatively placing the information protected by CPLR 160.50 into issue' [citations omitted]. The wife's argument founders upon the fact that it was she, not the husband, who has 'placed in issue elements that are common or related to the prior criminal action' by alleging the husband's assaultive conduct [citation omitted]. The husband, in contrast, has only denied the wife's allegations and sought various relief upon, in part, the premise that they are untrue. There may well be instances where a defendant affirmatively raises issues, be they financial or otherwise, so as to waive the protection afforded by CPLR 160.50, but 'more than simply denying the allegations in the complaint' is required."

Matter of Murray Energy v. Reorg Research, 152 A D 3d 445 (1st Dept. 2017) – Last year's "Update" reported on the Supreme Court decision in this action [55 Misc 3d 669 (Sup.Ct. N.Y.Co. 2017)]. This is an application for pre-action disclosure pursuant to CPLR 3102(c). Petitioner seeks information from respondent as to the source of information respondent published about petitioner, claiming the information had to come from one of its investors, in violation of a confidentiality agreement. Respondent claims that it is entitled to the protection of the "Shield Law," Civil Rights Law §79-h. Supreme Court concluded that respondent is not a "professional journalist" entitled to the law's protection. Respondent has some 375 subscribers, who pay from $30,000 to $120,000 per year. Those subscribers must sign confidentiality agreements, promising to withhold the information provided by respondent from the general public. The statute defines a professional journalist as an individual or organization "which has as one of its regular functions the processing and researching of *news intended for dissemination to the public*" [emphasis by the Court]. Respondent does not fit within the statute's scope or purpose, and is therefore not entitled to the privilege. The Appellate Division has reversed. The features listed by Supreme Court "are not uncommon among, and in fact are essential to the economic viability of, specialty or niche publications that target relatively narrow audiences by focusing on a topic not ordinarily covered by the general news media – such as the debt-distressed market." And, "significantly, respondent

established that its editorial staff is solely responsible for deciding what to report on and that it does not accept compensation for writing about specific topics or permit its subscribers to dictate the content of its reporting. Other courts have found the extent of a publication's independence and editorial control to be important in determining whether to apply the Shield Law." In sum, "extending protection to respondent under the Shield Law is consistent with New York's 'long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press' – protection that has been recognized as 'the strongest in the nation' [citation omitted]. To condition coverage on a fact-intensive inquiry analyzing a publication's number of subscribers, subscription fees, and the extent to which it allows further dissemination of information is unworkable and would create substantial prospective uncertainty, leading to a potential 'chilling' effect."

Abraha v. Adams, 148 A D 3d 1730 (4th Dept. 2017) – In this medical malpractice action, relating to defendants' treatment of plaintiff after she was assaulted by her husband, defendants seek records "from the shelter for domestic violence victims where she was living at the time of the assault." The Court concludes that "the shelter records are not protected by any privilege, and they are thus subject to disclosure to the extent that they are material and necessary to the defense of the action [citations omitted]. Even assuming, *arguendo*, that the records were prepared by licensed social workers, which is not evident from the records themselves, we conclude that plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars [citations omitted]. Inasmuch as defendants are not seeking disclosure of the street address of the shelter, we reject plaintiff's contention that Social Services Law §459-h precludes disclosure of the records. Furthermore, 18 NYCRR 452.10(a), which renders confidential certain information 'relating to the operation of residential programs for victims of domestic violence and to the residents of such programs,' does not preclude disclosure of the records because that regulation allows for access to such information 'as permitted by an order of a court of competent jurisdiction [citation omitted]. That regulation does not preclude a court from ordering disclosure of shelter records that are material and necessary to the defense of an action."

Estate of Savage v. Kredentser, 150 A D 3d 1452 (3d Dept. 2017) – "Education Law §6527(3) and Public Health Law §2805-m protect from disclosure records relating to performance of a medical or quality assurance review function or participation in a medical malpractice prevention program [citations omitted]. The party asserting these statutory privileges bears the burden of establishing their applicability by demonstrating that a review procedure was in place and that the requested documents were prepared in accordance with such procedure." Here, "defendants failed to meet their burden of establishing the report's privilege. Defendants did not submit an affidavit or other information from anyone with first-hand knowledge establishing that a review procedure was in place or that the report was obtained or maintained in accordance with any such

review procedure." Thus, "in short, the purpose of the Education Law and Public Health Law discovery exclusions is to encourage a candid peer review of physicians, and thereby improve the quality of medical care and prevent malpractice [citations omitted], but such protections are not automatically available and do not prevent full disclosure where it should otherwise be provided."

Drum v. Collure, 161 A D 3d 1509 (4th Dept. 2018) – "Education Law §6527(3) 'shields from disclosure the proceedings and the records relating to performance of a medical or a quality assurance review function' [citations omitted]. The party invoking the privilege must establish that the document at issue was 'generated in connection with a quality assurance review function pursuant to Education Law §6527(3)' [citation omitted]. Here, the court properly determined that [defendant] Sawyer's affirmation, which was submitted in support of the motion for a protective order, met that burden." For, it "outlined the quality assurance review procedure at MFSH in detail and explained that the slide show [at issue] was created for MFSH's weekly quality assurance review meeting." However, the Court held that the slide show is discoverable under an exception to the privilege "for 'statements made by any person in attendance at a medical or quality assurance review meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting." And "statements" include "written statements, such as letters [citation omitted], notes [citation omitted] and the PowerPoint slide show at issue here."

Bellamy v. State of New York, 154 A D 3d 1239 (3d Dept. 2017) – Plaintiff sues the facility at which she was assaulted by another patient, and seeks the investigation report prepared by defendant's employees. But that information "would be shielded from disclosure by Education Law §6527(3)." For the employee "averred that [defendant] had a procedure to review the systems in place to ensure patient safety and that she was assigned to investigate the assault on Bellamy and prepare a report on it." Such records "relating to performance of a medical or a quality assurance review function" including "the investigation of an incident reported pursuant to Mental Hygiene Law §29.29" are privileged.

Jousma v. Kolli, 149 A D 3d 1520 (4th Dept. 2017) – Hospital credentialing files "'fall squarely within the materials that are made confidential by Education Law §6527(3) and article 28 of the Public Health Law' [citations omitted]. That privilege shields from disclosure 'the proceedings and the records relating to performance of a medical or a quality assurance review function or participation in a medical malpractice prevention program.'" Although "there is an exception to the privilege, the exception is limited to those statements made by a doctor to his or her employer-hospital concerning the subject matter of a malpractice action and pursuant to the hospital's quality-control inquiry into the incident underlying the action."

Pasek v. Catholic Health System, Inc., 159 A D 3d 1553 (4th Dept. 2018) – A document privileged pursuant to Education Law §6527(3) is absolutely privileged, and "not subject to disclosure no matter how strong the showing of need or relevancy." Indeed, "the purpose of the privilege 'is to "enhance the objectivity of the review process" and to assure that medical review or quality assurance committees "may frankly and objectively analyze the quality of health services rendered" by hospitals and thereby improve the quality of medical care.'"

Abate v. County of Erie, 152 A D 3d 177 (4th Dept. 2017) – County Law §308(4) provides that records of 911 calls "shall not be made available to or obtained by any entity or person," other than public safety agencies or emergency health care services. The Court here holds that that provision, part of an article aimed at "the *financing* of a uniform, statewide telephonic emergency response system" [emphasis by the Court], was not intended to prevent civil litigants from obtaining 911 records where relevant. Moreover, "discovery of 911 records occurs with great regularity in criminal cases [citations omitted], and defendants' preferred construction of section 308(4) would, at the very minimum, call that longstanding and salutary practice into considerable question. We decline to construe section 308(4) in a manner that could effectively eliminate a criminal defendant's access to potentially critical, and even exculpatory, evidentiary material."

Smith v. Watson, 150 A D 3d 487 (1st Dept. 2017) – "[Supreme] Court erred in denying defendants' motion [to compel production of documents by nonparty New York City Police Department] outright because of the prior denials of their requests for the same information under the Freedom of Information Law (FOIL). 'CPLR article 31 is not a statute "specifically exempting" public records from disclosure under FOIL' and 'no provision of FOIL bars simultaneous use of both' CPLR 3101 and FOIL to procure discovery [citations omitted]. The 'public interest' privilege did not justify the outright denial of defendants' motion, because the court did not engage in the requisite balancing of the public interest in encouraging witnesses to come forward to cooperate in pending criminal investigations against defendants' need for the documents to defend against plaintiffs' claim."

Mosey v. County of Erie, 148 A D 3d 1572 (4th Dept. 2017) – The "deliberative process privilege" is also known as "the 'inter-agency or intra-agency materials' exemption under Public Officers Law §87(2)(g)' [citation omitted]. The question is whether that statutory exemption contained in the Freedom of Information Law [citation omitted] also applies to discovery in civil actions. We conclude that it does not. Both the CPLR and FOIL provide for disclosure of documents. The former controls discovery between litigants in court proceedings, and the latter permits disclosure of governmental records to the public even in the absence of litigation. 'When a public agency is one of the litigants, this means that it has the distinct disadvantage of having to offer its adversary two routes into

its records' [citations omitted]. The deliberative process privilege or exemption under FOIL seeks 'to protect the deliberative process of the government by ensuring that persons in an advisory role will be able to express their opinions freely to agency decision makers' [citation omitted]. While some courts have applied that privilege outside the FOIL context [citations omitted], we decline to do so inasmuch as the Court of Appeals 'has never created nor recognized a generalized "deliberative process privilege"' [citation omitted]. We 'recognize the existence of some cases which all too casually mention the "deliberative process privilege" and purport to apply it outside the context of a FOIL proceeding' [citation omitted]. Nevertheless, it is also important to recognize that 'privileges simply do not exist in the absence of either constitutional or statutory authority, or, when created as a matter of jurisprudence' [citation omitted]. Although the County seeks to assert 'the so-called "deliberative process privilege"' in the context of a civil litigation, 'neither the Court of Appeals' case law nor that of the Fourth Department can be construed as having created a distinct "deliberative process privilege" outside the context of a FOIL proceeding.'"

DEPOSITIONS

Matter of Spira, N.Y.L.J., 1527733383 (Surr.Ct. Queens Co. 2018)(Kelly, J.) – "There is no authorization for service of a subpoena *ad testificandum* outside the state [citations omitted]. While under the 'longarm' statute, a summons may be served outside the state, there is no such provision for a subpoena."

O'Brien v. Village of Babylon, 153 A D 3d 547 (2d Dept. 2017) – "A corporate entity has the right to designate the employee who will be deposed [citations omitted]. A party 'seeking additional depositions has the burden of demonstrating "(1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case."'"

Kaye v. Tee Bar Corp., 151 A D 3d 1530 (3d Dept. 2017) – "'In conducting depositions, questions should be freely permitted "unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant"' [citations omitted]. 'A plaintiff at a deposition may not "be compelled to answer questions seeking legal and factual conclusions or questions asking him or her to draw inferences from the facts"' [citations omitted]. Here, the challenged questions addressed the ultimate legal contentions as to the warnings required, the dangerous conditions created and the risks involved, and do not, as defendants contend, speak just to the underlying facts. It is one thing, for example, for defendants to have inquired as to what warnings were given – an acceptable factual inquiry that Kaye duly responded to during his deposition. It is altogether something else to then ask Kaye to explain what warning he felt defendants should have given. The latter inquiry is a legal assessment derived

from the underlying facts that goes beyond the factual evidentiary scope of a deposition. We agree with Supreme Court that each question was palpably improper."

Carrero v. New York City Housing Authority, 162 A D 3d 566 (1st Dept. 2018) – "Supreme Court correctly struck plaintiff's errata sheet purporting to correct the transcript of her General Municipal Law §50-h hearing testimony, because plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them."

Matter of 91 Street Crane Collapse Litigation (Calabro v. City of New York), 159 A D 3d 511 (1st Dept. 2018) – CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state or territory within the United States [citation omitted], not the other way around. Thus, it is not applicable in this case, in which parties to an action pending in New York seek discovery from out-of-state witnesses." The law of the jurisdiction where those witnesses are found will govern the mechanism for taking discovery there.

INTERROGATORIES

Goldstein v. Orensanz Events LLC, N.Y.L.J., 1529974100 (Sup.Ct. N.Y.Co. 2018)(Reed, J.) – "CPLR 3130 does not prohibit the use of both depositions and interrogatories in actions rooted in breach of contract. The prohibition against the use of both depositions and interrogatories applies only to actions to recover damages for personal injury, injury to property or wrongful death, i.e., in cases predicated solely on a cause of action for negligence." And, "absent evidence that a party intended to abuse discovery, a court may permit interrogatories and conduct a deposition in the same action, notwithstanding the wording of CPLR 3130(1)."

PRODUCTION OF DOCUMENTS

Stepping Stones Associates, L.P. v. Scialdone, 148 A D 3d 855 (2d Dept. 2017) – "Many of the 266 requests made in the defendants' first demands for discovery were of an overbroad and burdensome nature, and were palpably improper. Under these circumstances, 'the appropriate remedy is to vacate the entire demand rather than to prune it' [citations omitted]. Therefore, even though some of the defendants' requests may have sought relevant information, the Supreme Court providently exercised its discretion in granting the branch of the plaintiffs' cross motion which was to strike, in their entirety, the defendants' first demands for discovery and denying that branch of the defendants' motion which was to compel the plaintiffs to respond to those demands."

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DISCLOSURE OF SOCIAL MEDIA

Forman v. Henkin, 30 N Y 3d 656 (2018) – Last year's "Update" reported on the Appellate Division decision in this action [134 A D 3d 529 (1st Dept. 2015)], in which the First Department narrowly-divided over the issue of the burden upon the party seeking discovery of otherwise private pages of social media. The majority held, consistent with its prior decisions, that "it is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims," and "discovery demands are improper if they are based upon 'hypothetical speculations calculated to justify a fishing expedition.'" Thus, "we disagree with the dissent's position that we should reconsider the well-settled body of case law, from both this Court and other Departments, governing the disclosure of social media information." For, "although we agree with the dissent that social media is constantly evolving, there is no reason to alter the existing legal framework simply because the potential exists that new social network practices may surface. Furthermore, there is no dispute that the features of Facebook at issue here (i.e., the ability to post photographs and send messages) have been around for many years. Contrary to the dissent's view, this Court's prior decisions do not stand for the proposition that different discovery rules exist for social media information. The discovery standard we have applied in the social media context is the same as in all other situations – a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims [citations omitted]. This threshold factual predicate, or 'reasoned basis' in the words of the dissent, stands as a check against parties conducting 'fishing expeditions' based on mere speculation." And, "the question of whether a court should conduct an *in camera* review of social media information is not presented on this appeal. The court below did not order an *in camera* review, nor do the parties on appeal request any such relief. Further, the dissent is mistaken that our prior decisions in this area require a court to conduct an *in camera* review in all circumstances where a sufficient factual predicate is established. The decision whether to order an *in camera* review rests in the sound discretion of the trial court, or in this Court's discretion if we choose to exercise it." The dissenting Justices argued that the case law in this area was too recent to be considered well-settled, and should be revisited. They argued that demands for discovery of social media should be treated the same as other discovery demands, where, "assuming that the demand is sufficiently tailored to the issues, and unless a claim of privilege is made, normally the plaintiff must then search through those items to locate any items that meet the demand, and provide those items. There is not usually a need for the trial court to sift through the contents of the plaintiff's filing cabinets to determine which documents are relevant to the issues raised in the litigation." And, "there is no reason why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control, posted on a social networking site. The demand, like any valid discovery demand, would have to be

limited to reasonably defined categories of items that are relevant to the issues raised. Upon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted through those documents for responsive relevant documents, and, barring legitimate privilege issues, such responsive documents would be turned over; and if they could not be accessed, an authorization for them would be provided." Thus, urged the dissent, "as long as the item is relevant and responsive to an appropriate discovery demand, it is discoverable. To the extent disclosure of contents of a social media account could reveal embarrassing information, 'that is the inevitable result of alleging these sorts of injuries.'" The Court of Appeals has reversed. "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called 'privacy settings' govern the scope of disclosure of social media materials. That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable [citations omitted]. Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from 'unnecessarily onerous application of the discovery statutes' [citation omitted]. Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper 'fishing expeditions.' In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate – for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or

embarrassing materials of marginal relevance, the account holder can seek protection from the court." But, "even private materials may be subject to discovery if they are relevant."

Doe v. The Bronx Preparatory Charter School, 160 A D 3d 591 (1st Dept. 2018) – In this action for damages resulting from an attack on plaintiff on defendant's property, the Court concludes that "defendant's demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case."

SPOLIATION

Gomez v. Cabatic, 159 A D 3d 62 (2d Dept. 2018) – "We now hold that where, as here, a plaintiff recovers compensatory damages for a medical professional's malpractice, a plaintiff may also recover punitive damages for that medical professional's act of altering or destroying medical records in an effort to evade potential medical malpractice liability." In so holding, the Court rejected defendant's argument that "as a matter of law, her act of destroying the original records of her treatment of the child cannot support an award of punitive damages" because "her destruction of the original records did not contribute to causing the child's death and did not prevent the plaintiff from successfully prosecuting this action." For, "'courts in this state have long recognized that those who, without specifically intending to cause harm, nevertheless engage in grossly negligent or reckless conduct showing an utter disregard for the safety or rights of others, may also be deserving of the imposition of punitive damages.'" And, here, "the defendant's conduct 'evinces a high degree of moral culpability or willful or wanton negligence or recklessness.'"

Zacharius v. Kensington Publishing Corporation, 154 A D 3d 450 (1st Dept. 2017) – "Spoliation sanctions were providently granted. The record demonstrates that plaintiff was in control of her own email account, was aware, as an attorney, of her obligation to preserve it at the time it was destroyed, with or without service of defendants' litigation hold notice upon her, since she commenced the action, and had a 'culpable state of mind,' as she admitted that she intentionally deleted well over 3,000 emails during the pendency of the action [citations omitted]. Destroyed evidence is automatically presumed 'relevant' to the spoliator's claims when it is intentionally deleted." Thus, "under the circumstances, the court providently exercised its discretion in limiting the sanction against plaintiff to costs and attorneys' fees, rather than the 'drastic remedy' of striking plaintiff's complaint [citations omitted]. While plaintiff's actions were intentional, defendants were 'not entirely bereft of evidence tending to establish its position.'"

Matter of New York City Asbestos Litigation (Warren v. Amchem Products, Inc.), 157 A D 3d 564 (1st Dept. 2018) – "In or around the 1990's, JMM lost and destroyed

numerous banker's boxes containing the records of the manufacture, sale, and marketing of pipe which contained asbestos, a line of business it purchased from Johns-Manville in the 1980s." But, "JMM was on notice that the records might be needed for future litigation, and thus JMM's behavior constituted spoliation [citations omitted]. JMM was well aware of the long history of personal injury claims arising from other Johns-Manville asbestos-containing products, and the Worker's Compensation claims filed by individuals who worked in the manufacture of the pipes at issue. JMM contemplated the possibility of litigation, having entered into a litigation cooperation agreement with Johns-Manville at the time it purchased the pipe business, and internal memos from the 1980's show that executives and lawyers at JMM discussed the risk-benefit of continuing the product line, as well as the possibility that its insurance carriers would withdraw liability coverage for the product [citations omitted]. Accordingly, the motion court did not abuse its broad discretion in directing that the jury be charged with an adverse inference at the time of trial."

SM v. Plainedge Union Free School District, 162 A D 3d 814 (2d Dept. 2018) – The infant plaintiff was injured when he attempted to do a second cartwheel into a handstand from atop monkey bars during recess at defendant's school. "According to the deposition testimony of the school principal, given the nature of the accident, an incident report was completed by the school nurse, notice was given to the school's insurance company, and a report was made directly to the 'central office.' In addition, immediately following the accident, the school principal reviewed surveillance footage to determine the cause of the accident. The defendant preserved 24 seconds of surveillance footage from the day of the accident. The preserved footage shows what was alleged to have been the infant plaintiff's second attempt at the cartwheel-to-handstand maneuver. He is seen on top of the monkey bars for no more than six seconds before his fall. During the course of this litigation, the plaintiffs made a discovery demand for, *inter alia*, 'the entire footage of the recess period leading up to the time of the accident.' In response, the defendant stated that it had saved only that portion of the video which depicted the 'actual accident,' and claimed that because it had no prior notice of the need to preserve any additional footage, in keeping with the defendant's usual custom and practice, the remaining footage was automatically erased 30 days after the accident." The Court directs a "negative inference charge against the defendant." For, "plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff's accident at the time of its destruction, but negligently failed to do so. Given the nature of the infant plaintiff's injuries and the immediate documentation and investigation into the cause of the accident by the defendant's employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation [citations omitted]. The defendant failed to meet this obligation. The defendant acted negligently in unilaterally deciding to preserve only 24 seconds of footage and passively permitting the destruction of the remaining footage, portions of which were undisputedly relevant to the plaintiff's case."

Watson v. 518 Pennsylvania Housing Development Fund Corporation, 160 A D 3d 907 (2d Dept. 2018) – Plaintiff was shot by an intruder in defendant's building, and sought "records regarding the condition of the building's entrances and locks." Defendant belatedly denied that any such records existed. The Appellate Division affirms the denial of plaintiff's motion to strike defendant's answer. "The plaintiff failed to sustain his burden of establishing that spoliation occurred as there was no evidence submitted that the requested documents ever actually existed [citations omitted]. The plaintiff also did not establish that the absence of any such documents deprived him of his ability to prove his claim." However, under these circumstances, "the Supreme Court should have exercised its discretion to grant the plaintiff the alternative relief of an order of preclusion." For, "the defendant's dilatory discovery conduct cannot be condoned, and it would be manifestly unfair to the plaintiff for the defendants to attempt to offer any of the subject documents at trial, should the documents be located."

Smith v. Cunningham, 154 A D 3d 681 (2d Dept. 2017) – Defendant hired plaintiff to do repairs and alterations to plaintiff's home. "Unsatisfied with the work performed by the plaintiff, the defendant terminated the plaintiff's employment." Plaintiff then sued for unpaid fees, and defendant counterclaimed for the expenses necessary to correct allegedly defective work. When plaintiff inspected the premises, it was discovered that all of plaintiff's work had been altered or redone. "We conclude that the Supreme Court providently exercised its discretion in denying the plaintiff's request to strike the defendant's answer and counterclaim. However, the court improvidently exercised its discretion in imposing the sanction of precluding the defendant from calling any expert witness at trial to testify regarding alleged defects in the plaintiff's work." For, "plaintiff failed to demonstrate that the defendant's conduct rose to the level of being intentional or willful." Thus, "under the circumstances of this case, the appropriate sanctions was to give an adverse inference charge at trial."

Burke v. Queen of Heaven Roman Catholic Elementary School, 151 A D 3d 1608 (4th Dept. 2017) – Plaintiff seeks damages for personal injuries allegedly caused by defective stairs. "Defendants concede that the original condition of the stairway was relevant. Furthermore, an obligation to preserve the condition of the stairs existed because litigation had begun at the time the stairs were replaced [citations omitted]. We agree with plaintiff that she met her burden of establishing that defendants destroyed the stairs with a culpable state of mind. As Supreme Court properly concluded, defendants' culpable state of mind was evidenced by their destruction of the stairs during the parties' ongoing debate about whether plaintiff had to disclose the name of her expert to defendants before defendants would agree to the inspection [citations omitted]. We thus agree with plaintiff that the imposition of a sanction against defendant for spoliation of evidence was warranted here [citation omitted]. Nevertheless, we conclude that the court abused its discretion in striking defendants' answer and granting plaintiff partial summary judgment on liability based on defendants' destruction of the stairway." Since

"the record does not demonstrate that plaintiff has been left 'prejudicially bereft' of the means of prosecuting her action," the Court concludes that an adverse inference charge is the appropriate sanction.

Macias v. ASAL Realty, LLC, 148 A D 3d 622 (1st Dept. 2017) – "The motion court exercised its discretion in a provident manner in ordering the lesser sanction of an adverse inference charge. Defendant's principal testified that the building superintendent regularly viewed the lobby surveillance tapes, and the superintendent admitted knowing that the video automatically erased itself approximately every two weeks. This knowledge, coupled with the superintendent being at the scene of plaintiff's fall in defendant's building immediately after it occurred, was a sufficient showing that defendant's destruction of the evidence was, at a minimum, negligent."

Rokach v. Taback, 148 A D 3d 1195 (2d Dept. 2017) – Defendant's principal "viewed a surveillance video recording shortly [after the accident at issue] which allegedly revealed that the plaintiff stood at the side of the vehicle as it backed up and then sat down behind the front tire, causing the vehicle to drive over her toes." Although that principal "was notified of an impending lawsuit by the plaintiff only two days after the incident, the defendants took no steps to preserve the video recording, and it subsequently was erased." The Court concluded that "the plaintiff sustained her burden of establishing that spoliation occurred, given that the defendants failed to preserve the surveillance video despite their knowledge of a reasonable likelihood of litigation regarding the incident, and the highly relevant nature of the video evidence to that litigation [citations omitted]. However, since the destruction of the evidence did not deprive the plaintiff of her ability to prove her claim so as to warrant the drastic sanction of striking the defendants' answer, the appropriate sanction for the spoliation herein is to preclude the defendants from offering any evidence in this action regarding the alleged contents of the erased surveillance video."

Lilavois v. JPMorgan Chase and Company, 151 A D 3d 711 (2d Dept. 2017) – Plaintiff slipped and fell in the ATM vestibule of one of defendant's branches. The vestibule "purportedly contained multiple security cameras." An employee of defendant averred that she had conducted a search, "and determined that no such surveillance video existed for the subject location." Thus, "contrary to the plaintiffs' contention, the Supreme Court properly determined that the affidavit of Chase's employee raised a triable issue of fact as to whether spoliation of the surveillance video occurred." Accordingly, the Court directs "that an adverse inference charge be given against Chase at trial with respect to surveillance video of the underlying incident if the jury does not credit testimony of Chase's witness that no surveillance video existed for the subject location."

Zuniga v. TJX Companies, Inc., N.Y.L.J., 1513825238 (Sup.Ct. N.Y.Co. 2017) (St. George, J.) – In this slip and fall case, defendant's store manager testified at deposition

that the store was equipped with surveillance cameras throughout, but that there were areas that were not covered and coverage areas changed from time to time. She recalled speaking to the store's "loss prevention associate," who told her that plaintiff's accident had not been recorded. She also testified that she had prepared a hand-written incident report relating to the accident which had been kept in a binder in her office for the "retention period" of one year. Plaintiff's counsel first wrote to defendants some four months after the incident, but that letter did not include a demand for preservation of evidence. This action was commenced 2 1/2 years after the incident, and the demand for production of the video and notes was made 3 years later. The Court rejects plaintiff's request to strike defendant's pleading, especially "given the lack of concrete evidence that the accident was even recorded in the first place." The Court held that "an adverse inference charge at trial as to the handwritten incident report only [is] a more appropriate remedy in this case."

Fischetti v. Savino's Hideaway, Inc., N.Y.L.J., 1202791284026 (Sup.Ct. Suffolk Co. 2017)(Ford, J.) – One of defendant restaurant's employees – and son of the owners – who had been involved in the installation of a surveillance camera system, was present in the restaurant at the time of plaintiff's accident. He did not, however, review the video of the accident. The system automatically erases footage after two weeks, and the ordinary protocol is "to view the footage on an *ad hoc* basis, responding to allegations of theft or vandalism." Several months after the accident, plaintiff commenced this action, and her counsel "sent a form demand letter" which did not request preservation of any evidence. Plaintiff's motion for spoliation sanctions is denied. "The Appellate Division has recognized that a defendant who destroys documents in good faith and pursuant to normal business practice should not be sanctioned unless the defendant is on notice that the evidence might be needed for future litigation." Here, "defendant was not on notice of the reasonable possibility of future litigation so as to be under a duty to suspend its regular 2 week video retention policy."

Aponte v. Clove Lakes Health Care and Rehabilitation Center, Inc., 153 A D 3d 593 (2d Dept. 2017) – "Plaintiff Blanche Aponte was injured at the defendant's facility when a bed upon which she was lying collapsed. Approximately two years later, on March 17, 2015, the plaintiffs commenced the instant action by filing a summons and complaint. Sometime after the action was commenced, the plaintiffs demanded an inspection of the bed. However, the defendant claimed that, long before the instant action was commenced, the bed was examined by the defendant's maintenance worker, found to be fit, and reinserted into use at the defendant's facility, thereby rendering it unidentifiable. There is nothing in the record before this Court which demonstrates that the defendant had notice of the plaintiffs' claim prior to the commencement of the litigation, which was approximately two years after the accident. The plaintiffs therefore failed to establish that the defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence might be needed for future litigation."

ELECTRONIC DISCLOSURE

Brook v. Peconic Bay Medical Center, N.Y.L.J., 1202796849649 (Sup.Ct. N.Y.Co. 2017) (Scarpulla, J.) – In this action for fraud, breach of contract, and related claims, "defendant's counsel issued two formal litigation hold letters on: 1) January 21, 2011, and 2) June 20, 2012. Both letters provide detailed instructions regarding the content to be preserved and the individuals who must preserve. The letters also gave advice on how to ensure preservation. During discovery in this action, [plaintiff] Dr. Brook identified missing documents that he believed defendants should have produced. Of the identified missing documents, defendants were unable to locate any of the emails from 2009 and certain additional emails from subsequent years. Of the emails defendants produced, Dr. Brook notes that most were produced from their counsel's email account and not the account of the original sender or recipient. Dr. Brook argues that PMBC's failure to produce emails from the original custodian's account indicates that there must have been relevant emails that were deleted, which would have clearly demonstrated defendants' wrongful conduct." Plaintiff "asserts that defendants should have reasonably anticipated litigation as early as October 2009, when the conduct underlying this litigation occurred, or at least in July 2010 or November 2010, when plaintiff's former counsel demanded PMBC withdraw the A[dverse] A[ction] R[eport] [which is the subject matter of the lawsuit] or otherwise be subject to litigation. Based on plaintiff's letters in July and November 2010, I find that the defendants should have begun preserving and preventing the destruction of documents, including emails at that time." The Court concludes that defendants were negligent in failing to preserve emails and documents from those dates until the formal litigation hold was in place, and determines that "to impose a sanction commensurate with the defendants' conduct, I find that an adverse inference charge is appropriate solely for emails concerning Dr. Brook created by defendants between July 2010 and January 2011."

Iris Mediaworks, Ltd. v. Vasisht, N.Y.L.J., 1202791048431 (Sup.Ct. N.Y.Co. 2017) (Chan, J.) – The forensic evidence demonstrated that, at the beginning of this litigation, defendant hacked plaintiffs' computer system, causing its e-mails – including e-mails to and from their counsel – to be automatically forwarded to an address that then automatically forwarded them to defendant. "The hacking of plaintiffs' email during litigation can only be seen as an attempt to undermine plaintiffs' case. It is also indicative of Vasisht's disregard for the judicial process. While striking a defendant's answer is an extreme sanction, it is warranted here as hacking plaintiffs' email to obtain information during litigation without going through proper discovery channels is an egregious act and sidesteps discovery procedures."

MEDICAL RECORDS AND EXAMINATIONS

Snyder v. Asher, 153 A D 3d 1647 (4th Dept. 2017) – The Court concludes that "unlimited authorizations for primary care, Social Security disability, and pharmaceutical

records" are appropriate in this case, as those records "are likely to contain relevant information about plaintiff's prior medical conditions." But, rather than permit all such records to be turned over to defendant, the Court remits "the matter to Supreme Court for an *in camera* review of the subject records and the redaction of any irrelevant information."

Moore v. Metropolitan Transportation Authority, N.Y.L.J., 1202798040948 (Sup.Ct. Bronx Co. 2017)(Barbato, J.) – Disclosure of medical records is "generally limited to those conditions which are placed at issue in the relevant lawsuit, meaning those conditions on which the suit is premised [citations omitted]. However, when a plaintiff makes broad allegations regarding physical injury and mental anguish, a 'defendant is entitled to full disclosure regarding any medical or psychological treatment that the plaintiff may have received' [citations omitted]. Under the foregoing circumstances, unrelated preexisting injuries and/or conditions become material and necessary in the litigation of potential damages."

McMahon v. New York Organ Donor Network, Inc., 56 Misc 3d 467 (Sup.Ct. N.Y.Co. 2017)(Bluth, J.), *modified*, 161 A D 3d 680 (1st Dept. 2018) – Supreme Court held that, "the instant motion appears to raise an issue of first impression – whether an O[rgan] P[rocurement] O[rganization] that is not covered by HIPAA must produce medical records it obtained from a covered entity because this information is required in order to run its organization. The reason that defendant receives medical records is that it needs the information to process organ donations. Defendant must know certain information about a donor's medical history in order to ensure that a donation is successful. However, defendant is not a covered entity and, therefore, must turn over the requested information. Defendant failed to identify a federal regulation or case law that would prevent this court from requiring disclosure." The Appellate Division agrees that "disclosure of these records is not prohibited by federal law." For, while defendant "is required to abide by HIPAA's privacy protections pursuant to Public Health Law §4351(8)," because "the subject disclosure would be made in the course of a judicial proceeding and pursuant to a qualified protective order, it is authorized under HIPAA." The Court modified the Supreme Court order to direct that "all identifying patient information be redacted."

Colindres v. Carpenito, 55 Misc 3d 856 (Sup.Ct. Westchester Co. 2017)(Lefkowitz, J.) – "Section 202.17(b)(1) of the Uniform Rules for Trial Courts (22 NYCRR) obligates a party, who has been served with a notice for a physical examination, to provide, at least 20 days prior to the examination or other date directed by the court, reports from their treating and examining medical providers, which shall (1) include a recital of injuries and conditions as to which testimony will be offered at trial, and (2) set forth a description of the injuries, a diagnosis and a prognosis. Contrary to plaintiff's contention, the rule does not apply 'predominantly' to toxic tort actions, but instead applies to all personal injury

and wrongful death actions as noted in the title of the rule, to wit, 'Exchange of medical reports in personal injury and wrongful death actions.' It is undisputed that plaintiff failed to provide a report from her treating psychologist, Ms. Henry, either prior to or subsequent to her IME by defendants' designated psychologist. The fact that a treating or examining medical provider, such as here, has not drafted a report does not obviate a plaintiff's obligation to provide such a report under the rules." Moreover, "contrary to plaintiff's contention, the fact that defendants conducted plaintiff's psychological IME without first receiving a report from plaintiff's treating psychologist did not waive defendants' entitlement to a medical report from plaintiff's treating psychologist. Unlike other items of discovery which must be affirmatively sought by a party, the exchange of medical reports in a personal injury action, including reports of a plaintiff's treating medical providers, is required, without demand, by section 202.17 of the Uniform Rules for Trial Courts (22 NYCRR). With respect to the reports of a plaintiff's treating medical providers, a plaintiff's obligation under the rule to exchange such reports is triggered when plaintiff is served with a notice fixing the time and place of a physical examination." The Court directed prompt exchange of a report by the treating psychologist.

Marriott v. Cappello, 151 A D 3d 1580 (4th Dept. 2017) – Plaintiff was accompanied to defendant's neuropsychological examination by a nurse, who intended to attend the entire examination. The doctor, however, stated that, "in accordance with the ethical standards of his practice, he informed plaintiff and the nurse that, typically, he would conduct plaintiff's neuropsychological testing without the nurse in the room." The nurse "acquiesced," and the 2 1/2 hour examination was conducted without her presence. A divided Appellate Division concludes that the exclusion was improper, and remits for the appropriate sanction. Plaintiff had the right to have a witness attend the examination, and "it was incumbent upon the defense, which selected the doctor to perform the examination, to know of the doctor's 'ethical standards' and to have either selected a different doctor who would follow the law or to seek guidance from the court before the examination concerning any limitations on plaintiff's right to have a representative present." The dissenter argued that "in the absence of any motion or protest by plaintiff's attorney or the nurse who was present, there is no basis upon which to preclude the expert's testimony."

Santana v. Johnson, 154 A D 3d 452 (1st Dept. 2017) – "Plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examination conducted by defendants' designated physician or prevent defendants' physician from conducting a meaningful examination." And, "to the extent that this Court has implicitly suggested that a representative can be barred from an examination if the plaintiff fails to demonstrate special and unusual circumstances [citation omitted], that is not the current state of the law in either the First, Second or

Fourth Departments and is inconsistent with the general principle that plaintiffs are entitled to have a representative at their medical examinations."

Barahona v. Continental Hosts, Ltd., 59 Misc 3d 1001 (Sup.Ct. N.Y.Co. 2018) (Silvera, J.) – Defendant seeks discovery of the notes taken by plaintiff's "IME Watchdog" during defendant's physician's examination of plaintiff. The application is denied. "It is undisputed that plaintiff's counsel hired the IME Watchdog, and obtained their notes taken during the IME, in anticipation of litigation or trial. Here, the Fountainhead Defendants' motion is noticeably silent as to any need, let alone a substantial need, for the notes of the IME Watchdog. Rather, the Fountainhead Defendants argue only that such notes were demanded, and that plaintiff's failure to provide them is intentional and deserving of sanctions. As it is clear that the Fountainhead Defendants have failed to even allege any need for the IME Watchdog notes, as per CPLR 3101(d)(2), the instant motion to strike, preclude or compel is denied."

ENFORCING DISCLOSURE ORDERS

Luo v. Yang, 150 A D 3d 726 (2d Dept. 2017) – "'A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order' [citations omitted]. Here, the so-ordered stipulation entered into by the parties in this action functioned as a conditional order of preclusion, which became absolute upon the defendant's failure to comply with it [citations omitted], unless the defendant demonstrated a reasonable excuse for failure to comply with its terms and the existence of a potentially meritorious cause of action or defense [citations omitted]. The defendant, who offered bare allegations of neglect by his prior counsel, failed to demonstrate a reasonable excuse for his failure to comply with the so-ordered stipulation [citations omitted]. Inasmuch as the defendant failed to demonstrate a reasonable excuse for his failure to comply with the so-ordered stipulation, we need not consider whether he offered a potentially meritorious cause of action or defense to the action."

Colucci v. Stuyvesant Plaza, Inc., 157 A D 3d 1095 (3d Dept. 2018) – A year after their failure to comply with expert disclosure orders, and only in response to defendant's motion for summary judgment, plaintiffs produced three expert affidavits. Supreme Court rejected those affidavits and granted summary judgment. The Appellate Division affirms. While "we are mindful that 'the remedy of preclusion is reserved for those instances where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious," Plaintiffs "were not entitled to 'ignore court orders with impunity' [citation omitted]. Under these circumstances, we cannot conclude that Supreme Court abused its discretion in precluding plaintiffs from submitting the expert affidavits and opinions of Colluci, Domer and Janning in opposition to defendant's motion and at trial."

Schiller v. Sunharbor Acquisition I, LLC, 152 A D 3d 612 (2d Dept. 2017) – "Almost four years after she commenced the action, the plaintiff moved, *inter alia*, pursuant to CPLR 3126 to strike the defendants' answer on the ground that the defendants were willful and contumacious in their failure to respond to the plaintiff's repeated demands for the decedent's entire medical record and the Supreme Court's orders related to the same." The Appellate Division affirms the granting of that motion. "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious [citations omitted]. The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse." Moreover, here, "in an April 2013 response by the defendants to the plaintiff's demand for supplemental discovery, the defendants represented they were 'not in possession of any electronically stored medical records,' yet the affidavit submitted by the defendants in opposition to the motion to strike contended that the repeated failure to provide the complete medical record to the plaintiff arose from a malfunction with the computer system on which such medical records were stored. The defendants failed to provide an explanation for their initial false statement in the discovery response to the plaintiff."

McHugh v. City of New York, 150 A D 3d 561 (1st Dept. 2017) – "The City's and the MTA's unexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly three years constituted willful and contumacious behavior, warranting the striking of their answer [citations omitted]. Defendants' belated production of 'a witness' for deposition on behalf of all three defendants failed to satisfy the requirements of the July 2015 order, since the witness produced was unprepared and had knowledge only on behalf of defendant Parsons. While the court thus providently exercised its discretion in declining to sanction Parsons, the order on appeal directing the City and the MTA yet again to produce a witness with knowledge was insufficient. Given the City's and the MTA's prolonged and willful failure to provide a 'timely response and one that evinces a good-faith effort to address the requests meaningfully' [citation omitted], the striking of their answer is appropriate."

ICM Controls Corp. v. Morrow, 151 A D 3d 1935 (4th Dept. 2017) – "A 'defendant's obligation to afford a plaintiff the opportunity to pursue discovery is not terminated when the answer is stricken,' inasmuch as a plaintiff should not be 'handicapped in the proof of its damages by a defendant's prior defiance of orders, notices, or subpoenas calling for his production of records or the taking of a deposition' [citations omitted]. Thus, a 'plaintiff, if it chooses to do so, may press its right to discovery in advance of the inquest, whether for direct use as evidence in proving its damages or for the procurement of information that may lead to such evidence.'"

Marcelo v. Elmoudni, N.Y.L.J., 1534818340 (Sup.Ct. N.Y.Co. 2018)(Silvera, J.) – "The Appellate Division First Department has found that 'the specific remedy for a party's failure to appear for deposition was preclusion, not the striking of his answer.'" Here, "the defendants failed to appear for seven scheduled depositions, have not provided this Court with a proper explanation for their failure to appear, and did not apprise the Court of their inability to be deposed on the scheduled deposition dates. Thus, the Court can infer that defendants have willfully failed to comply with discovery warranting the imposition of preclusion." The Court "shall preclude any testimony of defendants at trial and from providing any affidavits as to any substantive motion concerning liability and proximate cause."

STIPULATIONS AND SETTLEMENT

Jimenez v. Yanne, 152 A D 3d 434 (1st Dept. 2017) – "The email communications between plaintiffs' counsel and defendants' counsel sufficiently set forth an enforceable agreement to settle plaintiffs' personal injury claims." For, "counsel typed his name at the end of the email accepting defendants' offer, which satisfied CPLR 2104's requirement that settlement agreements be in a 'writing subscribed by him or his attorney' in order to be enforceable [citations omitted], thus creating a binding settlement agreement."

Solartech Renewables, LLC v. Vitti, 156 A D 3d 995 (3d Dept. 2017) – State Technology Law §304(2), the Electronic Signatures and Records Act ("ESRA"), provides that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." And, "an electronic signature is defined as 'an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.'" Thus, "although emails are electronic records, not every attachment to an email qualifies as an electronic record under ESRA. One of the purposes of ESRA is 'to promote the use of electronic technology in the everyday lives and transactions' of government entities, businesses and average citizens [citations omitted]. To fulfill this purpose, it was necessary for the Legislature to permit emails to be considered equivalent to signed writings when that was the sender's intent [citation omitted], because it was not possible to place a handwritten signature on an email or similar electronic record that was being transmitted electronically. The same logic does not apply to ordinary typed documents that are scanned and attached to emails, because a party could easily affix a handwritten signature to those documents."

Kataldo v. Atlantic Chevrolet Cadillac, 161 A D 3d 1059 (2d Dept. 2018) – "To be enforceable, a stipulation of settlement must conform to the criteria set forth in CPLR 2104 [citations omitted]. Where, as in the instant case, counsel for the parties did not

enter into a settlement in open court, an 'agreement between parties or their attorneys relating to any matter in an action is not binding upon a party unless it is in a writing subscribed by him or his attorney.'" An email message "may be considered 'subscribed' as required by CPLR 2104, and, therefore capable of enforcement, where it 'contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature' [citation omitted]. Here, the email confirming the settlement agreement was sent by counsel for the party seeking to enforce the agreement, LICO. There is no email subscribed by the plaintiff, who is the party to be charged, or by her former attorney. In the absence of a writing subscribed by the plaintiff or her attorney, the settlement agreement is unenforceable against the plaintiff."

Estate of Abrams v. Seaview Association of Fire Island New York, Inc., 151 A D 3d 809 (2d Dept. 2017) – The parties entered into a stipulation of settlement, and "executed a stipulation of discontinuance with prejudice." Thereafter, plaintiff moved to vacate the discontinuance and compel compliance with the settlement. The Appellate Division affirms the denial of those motions. "The Supreme Court properly denied the plaintiff's motion, in effect, to vacate the stipulation of discontinuance and to restore the action to the active calendar. The relief requested by the plaintiff was not available by way of a motion since the action was terminated by the stipulations of discontinuance with prejudice, and thus, the plaintiff could only obtain such relief by commencing a plenary action."

69 Columbia Street Realty v. SDS Colcon Owners LLC, N.Y.L.J., 1516241910 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – "Although a trial court has the power 'to exercise supervisory control over all phases of pending actions and proceedings' [citations omitted], it lacks jurisdiction to entertain a motion after the action has been 'unequivocally terminated by the execution of an express, unconditional stipulation of discontinuance' [citations omitted]. By the parties' stipulation to discontinue the action, filed on April 6, 2017, the instant action was terminated. Any Court orders issued thereafter including the extension of a temporary restraining order are vacated as nullities. This is without prejudice to the parties' right to seek enforcement of the Agreement and the Consent Order so-ordered on August 18, 2017 by the commencement of a separate plenary action."

Ronkese v. Tilcon New York, Inc., 153 A D 3d 259 (3d Dept. 2017) – CPLR 5003-a(a) provides that when an action has been settled, "any settling defendant shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action." If payment is not timely made, then, pursuant to CPLR 5003-a(e), plaintiff may enter judgment for the full amount set forth in the release together with interest, costs and disbursements. "The dispute here centers on whether monies payable by a settling

defendant to a third-party lienholder pursuant to a settlement agreement between a plaintiff and the defendant constitute a 'sum due' to the plaintiff within the meaning of CPLR 5003-a. We hold that it does not." For, "we conclude that CPLR 5003-a applies only to the nonpayment of settlement monies owed directly to a settling plaintiff pursuant to a settlement agreement. This construction is not only in accord with the plain language of the prompt payment mandate itself, but is also supported by the language of the statutory enforcement mechanism set forth in subdivision (e)," and "finds further support in its legislative history."

Azbel v. County of Nassau, 149 A D 3d 1020 (2d Dept. 2017) – The parties entered into an unconditional settlement of this personal injury action. Thereafter, the County Legislature "authorized the County Attorney to settle the action 'provided that a bond ordinance to finance such settlement is adopted by this Legislature and any borrowing pursuant to such bond ordinance is approved by the Nassau County Interim Finance Authority, if such approval is required.'" The bond ordinance was not approved, and, by the time defendant paid the amount of the settlement, from a different source, the 90 days provided for such payment by a government agency under CPLR 5003-a(b) had expired. Plaintiff accordingly sought "interest, costs and disbursements" pursuant to CPLR 5003-a(e). The Court denies the application. While the language of the settlement agreement contained no condition to payment by the County, "the Nassau County Administrative Code provides that the County Attorney shall not be empowered to settle any rights, claims, demands or causes of action against the County unless authorized by the County Legislature," and "'a party that contracts with the State or one of its political subdivisions is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them.'"

PRE-TRIAL PROCEEDINGS

Matos v. City of New York, 154 A D 3d 532 (1st Dept. 2017) – "The motion court providently exercised its discretion in vacating plaintiff's note of issue where plaintiff's former counsel made a material misstatement that discovery was complete. A note of issue should be vacated where 'it is based upon a certificate of readiness that incorrectly states that all discovery has been completed [citation omitted]. Since discovery was not completed, the motion court correctly vacated the note of issue [citations omitted]. Upon vacatur of the note of issue, the case was restored to its pre-note of issue status [citation omitted]. Accordingly, the court properly granted plaintiff's motion to compel defendant to comply with outstanding discovery demands."

Bradley v. Konakanchi, 156 A D 3d 187 (4th Dept. 2017) – "In the First and Second Departments, it is very well established that 'CPLR 3404 does not apply to cases in which the note of issue has been vacated' [citations omitted]. The Second Department

has explained the rationale for this rule as follows: 'The vacatur of a note of issue returns the case to pre-note of issue status. It does not constitute a marking "off" or striking the case from the court's calendar within the meaning of CPLR 3404' [citations omitted]. This rule is a specific manifestation of the First and Second Departments' consistently narrow construction of CPLR 3404 [citations omitted]. The third Department, however, has effectively rejected the First and Second Department' interpretation of CPLR 3404 (*see Hebert v. Chaudrey*, 119 A D 3d 1170, 1171-1172 [3d Dept. 2014]). In *Hebert*, the plaintiff's note of issue was vacated on the defendant's motion, and the plaintiff did not file a new note of issue within the following year. 'We must agree with defendant that, as a result, the case was automatically dismissed pursuant to CPLR 3404,' wrote the *Hebert* panel [citation omitted]. *Hebert* is the logical end point of the Third Department's oft-expressed view that, for purposes of CPLR 3404, a case is 'marked off' or 'struck' from the calendar whenever the note of issue is vacated." Here, in *Bradley*, the Fourth Department holds that, "in accordance with the tenor and spirit of our existing case law, we now explicitly adopt the First and Second Departments' rule, and reject the Third Department's. It is axiomatic that CPLR 3404 has no applicability in the absence of an extant and valid note of issue [citations omitted], and we agree with the Second Department that 'the vacatur of a note of issue returns the case to pre-note status and does not constitute a marking "off" or striking the case from the court's calendar within the meaning of CPLR 3404.'"

Pak v. Lancaster, N.Y.L.J., 1202787244698 (Sup.Ct. Queens Co. 2017)(Modica, J.) – Plaintiff seeks a trial preference pursuant to CPLR 3403(a)(4) on the ground that plaintiff is 70 years of age or older. But plaintiff failed to provide any documentary proof of age, other than his own affidavit. Accordingly, even though the motion is unopposed, it is denied with leave to renew. For, "in the interest of protecting the rolls of litigants waiting their turn patiently for their long-awaited 'day in court,' this Court, therefore, will not take the word of the plaintiff as to his age."

TRIAL AND JUDGMENT

TRIAL SUBPOENAE

RPN Management Co. v. Gonzalez, N.Y.L.J., 1520986271 (Civ.Ct. N.Y.Co. 2018) (Stoller, J.) – Petitioner served trial subpoenae on non-parties, properly made returnable at the Courthouse. But, "the subpoenaed entities, for some reason, produced subpoenaed materials to Petitioner's attorney's office rather than to the Courthouse." Petitioner's counsel did not notify respondent's counsel that the documents were in his possession, because, he says, he "wanted to review the records first to see if he would use the subpoenaed materials for trial, the reasoning being that he saw no point in making them available for inspection if he was not going to use the records at trial." But, "this course

of action contravenes the letter and the spirit of CPLR 408, 2304 and 3120(3), rendering the subpoena more like discovery, where a party gets to review documents before the trial, than a trial subpoena, and impermissibly conferring upon Petitioner the discretion to decide what Respondent may or may not review from the subpoena." The subpoenae were, accordingly, quashed.

Chicoine v. Koch, 161 A D 3d 1139 (2d Dept. 2018) – "A court of record generally has the power 'to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court' (Judiciary Law §2-b[1]). 'Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with CPLR 2103(b) to the party's attorney of record' [citation omitted]. Contrary to the defendant's contention, because he is a party to this action, over whom personal jurisdiction had been obtained, he is 'found in the state' within the meaning of Judiciary Law §2-b(1)," even though, after commencement of this action, he had relocated from New York to South Carolina.

JURY ISSUES

Security Pacific National Bank v. Evans, 148 A D 3d 465 (1st Dept. 2017) – "The motion court properly determined that defendant has no right to a jury trial on the triable issues identified by this Court on a prior appeal [citation omitted]. Since both parties sought equitable relief – that is, specific performance of their settlement agreement or injunctive relief – defendant is not entitled to a jury trial [citations omitted]. Even if defendant now asserts a claim for money damages, and even if she were to withdraw her equitable claims, that would not revive or create a right to a trial by jury that was waived by asserting equitable claims with respect to the same transaction."

Pittsford Canalside Properties, LLC v. Pittsford Village Green, 154 A D 3d 1303 (4th Dept. 2017) – "We have declined to apply the prevailing rule in the other Departments of the Appellate Division that a defendant waives his or her right to a jury trial on jury-triable causes of action in the complaint by interposing an equitable counterclaim based on the same transaction [citation omitted]. The plain text of CPLR 4102(c) does not address that issue, and the rule that prevails in the other Departments would force defendants to commence separate actions to assert equitable counterclaims, thereby encouraging the prosecution of inefficient and wasteful parallel actions [citation omitted]. We conclude, however, that 'the need for a full relitigation of the equitable claims and the possibility of inconsistent results can be avoided by permitting the legal action and the equitable claims to be tried at the same time."

TRIAL PROCEDURE

Nelson v. City of New York, 60 Misc 3d 353 (Sup.Ct. Queens Co. 2018)(Modica, J.) – The Court grants the application of plaintiff, "who is in her nineties and infirm, and who

previously was granted a trial preference pursuant to CPLR 3403(a)(4)," to "testify by videotelephony, a form of closed circuit television." The "right to face-to-face confrontation is not absolute, and may give way to important public policy exceptions provided there are other assurances of the testimony's reliability." Thus, "there is no rule that absolutely forbids the plaintiff from testifying through the use of a closed circuit television to the jury. It has been utilized in both Family Court proceedings and criminal prosecutions involving children who have been sexually abused [citations omitted]. The Court finds that, under the circumstances of this case, the plaintiff should be permitted to testify to the jury through the use of computerized audio-video technology."

VERDICTS

Peterson v. MTA, 155 A D 3d 795 (2d Dept. 2017) – "'The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation' [citations omitted]. 'The reasonableness of compensation must be measured against relevant precedent of comparable cases' [citations omitted]. 'Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation.'"

Kirkland v. Ranchers Best Wholesale Meats, Inc., 152 A D 3d 656 (2d Dept. 2017) – "'The setting aside of a jury verdict as a matter of law and the setting aside of a jury verdict as contrary to the weight of the evidence involve two inquiries and two different standards' [citations omitted]. In order to find that a jury verdict is not supported by sufficient evidence as a matter of law, there must be 'no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial' [citation omitted]. By contrast, 'the criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent' [citation omitted]. Thus, 'a jury verdict in favor of a defendant should not be set aside as against the weight of the evidence unless the evidence preponderates so heavily in the plaintiff's favor that the verdict could not have been reached on any fair interpretation of the evidence' [citations omitted]. When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view [citation omitted]. 'In reviewing the whole trial to ascertain whether the conclusion was a fair reflection of the evidence, great deference must be given to the fact-finding function of the jury [citation omitted]. It is within the jury's province to make credibility determinations, and to accept or reject some or all of the parties' testimony and weigh any conflicting inferences."

Blanchard v. Chambers, 160 A D 3d 1314 (3d Dept. 2018) – "Based on defendant's own testimony, the verdict exonerating her from any comparative fault is against the weight of

the evidence, and plaintiffs' motion to set aside the verdict should have been granted on that basis and a new trial ordered." Defendant motorist testified that she saw – from about 100 yards away – plaintiff and others beginning to cross the roadway. She estimated her speed at 30 miles per hour, and neither slowed down, nor sounded her horn. She merely, as she approached, "twisted my wheel of the car thinking I could get around them." Thus, "the jury's verdict exonerating defendant could not have been reached on any fair interpretation of the evidence."

11 Essex Street Corp. v. Tower Insurance Company of New York, 153 A D 3d 1190 (1st Dept. 2017) – "This Court has held that the requirement that a party opposing a directed verdict motion must have closed its presentation of evidence 'must be strictly enforced' [citation omitted]. Further, we have held that 'the grant of a dismissal pursuant to CPLR 4401 prior to the close of the opposing party's case will be reversed as premature, even if the ultimate success of the opposing party in the action is improbable.'" Defendant here "essentially asks us to endorse a system whereby a party can make a directed verdict motion at any time during trial, so long as the party opposing the motion has put in some unspecified quantum of evidence that, though it may not have been everything the opposing party intended to put in, was sufficient for the trial court to determine that there were no issues of fact and it could decide for the movant as a matter of law. We decline to do so." For, "to require a trial court to determine whether cutting off the opposing party's presentation of evidence would or would not prejudice it would place an unnecessary burden on the court, which would be put to the unenviable procedural burden of having to analyze the evidence already presented by the opposing party, as well as the evidence not yet presented."

INTEREST

Castle Restoration & Construction, Inc. v. Castle Restoration, LLC, 155 A D 3d 678 (2d Dept. 2017) – "'CPLR 5001(a) permits a creditor to recover prejudgment interest on unpaid interest and principal payments awarded from the date each payment became due under the terms of the promissory note to the date liability is established' [citations omitted]. Where, as here, the parties did not include a provision in the contract addressing the interest rate that governs after principal is due or in the event of a breach, New York's statutory rate will be applied as the default rate [citation omitted]. Thus, the plaintiffs are entitled to recover prejudgment interest on unpaid interest and principal payments awarded from the date each payment became due under the terms of the promissory note to the date liability was established at the statutory rate of interest."

JUDGMENTS

Minervini v. Minervini, 152 A D 3d 666 (2d Dept. 2017) – "'A judgment or order must conform strictly to the court's decision' [citations omitted]. 'Where there is an

inconsistency between a judgment or order and the decision upon which it is based, the decision controls.'"

Wells Fargo Bank, N.A. v. Choo, 159 A D 3d 938 (2d Dept. 2018) – "Although Supreme Court retains 'inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice' [citations omitted], 'a court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect.'"

ARTICLE 78 PROCEEDINGS

GENERAL CONSIDERATIONS

Musey v. 425 East 86 Apartments Corp., 154 A D 3d 401 (1st Dept. 2017) – "Supreme Court properly dismissed, as time-barred, so much of the third cause of action that sought a declaratory judgment that the house rules enacted by the co-op, concerning use of the roof/terrace adjoining plaintiff's penthouse unit, were contrary to the terms of the proprietary lease." For, "where, as here, a cooperative shareholder seeks to challenge a co-op board's action, such a challenge is to be made in the form of an article 78 proceeding," and subject to a 4-month statute of limitations, running, here, from when "plaintiff was provided with the final and binding house rules."

Matter of Reillo v. New York State Thruway Authority, 159 A D 3d 993 (2d Dept. 2018) – "CPLR 7804(c) provides that when a CPLR article 78 proceeding is commenced against a 'state body or officers' by a notice of petition, the notice of petition must be served upon the Attorney General. Here, upon conducting a 'particularized inquiry' into the nature of the Thruway Authority and the statute claimed to be applicable to it [citations omitted], we conclude that the Thruway Authority is a 'state body' for the purposes of CPLR 7804(c) [citations omitted]. Accordingly, since the Attorney General was not served, the court properly denied the petition and dismissed the proceeding."

Matter of D'Alessandro, 59 Misc 3d 748 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – "Under CPLR article 78, a petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CPLR 408. Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief [citation omitted]. In a summary proceeding in which a petitioner moves for disclosure under CPLR 408, the pertinent criteria for consideration include, *inter alia*: (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested

disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice."

Matter of Pooler v. Ark, 156 A D 3d 1428 (4th Dept. 2017) – The petition seeking prohibition claimed that respondent Justice improperly entered a monetary judgment against petitioner individually, when only his corporation was a defendant in an action pending before respondent. The petition is dismissed. Prohibition "is available when a court 'acts or threatens to act either without jurisdiction or in excess of authorized powers' [citations omitted], and 'the extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, no matter how grievous' [citation omitted]. Prohibition is 'ordinarily unavailable if a "grievance can be redressed by ordinary proceedings at law or in equity or merely to prevent error which may be readily corrected on appeal."'" Here, "petitioner contends that respondent lacked *personal* jurisdiction to issue the January order against him, not that respondent lacked subject matter jurisdiction or the power to issue the order [citation omitted; emphasis by the Court], and thus prohibition does not lie. Furthermore, we decline to exercise our discretion to grant the requested relief because there exist other remedies by which petitioner may seek the same relief [citation omitted]. Namely, petitioner could appeal directly from the order, even as a nonparty [citation omitted], or he could move to vacate the order and appeal from any subsequent order denying that relief."

Matter of Raiser & Kenniff, P.C. v. Nassau County Sheriff's Department, 149 A D 3d 1084 (2d Dept. 2017) – Petitioner sought "to prohibit the Nassau County District Attorney's Office from ordering recordings of conversations of inmates housed at the Nassau County Correctional Facility without a subpoena issued upon notice to defense counsel," and "mandamus to compel the Nassau County Sheriff's Department" to "deliver such recordings only after receiving a properly issued subpoena." The Appellate Division affirms dismissal of the petition. As to the writ of prohibition, "'the remedy is confined to judicial or quasi-judicial action rather than to legislative, executive, administrative or ministerial acts' [citations omitted]. Here, the petitioner failed to demonstrate that the conduct sought to be prohibited pertained solely to quasi-judicial action, as opposed to an investigative function performed in an executive capacity." As to mandamus to compel, that "extraordinary remedy" will lie "only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought." That was not demonstrated here.

Matter of Erie County Sheriff's Police Benevolent Association, Inc. v. County of Erie, 159 A D 3d 1561 (4th Dept. 2018) – "Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804(g) on the ground that the petition raised a substantial evidence issue. 'Respondent's determination was not "made as a result of a

hearing held, and at which evidence was taken, pursuant to direction by law" [citation omitted]. Rather, the determination was the result of a hearing conducted pursuant to the terms of the collective bargaining agreement' [citations omitted]. Nevertheless, in the interest of judicial economy, we consider the merits of the petition."

STATUTE OF LIMITATIONS

Valyrakis v. 346 West 48th Street Housing Development Fund Corporation, 161 A D 3d 404 (1st Dept. 2018) – "A proceeding challenging an action taken by a cooperative corporation must be commenced within four months after the action is final [citation omitted]. 'In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination.'"

Matter of De Filippis v. Proud, 151 A D 3d 963 (2d Dept. 2017) – "A request for discretionary reconsideration [of the decision after a fair hearing] does not extend the statute of limitations or render an otherwise final determination nonfinal."

Matter of Knavel v. West Seneca Central School District, 149 A D 3d 1614 (4th Dept. 2017) – A splintered Appellate Division concludes that petitioners' Article 78 proceeding is not time-barred. Petitioners are retired employees of respondent School District. The challenged act was the determination by respondent, contained in a letter mailed on June 5, 2014, addressed to "Retirees Under age 65 carrying Blue Cross Blue Shield Health Insurance," and stating that "effective July 1, 2014, West Seneca Central School District will no longer offer Under Age 65 retirees the option of carrying their health insurance through the active employee Blue Cross Blue Shield plan." The Court was unanimous that "the 'determination to be reviewed' in this proceeding is the decision embodied in the undated letter sent on June 5, 2014." What divided the Court was whether the date of mailing, or the date of receipt, began the running of the statute of limitations. The two-Justice plurality opinion rejected respondent's argument that "the undated letter is properly characterized as a 'quasi-legislative' decision, that actual notice is not required, and that constructive notice by mailing was sufficient to commence the four-month limitations period." For, "a quasi-legislative-type administrative determination is one having an impact far beyond the immediate parties at the administrative stage [citations omitted]. Thus, where a quasi-legislative determination is challenged, 'actual notice of the challenged determination is not required in order to start the statute of limitations clock' [citations omitted]. The policy underlying the rule is that actual notice to the general public is not practicable [citation omitted]. Instead, the statute of limitations begins to run once the administrative agency's quasi-legislative determination of the issue becomes 'readily available' to the complaining party [citation omitted]. On the other hand, where the public at large is not impacted by a determination, actual notice commonly in the form of receipt of a letter or other writing containing the final and binding determination, is required to commence the statute of limitations." Here, "the

determination clearly had no impact upon the public at large." Therefore, "we thus conclude that respondents failed to meet their burden of establishing that the challenged determination was 'quasi-legislative' and, therefore, that the 'readily ascertainable' constructive notice test should be applied herein." One Justice concurred in result only. She agreed with the dissenters that respondent's determination "was a quasi-legislative determination." For, "the nature of the determination, i.e., the decision of a school district to discontinue offering certain of its retirees enrollment access to a particular health insurance plan, has none of the hallmarks of quasi-judicial decision-making." However, the concurring Justice concluded that merely placing a letter in a mailbox did not render "the determination contained in that letter readily ascertainable to the affected retirees on that same date. The record does not establish that respondents undertook any other notification procedures to disseminate the subject information that would have adequately provided petitioners with constructive notice of the District's determination on that date." The two-Justice dissent argued that, "inasmuch as the nature of the action taken by the District was quasi-legislative, the undisputed date of the determination's mailing is, as a matter of public policy, the accrual date."

Matter of Crowell v. Zoning Board of Appeals of the Town of Queensbury, 151 A D 3d 1247 (3d Dept. 2017) – "The crux of petitioner's challenge to the issuance of the building permits is that a use variance, not an area variance, is required for the Robertses' reconstruction of the two nonconforming structures on their property. That issue was squarely resolved by the ZBA in January 2014, when it considered and rejected petitioner's claim that a use variance was required for the project and granted the Robertses an area variance from the density requirement of the Town's zoning code. To test that determination, petitioner was required to commence a CPLR article 78 proceeding within 30 days after the filing of the resolution granting the variance." And, "the fact that petitioner denominated his challenge as one to the issuance of the building permits does not control for statute of limitations purposes. In order to determine the applicable limitations period and the event that triggered its commencement, 'we must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner.'"

Hughey v. Metropolitan Transportation Authority, 159 A D 3cd 596 (1st Dept. 2018) – "While plaintiff originally brought this matter as a plenary action asserting that defendants breached a contract to provide him with the pension benefits that he was entitled to under the MTA's Pension Plan, the gravamen of plaintiff's claim as ultimately presented to the motion court was a review of the Board's administrative determination interpreting the pension plan. Consequently, the motion court properly concluded that this matter was in the nature of a CPLR article 78 proceeding, and subject to the four-month statute of limitations."

Matter of Broadway Barbeque Corporation v. New York City Department of Health and Mental Hygiene, 160 A D 3d 719 (2d Dept. 2018) – "In March 2010, the respondent/defendant New York City Board of Health adopted section 81.51 of the New York City Health Code [citation omitted], which authorizes the grading of inspection results for certain food service establishments and the posting of those grades [citation omitted]. This grading system was implemented in July 2010. In August 2014, the petitioners/plaintiffs (hereinafter the appellants) commenced this hybrid proceeding pursuant to CPLR article 78 and action for declaratory relief challenging the authority of the respondents/defendants (hereinafter the respondents) to implement the grading system and seeking to invalidate the system." The gravamen of the petition "was that the grading system was implemented in violation of lawful procedure, affected by an error of law, and arbitrary and capricious. Therefore, the Supreme Court correctly determined that the four-month statute of limitations set forth in CPLR 217(1) applies to this proceeding." Accordingly, the action is time-barred. For, "the appellants challenge the adoption of the grading system, which became effective in July 2010. Inasmuch as the appellants did not commence the instant proceeding until August 2014, more than four years later, their causes of action are time-barred."

Miranda Holdings, Inc. v. Town Board of Town of Orchard Park, 152 A D 3d 1234 (4th Dept. 2017) – "Plaintiff's first cause of action, which seeks a declaration invalidating Local Law No. 9-2014 in full or to the extent that the law improperly empowered defendant to classify projects that are Type II actions pursuant to SEQRA as Type I actions, was timely commenced inasmuch as it is a challenge to the substance of the law and is therefore subject to a six-year statute of limitations pursuant to CPLR 213(1)."

Matter of Granto v. City of Niagara Falls, 148 A D 3d 1694 (4th Dept. 2017) – The majority of this divided Court holds that "it is well settled that where, as here, the proceeding is in the nature of mandamus to compel, it 'must be commenced within four months after refusal by respondent, upon demand of petitioner, to perform its duty' [citations omitted]. 'A petitioner, however, may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches' [citation omitted]. Inasmuch as 'the problem is one of the statute of limitations, it is immaterial whether or not the delay causes any prejudice to the respondent' [citations omitted]. Thus, to the extent that we held in *Matter of Degnan v. Rahn* (2 A D 3d 1301, 1302 [2003]) that a respondent is required to make a showing of prejudice to establish that a proceeding in the nature of mandamus to compel is barred by the doctrine of laches, that case is no longer to be followed. 'The four-month limitations period of CPLR article 78 proceedings has been "treated as a measure of permissible delay in making of the demand.'"" The dissenting Justice argued that "'the sole test for courts to consider is

whether, under the circumstances of the case, the petitioners' delay in making the demand was unreasonably protracted." And, "in my view, however, this 10-month delay in making the demand was not so unreasonable as to deprive petitioners of their day in court." And, the dissent was "concerned that the majority's decision seeks to draw a hard and fast line rather than following long-established precedent requiring that we apply a facts-and-circumstances test to determine whether the excuse for delay is reasonable."

Matter of Kirsch v. Board of Education of Williamsville Central School District, 152 A D 3d 1218 (4th Dept. 2017) – The relation back doctrine enshrined in CPLR 203(f) is applicable to Article 78 proceedings. In this challenge to the denial of a FOIL request, petitioner seeks to add his counsel – who signed the request – as a petitioner, to avoid a standing argument. "Under the circumstances here, the relation back doctrine permits the addition of [lawyer] Starvaggi after the expiration of the statute of limitations inasmuch as the claims brought by Starvaggi and Kirsch are identical in substance, i.e., that respondents improperly denied the FOIL request made by Starvaggi on behalf of Kirsch, and Starvaggi and Kirsch are united in interest in seeking compliance with that request."

ARBITRATION

THE ARBITRATION AGREEMENT

Ramos v. Uber Technologies, Inc., 60 Misc 3d 422 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – "There is no dispute that on November 4, 2015, Ramos registered an account with Uber using an Uber application on her mobile telephone. Uber contends that by the process of registering, Ramos necessarily accepted Uber's terms and conditions which included an agreement to arbitrate." The final screen of the registration process, "displays the last step, denominated 'ADD PAYMENT,' where the applicant would input their credit card details or PayPal information. Below the input fields for the credit card information is the following text: "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.' To finish the process the applicant must click on a button labeled 'DONE.' The applicant could before clicking the button labeled 'DONE' review the "Terms & Conditions" by clicking on the text. But the only indication that clicking on the text would send the applicant to additional screens containing the terms and conditions is that the text "is displayed within a rectangular box." Thus, "the instructions on the third screenshot do not contain any language or any indication advising the applicant that clicking on the words 'Terms and Conditions and Privacy Policy' will take the applicant to another screen purportedly containing Uber's terms and conditions. In fact, an applicant may complete the registration process after completing the third screenshot and hitting the 'DONE' button without ever seeing or even being aware that a separate screen contains Uber's terms and conditions." Thus, "Uber has not

demonstrated that Ramos clearly, explicitly and unequivocally agreed to arbitration when she registered for Uber services."

Alam v. Uddin, 160 A D 3d 915 (2d Dept. 2018) – "Where a party has applied for an order compelling arbitration, the court shall direct the parties to arbitrate if, among other conditions, 'there is no substantial question whether a valid agreement was made' [citation omitted]. Here, the defendant alleged that his signature on the purported partnership agreement was a forgery and thus no valid agreement was made. Contrary to the defendant's contention, the question of forgery is a threshold question for the court and not an arbitrator to determine."

PROVISIONAL REMEDIES IN AID OF ARBITRATION

Matter of Uniformed EMS Officers Union v. New York City Fire Department, N.Y.L.J., 1511997276 (Sup.Ct. N.Y.Co. 2017)(Perry, J.) – "CPLR 7502(a) provides in pertinent part that 'the supreme court in the county in which an arbitration is pending may entertain an application for a preliminary injunction in connection with an arbitration that is pending only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.' A party seeking injunctive relief must also demonstrate the traditional three-prong factors for such relief as set forth under CPLR Article 63 [citation omitted]. Specifically, petitioners bear the burden of demonstrating a probability of success on the merits, danger of irreparable injury in the absence of a preliminary injunction, and a balance of the equities in their favor."

DISCOVERY IN AID OF ARBITRATION

Matter of Roche Molecular Systems, Inc., 60 Misc 3d 222 (Sup.Ct. Westchester Co. 2018)(Ruderman, J.) – CPLR 3119 authorizes "the issuance of New York subpoenas for depositions that were directed by an arbitral tribunal, rather than by a court in the context of a lawsuit." For, "in making reference to the out-of-state 'proceeding' from which the subpoena arises, the statute does not use the words 'action' or 'litigation.' Nor does it require that the out-of-state document which is 'issued under authority of a court of record' be rendered by a judge following any particular form of judicial review. It is the commission to take an out-of-state deposition, issued by a clerk of the Superior Court of California, that satisfies the definition of an 'out-of-state subpoena' provided by CPLR 3119(a)(1) and (4)." Thus, since the statute "merely requires that the subpoena or other such document be 'issued under authority of a court of record,'" petitioner here "does not rely on an arbitral subpoena, but rather on a commission obtained from a court of record based on the arbitrator's authorization to seek such a commission." And, while "many federal courts have held that section 7 of the FAA does not allow arbitrators to order discovery from nonparties," in contrast, here, "this matter does not involve a subpoena issued by an arbitral tribunal, but rather, a New York subpoena properly issued pursuant to CPLR 3119 based on a commission properly issued by a California state court

pursuant to California Civil Procedure Code §1297.271." Finally, a First Department decision, *ImClone Systems, Inc. v. Waksal*, 22 A D 3d 387 (1st Dept. 2005), has held that "depositions of nonparties may be directed in FAA arbitrations where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." And, "the ruling by the First Department is controlling on this New York State trial-level court in the absence of any contrary ruling by the Second Department or the Court of Appeals."

WAIVER OF ARBITRATION

Primer Construction Corp. v. Empire City Subway Company, Ltd., N.Y.L.J., 1202800580024 (Sup.Ct. N.Y.Co. 2017)(Bransten, J.) – The parties' agreement contained an arbitration provision, as well as a "binding written modification clause, which states that the agreement 'shall not be modified or rescinded, except by a writing signed by a duly authorized representative of both parties." But, "like contract rights generally, a right to arbitration may be modified, waived or abandoned [citations omitted]. When a plaintiff chooses to take the course of litigation, the party has waived the right to submit the question to arbitration [citation omitted]. 'Where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory' [citations omitted]. Although there is a written modification provision at issue, 'a party to a written agreement may orally waive enforcement of one of the terms despite a provision to the contrary' [citation omitted]. Therefore, an oral waiver of the arbitration clause is enforceable. Plaintiff has waived the right to arbitration by choosing to litigate the dispute in the Court. Defendants have waived the right to arbitration by participating in the instant litigation. Since both parties have mutually waived the right to arbitration, this Court has proper subject matter jurisdiction to hear the claims in this matter."

COMPELLING OR CHALLENGING ARBITRATION

Kindred Nursing Centers Limited Partnership v. Clark, ___ U.S. ___, 137 S.Ct. 1421 (2017) – "In the decision below, the Kentucky Supreme Court declined to give effect to two arbitration agreements executed by individuals holding 'powers of attorney' – that is, authorizations to act on behalf of others. According to the court, a general grant of power (even if seemingly comprehensive) does not permit a legal representative to enter into an arbitration agreement for someone else; to form such a contract, the representative must possess specific authority to 'waive his principal's fundamental constitutional rights to access the courts and to trial by jury' [citation omitted]. Because that rule singles out arbitration agreements for disfavored treatment, we hold that it violates the F[ederal] A[rbitration] A[ct]." For, "a court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue' [citation omitted]. The FAA thus preempts any state

rule discriminating on its face against arbitration – for example, a 'law prohibiting outright the arbitration of a particular type of claim' [citation omitted]. And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." Justice Thomas dissented, continuing "to adhere to the view that the Federal Arbitration Act [citation omitted] does not apply to proceedings in state courts."

Epic Systems Corporation v. Lewis, ___ U.S. ___, 2018 WL 2292444 (2018) – The narrowly-divided Supreme Court holds that employment contracts which provide for arbitration of wage disputes, and preclude class actions, are enforceable. The majority holds that, while "as a matter of policy these questions are surely debatable," nonetheless, "as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA – and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful." The dissenters argued that "the employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescription of the Fair Labor Standards Act of 1938 [citation omitted] and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone [citation omitted]. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced [citation omitted]. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act [citation omitted] permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act [citation omitted] 'to engage in concerted activities' for their 'mutual aid or protection'? [citation omitted]. The answer should be a resounding 'No.'"

Adams v. Kent Security of New York, Inc., 156 A D 3d 588 (1st Dept. 2017) – "The court [below] erred in failing to address plaintiff's contention that, because of his financial circumstances, requiring him to arbitrate [his wage claim against defendant] and to do so in Florida, would preclude him from pursuing his claims (*Matter of Brady v. Williams*

Capital Group, L.P., 14 N Y 3d 459 [2010]). Acknowledging the 'strong public policy favoring arbitration and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum' [citation omitted], the Court of Appeals in *Brady* held, as here relevant, that 'in this context, the issue of a litigant's financial ability to arbitrate is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum. Although a full hearing is not required in all situations, there should be a written record of the findings pertaining to a litigant's financial ability' [citation omitted]. Applying the foregoing standard we hold that plaintiff has made a preliminary showing that the fee sharing and venue provision in the arbitration agreement have the effect of precluding him from pursuing his statutory wage claim in arbitration." The Court therefore remanded for a hearing "consistent with *Brady*."

Piller v. Tribeca Development Group LLC, 156 A D 3d 1257 (3d Dept. 2017) – "Where, as here, there is a valid arbitration clause in an agreement and the party sued (here, Eisner) moves to compel arbitration, the court should stay the judicial action rather than dismiss it."

Matter of Allstate Insurance Company v. Howell, 151 A D 3d 461 (1st Dept. 2017) – "The time restriction set forth at CPLR 7503(c) do not apply where, as here, respondent waived her right to arbitrate by initiating litigation on the same claims [citations omitted]. 'Once waived, the right to arbitrate cannot be regained, even by the respondent's failure to timely seek a stay of arbitration.'"

CONFIRMING OR VACATING THE AWARD

Daesang Corporation v. The NutraSweet Company, N.Y.L.J., 1202788875727 (Sup.Ct. N.Y.Co. 2017)(Ramos, J.) – "An award may be vacated under federal law only if it violates a ground set forth in Section 10 of the Federal Arbitration Act ("FAA") [citation omitted]. In addition to the grounds set forth in the FAA, a court may vacate an arbitration award 'if it was rendered in manifest disregard of the law' [citation omitted]. A court must determine whether 'the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether,' and whether the governing law ignored was 'well defined, explicit, and clearly applicable to the case' [citation omitted]. Merely an error or misunderstanding of the applicable law does not constitute manifest disregard [citation omitted]. Judicial review of arbitration awards is extremely limited [citation omitted]. An arbitration award must be upheld when the arbitrator 'offers even a barely colorable justification for the outcome reached.'"

Matter of City of Buffalo (Buffalo Police Benevolent Association, Inc.), 150 A D 3d 1641 (4th Dept. 2017) – After a Buffalo police officer confessed to operating a "marijuana 'grow operation,'" the Commissioner served charges on him and promptly terminated his employment prior to holding a disciplinary hearing. The Collective Bargaining Agreement provides that a disciplinary penalty may only be imposed "after a hearing upon stated charges." Upon the grievance filed by respondent, the arbitrator concluded that "petitioner had violated the 'very clear procedure' delineated in the CBA and awarded the officer back pay." The Court concludes "that petitioner failed to meet its 'heavy burden' of demonstrating that the award should be vacated" on "public policy" grounds. For, "a court may vacate an award on that ground 'where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator' [citations omitted]. Vacatur of an award may not be granted 'on public policy grounds when vague or attenuated considerations of a general public interest are at stake' [citation omitted]. The court [below] properly determined that petitioner's proffered public policy considerations do not preclude the relief granted by the arbitrator. Petitioner's arguments in that regard constitute little more than vague considerations of a general public interest, which are insufficient to support vacatur of an award [citations omitted]. Although the underlying facts make the size of the award distasteful – over two years of back pay for a police officer who allegedly confessed to committing crimes both before and after becoming a police officer – 'our public policy analysis cannot change because the facts or implications of a case might be disturbing, or because an employee's conduct is particularly reprehensible."

Matter of Fast Care Medical Diagnostics, PLLC/PV v. Government Employees Insurance Company, 161 A D 3d 1149 (2d Dept. 2018) – Petitioner provided medical services to its 15-year-old patient after a motor vehicle accident, and both the infant and his mother assigned all benefits under their policy with respondent to petitioner. When petitioner sought to arbitrate the assigned claim, the arbitrator "dismissed the proceeding, without prejudice, on the ground that Fast Care had failed to comply with CPLR 1209, which provides, in relevant part, that 'a controversy involving an infant shall not be submitted to arbitration except pursuant to a court order made upon application of the representative of such infant.'" The Master Arbitrator confirmed the determination. The Appellate Division affirms the vacatur of that determination. "The arbitrator's award was irrational and in conflict with CPLR 1209, which applies 'only where an infant is a party' to an arbitration proceeding [citations omitted]. The infant patient was not a party to the arbitration; rather, Fast Care, as the infant's assignee, was the party that brought the arbitration." Therefore, "the arbitrator disregarded established law in determining that the requirements of CPLR 1209 applied here."

Matter of Ferraro v. Farina, 156 A D 3d 549 (1st Dept. 2017) – "Where, as here, the parties have submitted to compulsory arbitration 'judicial scrutiny is stricter than that for

a determination made in a voluntary arbitration and the determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78." Here, "the standard for reviewing a penalty imposed after a hearing pursuant to Education Law §3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness [citation omitted]. Termination of petitioner's employment does not shock the conscience in that the attempts to improve his performance, which extended over a two to three year period, were largely unsuccessful. Moreover, his testimony demonstrated that he did not believe that his pedagogical technique was deficient."

Matter of Heller v. Bedford Central School District, 154 A D 3d 754 (2d Dept. 2017) – "'Where, as here, the obligation to arbitrate arises through a statutory mandate, the determination of the arbitrator is subject to "closer judicial scrutiny" under CPLR 7511(b) than it would otherwise receive' [citations omitted]. 'An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious' [citations omitted]. 'In addition, article 75 review questions whether the decision was rational or had a plausible basis' [citation omitted]. When reviewing compulsory arbitrations in education proceedings such as this, the court should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice exists."

Schieferle v. Capital Fence Co., Inc., 155 A D 3d 122 (4th Dept. 2017) – "When an employee prevails on a wage nonpayment claim under article 6 of the Labor Law, 'the court shall allow such employee to recover all reasonable attorney's fees' [citation omitted]. We hold that a wage claimant may, in certain circumstances, validly waive their statutory right to attorney's fees under section 198. And because this case presents a textbook instance of such a valid waiver, there is no basis to upset the challenged arbitration award." For, "had the subject arbitration agreement been silent on the subject of attorney's fees, we would have little difficulty in concluding that the arbitrator's refusal to award the attorney's fees required by Labor Law §198 contravened public policy and constituted a manifest disregard of the law [citation omitted]. But the subject arbitration agreement is not silent on the question of attorney's fees' in paragraph 9, plaintiff explicitly waived his right to the attorney's fees provided by section 198." And the Court "can identify no *per se* impediment to a wage claimant's waiver of his or her right to the attorney's fees provided by Labor Law §198."

NRT New York LLC v. Spell, N.Y.L.J., 1518765396 (Sup.Ct. N.Y.Co. 2018)(Bluth, J.) – "The Court finds that the arbitrator's decision must be vacated because it is irrational and violates a strong public policy. The basis for the arbitrator's decision is that Mrs. Spell did not understand, focus on, or remember the sales commission component of the brokerage agreement with petitioner. That is not a valid basis to void a clear and obvious

written provision [citation omitted]. The arbitrator did not find that Mrs. Spell was incapable of understanding the provisions in the contract. The arbitrator did not find that the brokerage agreement was procured by fraud. The arbitrator did not find that Mrs. Spell lacked authority to enter the contract. Instead, and again, oddly, the arbitrator gives great weight to the fact that Mr. Spell was not present when the agreement was signed. So what if he was not present? No one challenged her authority to sign it or her capacity to understand it when she signed this two and a half page brokerage agreement, in which the key provision (paragraph 7) is clear." In sum, "the Court recognizes that it must give deference to an arbitrator's decision. But, here, that determination is wholly irrational because it ignores a clear and obvious agreement. Parties may not avoid their obligations under a contract because they claim that they forgot about them or think the other party does not deserve compensation."

Matter of New York City Transit Authority v. Phillips, 162 A D 3d 93 (1st Dept. 2018) – "In this Article 75 proceeding, petitioners seek to vacate a determination by an arbitrator under a collective bargaining agreement that set aside a determination by petitioners that Tony Aiken had committed sexual harassment, and ordered his termination. Although expressly agreeing with the pertinent factual findings in the investigation report of petitioners' Office of Equal Employment Opportunity (EEO) – including findings that Aiken had stated to a colleague that if he had a woman like her he would stay in bed all day and 'oil her down' – the arbitrator nevertheless, and incredibly and inconsistently with his own findings, ruled that the conduct did not 'rise to the level' of sexual harassment. We now reverse" the judgment below denying the petition to vacate the award. After cataloguing Aiken's outrageous comments, the Court noted that, "judicial review of an arbitration award is narrowly circumscribed, and vacatur limited to instances where the award is 'violative of a strong public policy, is irrational, or clearly exceeds a specific limitation on an arbitrator's power' [citations omitted]. Under the public policy exception, courts will intervene only in 'cases in which the public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator.'" Here, "the arbitrator's decision fashions a remedy that violates public policy. Moreover, it contains language maligning victims in an entirely inappropriate manner, including statements that it was incumbent on Melendez to take appropriate action if she felt Aiken's comments were inappropriate. Such a 'blame the victim' mentality inappropriately shifts the burden of addressing a hostile work environment onto the employee. The arbitrator's decision belies the realities of workplace sexual harassment." Accordingly, "public policy prohibits enforcement of the arbitration award in this case [citations omitted]. Further, the arbitrator's decision is irrational as it purports to adopt the findings of the EEO in all respects, and yet arrives at the unsustainable conclusion that Aiken did not violate the workplace sexual harassment policy."

Matter of 797 Broadway Group LLC v. BCI Construction, Inc., 57 Misc 3d 391 (Sup.Ct. Albany Co. 2017)(Platkin, J.) – Respondent contends that the arbitrator's award should be vacated for "evident partiality," which it claims "was manifested by his undisclosed prior representation of a client in a 2008 lawsuit against [respondent] BCI." But, "'unlike a judge, who can be disqualified in any proceeding in which his or her impartiality *might* reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, *would have to conclude* that an arbitrator was partial to one side'" [emphasis by the Court]. Thus, "'it follows that *where an undisclosed matter is not suggestive of bias*, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory'" [emphasis by the Court]. Here, the 2008 representation by the arbitrator's law firm – and the arbitrator personally – in a matter against respondent "appears to have been pending for only about eight days before being resolved by the parties without the need for judicial intervention. Thus, the 2008 litigation was remote in time, brief in duration, and involved issues entirely dissimilar to those raised in the subject arbitration." Nor "is there any allegation that the arbitrator was under any continuing duty of loyalty to his client in the 2008 matter that was implicated by the arbitration." Accordingly, vacatur was denied.

Matter of Woods v. State University of New York, 149 A D 3d 1358 (3d Dept. 2017) – "'An arbitrator's authority extends to only those issues that are actually presented by the parties. Thus, an arbitrator may not reconsider an award – regardless of whether the request is couched as a clarification or modification – if the matter was not previously raised in arbitration."

Judiciary Law §5 prohibits Courts from sitting on a Sunday, or on a Saturday if it is kept as a holy day by any party. That provision has, in the past, been applied to arbitration proceedings as well, resulting in vacatur of awards when hearings were held on a weekend. Effective August 21, 2017, Judiciary Law §5 has been amended to provide that "no provision of this section shall be deemed to prohibit or prevent the conducting on Saturday and/or Sunday of any arbitration or mediation proceeding, provided all parties and the tribunal consent to such proceeding in writing."

ENFORCEMENT OF JUDGMENTS

Jones Morrison, LLP v. Schloss, 155 A D 3d 704 (2d Dept. 2017) – "Supreme Court properly granted the plaintiff's motion for summary judgment and entered a renewal judgment pursuant to CPLR 5014(1). The plaintiff established its *prima facie* entitlement to a renewal judgment as a matter of law by showing: (1) the existence of the original judgment; (2) that the defendant was the judgment debtor; (3) that the original judgment was docketed at least nine years prior to the commencement of this action; and (4) that the original judgment remains partially or completely unsatisfied."

Medallion Bank v. Papa of 5 Hacking Corp., N.Y.L.J., 1531185771 (Sup.Ct. N.Y.Co. 2018)(Ostrager, J.) – CPLR 5232(a) provides, *inter alia*, that "at the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought." Here, a motion to extend the 90-day limit was made on the 90th day after the levy. The Court holds that the motion is timely. "The judgment creditor need only commence a proceeding within 90 days to avoid expiration of the levy." The filing of the motion before expiration of the 90 days "constitutes a timely request for an extension of time to perfect the levies."

New York State Commissioner of Taxation and Finance v. TD Bank, N.A., 55 Misc 3d 395 (Sup.Ct. Albany Co. 2016)(Hartman, J.) – CPLR 5225(b) provides that when a judgment creditor commences a turnover proceeding against a person in possession of property owned by the judgment debtor, the judgment debtor must be served "in the same manner as a summons or by registered or certified mail, return receipt requested." The Court here rules that "certified mailing, return receipt requested, does not satisfy the service requirement of CPLR 5225(b) unless the completed and signed return receipt or other evidence shows actual delivery to a suitable person at the debtor's last known address." For, "if service were deemed successfully completed by the mere mailing of notice with a request for return receipt, regardless of whether the return receipt shows that the notice was delivered, the requirement for a return receipt would serve no purpose, and notice could as effectively be served by first-class mail [citations omitted]. CPLR 5225(b) contemplates that the judgment debtor may intervene. Compliance with the return receipt requirement is necessary to ensure that the judgment debtor has reasonable notice and the opportunity to seek intervention in the turnover proceeding. Due process requires as much."

Jackson v. Bank of America, N.A., 149 A D 3d 815 (2d Dept. 2017) – "Insofar as is relevant here, CPLR 5222(i), which is entitled, 'Effect of restraint on judgment debtor's banking institution account,' provides that a restraining notice 'shall not apply to an amount equal to or less than $1,740 at the time the subject accounts were restrained except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents' [citation omitted]. It further provides that if an 'account contains an amount equal to or less than 90% of $1,740 at the time the subject accounts were restrained, the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents.'" In this action seeking damages for improper restraint of bank accounts, "the plaintiffs, pointing to the Legislature's use of the term 'account' in the singular in CPLR 5222(i), contend that CPLR 5222(i) should be applied separately to

each account. Therefore, the plaintiffs urge, even though the total balance of their respective bank accounts was greater than $1740, BOA could not lawfully restrain any of their accounts that contained 90% of $1,740 or less and the first $1740 of each of their accounts containing over $1,740 was exempt from restraint or execution. BOA, pointing to the Legislature's use of the phrase 'amount equal to or less than $1,740' in the statute, contends that the total amount in restrained bank accounts must be aggregated to calculate the statutory exemption." Finding the language of the statute ambiguous "as to whether it applies to an 'amount' on deposit at a bank or to each 'account' maintained at a bank," the Court turns to the legislative history of the statute. And, "the legislative history, as reflected in the bill jacket, particularly in a letter in support of the bill written by the bill's Assembly sponsor, Helene Weinstein, indicates that the statute applies to each account."

Benzemann v. Citibank N.A., 149 A D 3d 586 (1st Dept. 2017) – "This case arises from the retraining notices issued by defendants and the resulting restraints placed on plaintiff's bank accounts in 2008 and 2011." Plaintiff's claims for "wrongful attachment" are dismissed. Those claims allege "that the defendants were collectively responsible for plaintiff's property being wrongfully restrained." But, "plaintiff does not plead that there was an 'attachment' governed by article 62 of the CPLR, but rather that there were restraining notices issued pursuant to CPLR 5222. 'There mere fact that property has been subjected to some form of restraint does not serve as a basis for the statutory claim of wrongful attachment."

George v. Albi, 148 A D 3d 1119 (2d Dept. 2017) – "CPLR 5240 provides the court with broad discretionary power to control and regulate the enforcement of a money judgment under CPLR article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice' [citation omitted]. Nevertheless, an application to quash a subpoena should be granted only where 'the futility of the process to uncover anything legitimate is inevitable or obvious [citation omitted], or where the information sought is 'utterly irrelevant to any proper inquiry' [citations omitted]. It is the burden of the party seeking to quash a subpoena to conclusively establish that it lacks information to assist the judgment creditor in obtaining satisfaction of the judgment."

Morin Boats v. Acierno, 150 A D 3d 844 (2d Dept. 2017) – "The Full Faith and Credit Clause requires that a New York court afford the judgment of a sister State the same credit, validity, and effect that it would have in the State that rendered it [citations omitted]. Where, as here, the out-of-state judgment was entered upon default, the plaintiff may proceed pursuant to CPLR 3213 for summary judgment in lieu of complaint."

TCA Global Credit Master Fund, L.P. v. Puresafe Water Systems, Inc., 151 A D 3d 1098 (2d Dept. 2017) – "A default judgment of a sister State can be accorded full faith and

credit, and 'review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations [citations omitted]. However, such an inquiry into the rendering court's personal jurisdiction over a defendant should only be made 'where the defendant raises the issue of lack of personal jurisdiction' [citations omitted]. Here, there was no jurisdictional challenge by the defendants. Accordingly, although the Supreme Court properly denied the plaintiff's motion without prejudice to renewal upon proper proof, it erred in requiring the plaintiff to furnish proof of the Florida court's personal jurisdiction over them."

AlbaniaBEG Ambient Sh.P.K. v. Enel S.p.a., 160 A D 3d 93 (1st Dept. 2018) – A prior year's "Update" reported on the First Department's decision in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Company*, 117 A D 3d 609 (1st Dept. 2014). There, plaintiff moved for summary judgment in lieu of complaint to convert a money judgment of the courts of England into a New York judgment. Defendant opposed, arguing that New York lacked jurisdiction over defendant, and that defendant had no assets in the State. The Court concluded that the issue in deciding whether to confirm a foreign country judgment is whether the foreign Court had jurisdiction over defendant, not whether New York does. For, "'in proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment.'" Nor "does the CPLR require the judgment debtor to maintain property in New York for New York to recognize a foreign money judgment. While CPLR 5304 provides a list of specific reasons why the trial court may refuse recognition of the foreign country judgment, the lack of property in the state is not one of them. Thus, 'even if defendant does not presently have assets in New York, plaintiff nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in future, whenever it might appear that defendant is maintaining assets in New York.'" Finally, "*Shaffer v. Heitner* (433 U.S. 186 [1977]) does not require otherwise. In *Shaffer*, the United States Supreme Court stated that 'once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a state where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter' [citation omitted]. *Shaffer* requires minimum contacts between the defendant and the forum in the action that determines the defendant's liability to the plaintiff and CPLR article 53 satisfies this due process requirement by providing that New York courts, in performing their ministerial function, will only recognize foreign judgments where the defendant had minimum contacts with the judgment forum." Here, in *AlbaniaBEG*, the Court declines "to extend the holding of *Abu Dhabi* beyond the particular circumstances under which that case was decided."

Here, the parties' contract contained an Italian choice-of-law clause, and provided for resolution of any dispute by arbitration in Rome. Having lost an arbitration in Rome, plaintiff then commenced an identical action in the courts of Albania, and secured a judgment it now seeks to have recognized and enforced in New York. Defendant opposes, claiming that the judgment is not a money judgment, is not "final" under Albanian law, and was decided in a jurisdiction that does not provide due process of law. "Unlike judgments of sister states, to which the Full Faith and Credit Clause of the Constitution applies, judgments of foreign countries are recognized in New York under the doctrine of comity [citation omitted], according to the principles and procedures set forth in [CPLR] article 53." First, the Court rejects defendant's argument that, because it is not "at home" in New York, and the cause of action sued upon has no relationship to New York, the Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014) mandates denial of the application for want of jurisdiction. "We do not believe that *Daimler*'s restriction of general jurisdiction to states where a corporate defendant is 'at home' should be extended to proceedings to recognize or enforce foreign judgments." But, "our conclusion that *Daimler* is not controlling, however, still leaves open the question of whether this proceeding may be maintained under the jurisdictional principles governing article 53 proceedings." Plaintiff argues that *Abu Dhabi* "established that no jurisdictional predicate, whether *in personam* or *in rem*, is ever required for any proceeding seeking recognition and enforcement of a foreign country judgment under Article 53. In our view, *Abu Dhabi* should not be read so broadly." For, "critically, the *Abu Dhabi* defendant – unlike defendants here – did not raise *any* of the previously described statutory grounds for nonrecognition of a foreign country judgment set forth in CPLR 5304 [emphasis by the Court]. As reflected in the record of *Abu Dhabi*, neither did the defendant in that case argue – as the instant defendants argue here – that the foreign judgment at issue failed to meet any of the prerequisites to enforcement under article 53, such as being 'final, conclusive and enforceable where rendered' [citation omitted] or 'granting or denying recovery of a sum of money.'" Thus, "the *Abu Dhabi* holding applies only 'under the circumstances' [citation omitted] that were presented by that case, namely, where the defendant – unlike the defendants in the case before us – does *not* contend that substantive grounds exist to deny recognition to the foreign judgment under article 53 [emphasis by the Court]. The underlying premise of *Abu Dhabi*'s holding that Supreme Court in that case had properly entered judgment under article 53, even if jurisdiction over the defendant's person or property had been lacking, was that the court had been merely 'performing a ministerial function' [citation omitted] in according recognition to a foreign judgment of unquestioned finality, conclusiveness and validity under the standards of article 53. Thus, in *Abu Dhabi*, entertaining the recognition and enforcement proceeding in New York imposed 'no hardship' on the defendant, since 'there was nothing to defend' [citation omitted], given that the defendant was not raising any substantive defenses to the recognition of the English judgment. *Abu Dhabi*, by its own terms, is not controlling where – as is the case here – the foreign

judgment's entitlement to recognition under article 53 is placed in question. In that situation, there is something to defend, and the court's function ceases to be merely ministerial. In such a case – and the matter before us is such a case – the court will be required to determine contested questions of fact, of law, or of both, and, if nonmandatory grounds for nonrecognition of a judgment are raised, to exercise judicial discretion [citation omitted]. To require a defendant to litigate such substantive issues in a forum where it maintains no property, and where it has no contacts that would otherwise subject it to personal jurisdiction would 'offend the traditional notions of fair play and substantial justice' [citation omitted] at the heart of the Due Process Clause."