New York Practice and CPLR Update

Hon. Shirley Troutman
Appellate Division, Fourth Department
Buffalo

CPLR UPDATE

August 2019

Hon. Shirley Troutman
Associate Justice
Supreme Court of the State of New York
Appellate Division
Fourth Department

PERSONAL JURISDICTION (CPLR 301)

General Rule:

A defendant must be "at home" for a court to have general jurisdiction.

A court must have jurisdiction over a person to adjudicate the person's rights or obligations (*see* ***Pennoyer v Neff***, 95 US 714, 725 [1877]). A state court may assert general jurisdiction over a person—i.e., it may hear any claims involving the person—if the person maintains such a systematic and continuous presence in the state that he, she, or it is essentially at home there (*see* ***Goodyear Dunlop Tires Operations, S.A. v Brown***, 564 US 915, 919 [2011]). If the person is not "at home" in the state, the court may nonetheless exercise specific jurisdiction—i.e., adjudicate a specific controversy—if there

is a sufficient affiliation between the state and the controversy (*see id.*).

In the seminal case of ***Daimler AG v Bauman***, the United States Supreme Court concluded that a foreign company does not become subject to the general jurisdiction of a state, i.e. it is not "at home there," merely because its wholly-owned subsidiary operates there and has contacts with the state (*see* 571 US 117, 136 [2014]). The Court suggested that in most cases, a company is "at home" only where it is incorporated or has its principal place of business (*see id.* at 137).

Recent Development:

Merely registering to do business in New York State and appointing an agent for service is insufficient to confer jurisdiction by consent.

In ***Aybar v Aybar***, the Second Department considered whether a New York resident, injured in a car crash in Virginia, could invoke a New York court's jurisdiction and sue Ford Motor Company (a Delaware

corporation with a principal place of business in Michigan) and Goodyear Tire & Rubber Co. (an Ohio corporation with a principal place of business in Ohio) (*see* 169 AD3d 137, 139-140 [2d Dept 2019]). Applying *Daimler*, the court held that a New York court lacked general jurisdiction over the companies because—even though they had operated in New York for decades and had a retail presence here—they were incorporated and had their principal places of business elsewhere (*see id.* at 144). Perhaps more significantly, the court determined that by registering to do business in New York and appointing an agent for service of process here, the defendant companies did not consent to the general jurisdiction of the state (*see id.* at 165-170). In doing so, the court questioned whether the Court of Appeals case ***Bagdon v Philadelphia & Reading Coal & Iron Co.*** (217 NY 432 [1916]) and its progeny, which would seem to allow the exercise of jurisdiction based upon registration to do business and appointment of an agent, is still good law after *Daimler* (*see Aybar*, 169 AD3d at 170).

The most compelling criticism of *Daimler*—and much of the Supreme Court's jurisprudence since ***Citizens United v FEC*** (558 US 310 [2010])—is that it applies the rights of natural persons to corporate persons. Indeed, arguably *Daimler's* reasoning amounts to little more than saying that because a natural person may have only one domicile, a corporate person may have only one domicile (*see* 571 US at 137). Not only is this reasoning ahistorical—the rights of the person were historically regarded as *natural* rights whereas the rights of the corporation were regarded as conferred by the state—it ignores an obvious difference between natural and corporate persons. A natural person may be present in only one place at one time, but a corporate person may be present in several places. To its credit, the court recognized this fact, noting that there were two "homes" for corporations, i.e. place of incorporation and principal place of business (*see Daimler*, 571 US at 137). Nevertheless, the Court reasoned that "[a] corporation that operates in many places can scarcely be deemed at home in all of them" (*id.* at 139 n 20).

Two recent decisions are worth noting. In ***AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A***., the First Department rejected the notion that *Daimler* should control in proceedings to recognize or enforce foreign judgments (*see* 160 AD3d 93, 101 [1st Dept 2018]). And in ***BRG Corp. v Chevron U.S.A., Inc.***, the Fourth Department held that a corporation does not become subject to the personal jurisdiction of the state merely because it bears successor liability to a corporation that itself was subject to personal jurisdiction in New York (*see* 163 AD3d 1495, 1496 [4th Dept 2018]).

General Rule:

An exercise of personal jurisdiction must comport with due process.

Although a court may have a basis to exercise personal jurisdiction over a defendant, it must nonetheless ensure that doing so comports with constitutional notions of due process, particularly notice and an opportunity to be heard (*see* ***Mullane v Cent. Hanover Bank & Tr. Co.***, 339 US 306, 313 [1950]).

Recent Development:

In foreclosure proceedings, there is no jurisdiction over heirs without notice.

An old but still interesting issue is the extent to which an *in-rem* proceeding must comport with constitutional notions of notice and due process vis a vis the persons touched by it (*see generally Pennoyer*, 95 US 714). In ***Matter of Foreclosure of Tax Liens***, the Second Department held that although a property tax foreclosure proceeding was an in-rem proceeding, the foreclosing authorities could not proceed where the owner of the property had died and an administrator had not been substituted, inasmuch as doing so would deprive the heirs of notice of the proceeding (*see* 165 AD3d 1112, 1120 [2d Dept 2018]).

General Rule:

An exercise of specific jurisdiction requires an affiliation between the state and the underlying controversy.

As mentioned, for a state court to exercise specific jurisdiction over a person, there must be an affiliation between the state and the events giving rise to the litigation (*see Goodyear*, 564 US at 919; *see also* ***Bristol-Myers Squibb Co. v Superior Ct. of California, San Francisco County***, 137 S Ct 1773, 1781 [2017]). Moreover, the exercise of specific jurisdiction over the defendant must comport with notions of due process, in other words, "the nonresident generally must have 'certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (***Walden v Fiore***, 571 US 277, 283 [2014], quoting ***International Shoe Co. v. Washington***, 326 U.S. 310, 316 [1945]).

New York's long-arm statute provides that a non-domiciliary's conduct may expose it to the state's personal jurisdiction if the non-domiciliary: (1) transacts business here or supplies goods and services here; (2) commits a tort here, (3) commits a tort outside of the state causing injury to a person or property in the state, if the tortfeasor does business here, derives substantial revenue here, or

should reasonably expect the act to have consequences here and derives substantial revenue from interstate commerce, or (4) owns, uses, or possesses real property in the state (*see* CPLR 302 [a]).

Recent Developments:

There are limits on long-arm jurisdiction.

The reach of long-arm jurisdiction is a perennial issue. In ***Williams v Beemiller***, the Court of Appeals affirmed the Fourth Department in holding that a New York court could not exercise personal jurisdiction over a firearm merchant who sold a gun in Ohio that was eventually resold on the black market and used to shoot the plaintiff in New York (*see* 2019 NY Slip Op 03656, at *2-3 [2019]). The Court held that doing so would offend notions of due process, and therefore did not address whether the exercise of jurisdiction would comport with the long-arm statute (*see id.* at *3 n 2). However, in a lengthy concurring opinion, Judge Feinman concluded that the firearm merchant's conduct would not have satisfied any of the bases for long-arm jurisdiction (*see id.* at *4-9).

In ***Glazer v Socata, S.A.S.***, the Fourth Department held that a French airplane servicer could not be subject to New York long-arm jurisdiction with respect to litigation involving a plane departing Rochester and crashing near Jamaica, where the sole basis for jurisdiction was that the servicer had contracted with the plane's manufacturer to provide warranty service in New York, but had never actually done so (*see* 170 AD3d 1685, 1687 [4th Dept 2019]).

In ***Gottlieb v Merrigan***, the Third Department held that a Massachusetts law firm would not be subject to the jurisdiction of New York courts where the law firm's sole contacts with the state were to send responsive correspondence to its client's medical providers in New York, to make limited contact with a New York trust, and to send certain emails to plaintiff's counsel (*see* 170 AD3d 1316, 1318 [3d Dept 2019]).

SUBJECT MATTER JURISDICTION

General rule:
Supreme Court is the court of general jurisdiction.

Although there are more than a dozen types of courts in New York State, the only court with general jurisdiction is the Supreme Court (*see* NY Const. art. VI, § 7).

Recent Developments:

In certain instances an action must be brought in Supreme Court.

The issue of general jurisdiction does not often surface, but a trio of recent cases shows that courts and litigants must be mindful of it.

In ***Caffrey v North Arrow Abstract & Settlement Servs., Inc.***, the Second Department held that the Supreme Court erred in transferring an action in equity to the Civil Court, which has jurisdiction only of actions in law, and further erred—upon retransfer to Supreme Court—in adopting the findings of facts and conclusions rendered by the Civil Court (*see* 160 AD3d 121, 134 [2d Dept 2018]).

In ***Guendjian v Reardon***, the Third Department held that it lacked original subject matter jurisdiction to entertain an Article 78 proceeding to review a determination by the Industrial Board of Appeals. Except in limited circumstances, an Article 78 proceeding must be brought in Supreme Court. The Appellate Division lacks original jurisdiction (*see* 170 AD3d 1288, 1289 [3d Dept 2019]).

In ***Richmond v Cohen***, the Second Department in a proceeding to compel a Supreme Court justice to dismiss an action held that it lacked subject matter jurisdiction of the action insofar as asserted against two attorneys (*see* 168 AD3d 1064, 1065 [2d Dept 2019]).

VENUE (CPLR ARTICLE 5)

General Rule:

Venue is Now Proper Where the Events Occurred.

Effective October 2017, venue continues to be proper in any county where a party resided upon commencement, but now is also proper in a county in which a substantial part of the events or omissions giving rise to the claim occurred (*see* CPLR 503 [a]).

Recent Development:

Occurrence-based venue takes hold.

Appellate courts have begun to apply that rule. For example, in ***Marrero v Mamkin***, the Second Department held that the trial court erred in changing venue where the plaintiffs—who lived in a different state but were injured in motor vehicle accident in Queens County—had initially laid venue in Queens County, rather than Richmond County where the defendant resided (*see* 170 AD3d 1159, 1160 [2d Dept 2019]).

General Rule:

In actions involving real property, venue is proper in the county where the real property is located (*see* CPLR 507)

Recent Developments:

CPLR 507 applies to real property only.

CPLR 507 does not often receive appellate attention, but last year it did. In ***Patiwana v Shah***, the Second Department held that a plaintiff seeking a declaration of its ownership interest in an LLC could not rely on CPLR 507 to use the county where the LLC was located to lay venue (*see* 162 AD3d 1059, 1060 [2d Dept 2018]).

In ***Tower Broadcasting, LLC v Equinox Broadcasting Corp.***, the Fourth Department held that venue is not proper in the county where a broadcasting tower is located, because a broadcasting tower is considered a trade fixture and should be considered personal property (*see* 160 AD3d 1435, 1436 [4th Dept 2018]).

General Rule:

Defendant serves demand to change venue, and then moves within 15 days; plaintiff may consent within five days of the demand.

The court may, upon motion, change venue where the county designated was improper, where an impartial trial cannot be had in the proper county, or where a change of venue will promote the convenience of material witnesses and the ends of justice (*see* CPLR 510; *cf.* ***Rowland v Slayton***, 169 AD3d 1474, 1475 [4th Dept 2019] [affirming denial of motion to change venue from Monroe County to Steuben County, where movant failed to show that witnesses—who resided in Steuben County where accident occurred—would be inconvenienced by litigating in Monroe County]).

A defendant seeking to change venue must first serve a written demand on the plaintiff before he or she may file a motion (*see* CPLR 511 [b]). Thereafter, "the defendant may move to change the place of trial within fifteen days after service of the demand, unless within

five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant" (*id.*).

Recent Development:

Defendant need not wait five days to file a motion.

The Third Department held that although the statute gives the plaintiff five days to consent to the change, the defendant need not wait the full five days before filing his or her motion. Rather, the five-day period operates as a time limit for the plaintiff only (*see* ***Aaron v Steele***, 166 AD3d 1141, 1143 [3d Dept 2018]).

DISCLOSURE

General Rule:

Disclosure is broadly permitted.

Parties must disclose "all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]).

Recent Developments:

Courts have refined disclosure rules.

In what is sure to become a seminal case, the Court of Appeals in ***Forman v Henkin*** held that the rule of broad disclosure applies to social media accounts, such as Facebook profiles (*see* 30 NY3d 656, 664 [2018]). But recognizing that Facebook accounts contain large amounts of private and irrelevant material, a court faced with a dispute concerning the scope of social media discovery should: (1) consider the nature of the event giving rise to the litigation and whether relevant material will be found on the Facebook account; and (2) balance the utility of the information against the privacy

concerns of the owner to tailor a discovery order accordingly (*see id.* at 665).

In ***Rickard v New York Cent. Mut. Fire Ins. Co.***, the Fourth Department disavowed ***Lalka v ACA Ins. Co.*** (128 AD3d 1508 [4th Dept 2015]), which held that documents are per se protected from discovery where in a claim file created after commencement of an action to recover supplementary underinsured motorist benefits where there had been no denial of coverage (*see* 164 AD3d 1590, 1591 [4th Dept 2018]).

In ***Norddeutsche Landesbank Girozentrale v Tilton***, the First Department held that where a party is entitled to disclosure of tax returns, it may also be entitled to underlying financial information, such as information contained in Form K-1, where that information is material and necessary (*see* 165 AD3d 447, 448 [1st Dept 2018]).

In ***Liberty Petroleum Realty, LLC v Gulf Oil, L.P.***, the First Department adopted a rule developed by the Second Department

which requires that, before a party may depose the attorney of an opponent, it must show that the information sought is both material and necessary, and that there is good cause for the deposition, in order to rule out the possibility that the deposition is being used for tactical reasons (*see* 164 AD3d 401, 406 [1st Dept 2018]).

In ***Brito v Gomez***, the First Department held that a plaintiff in a personal injury action does not in asserting a claim for lost earnings put at issue injuries to those parts of the body not the subject of the pending litigation, even though such information might be useful in determining the amount of lost wages attributable to the events giving rise to the litigation (*see* 168 AD3d 1, 6 [1st Dept 2018]).

General Rule:

In med-mal cases, a medical expert's identity may be kept confidential.

Generally, a party must upon request identify the experts he or she intends to call as a witness at trial and must disclose, inter alia, the

expert's qualifications and a summary of the grounds for his or opinion (*see* CPLR 3101 [d] [1] [i]). However, in medical malpractice cases the party may omit the names of its medical experts (*see id.*). Courts have been open to issuing protective orders to prevent disclosure of additional information that could be used to reveal the expert's identity (*see Morris v Clements*, 228 AD2d 990, 991 [3d Dept 1996]).

Recent Development:

Only the names of an expert may be withheld in medical malpractice cases.

Technology, however, is testing the limits of that protection. In ***Kanaly v DeMartino***, the plaintiff disclosed some materials regarding her expert's education and qualifications, but withheld several details, arguing that an advanced software program had become available allowing experts to be identified with only a few pieces of data (*see* 162 AD3d 142, 147 [3d Dept 2018]). The Third Department recognized that, under the existing rule, the plaintiff had

satisfied her burden of showing that more detailed disclosure was not required because it could be used to reveal the expert's identity (*see id.* at 150). Accordingly, the court ruled in the plaintiff's favor and held that she was entitled to a protective order (*see id.* at 152-153). However, it took this opportunity to "reassess[] [its] current standard" (*id.* at 150). The court determined that advancements in technology had neutered the statute, making it so that in any case a party could refuse to disclose most qualifications of his or her expert because any such disclosure might be used to reveal the expert's identity (*see id.* at 150-152). The Third Department then announced that going forward, the statute would be applied as written, and the only information a party will be entitled to withhold is the medical expert's name (*see id.* at 151).

General Rule:

Protective orders are available to prevent unreasonable prejudice.

The court may at any time issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*see* CPLR 3103 [a]).

Recent Development:

The President of the United States is not immune from disclosure.

In a case that has national implications, the First Department in ***Zervos v Trump*** considered whether a reality television star's defamation suit against another reality television star, the latter of whom is currently serving as President, should be stayed or dismissed based on notions of executive immunity (*see* 94 NYS3d 75, 77 [1st Dept 2019]). The First Department held that neither the Supremacy Clause nor notions of executive immunity shielded the President from litigation for his pre-election and non-official conduct (*see generally id.*). Nonetheless, the court suggested that protective orders be employed to minimize the impact on the President's performance of his official duties (*see id.* at 87).

General Rule:

A representative is allowed at an IME.

In a personal injury action where the plaintiff puts his or her physical condition at issue, the defendant may require that the plaintiff submit to an independent medical examination (*see* CPLR 3121 [a]). The plaintiff is entitled to have a representative present at the examination (*see* ***Parsons v Hytech Tool & Die***, 241 AD2d 936, 936 [4th Dept 1997]).

Recent Development:

Notes of plaintiff's representative taken at an IME are conditionally privileged.

In a case of first impression, the First Department held that the notes of a plaintiff's representative, taken during the IME examination, constituted material prepared in anticipation of litigation which enjoy a conditional privilege from disclosure (*see* ***Markel v Pure Power Boot Camp, Inc.***, 171 AD3d 28, 31-32 [1st Dept 2019]).

MOTIONS TO DISMISS & FOR SUMMARY JUDGMENT

General rule:

Certain defenses are waived if not asserted in an answer or pre-answer motion.

Before serving a responsive pleading, a party may move to dismiss a cause of action for eleven reasons set forth in statute (*see* CPLR 3211 [a]). Crucially, several bases for dismissal are waived if not asserted in a pre-answer motion or answer (*see* CPLR 3211 [e]), including the invocation of an affirmative defense (*see* CPLR 3211 [5]). Similarly, a defendant will waive the defense of a lack of personal jurisdiction if he or she moves to dismiss without raising the issue or fails to raise lack of personal jurisdiction in the responsive pleading (*see* CPLR 3211 [e]). Several bases for dismissal, such as a lack of subject matter jurisdiction, failure to state a cause of action, and lack of a necessary party, are not waived (*see* CPLR 3211 [a] [2], [7], [10]).

Recent Development:

A lack of standing may be waived.

A lack of standing will be waived if not asserted in a pre-answer motion or answer (*see* ***US Bank N.A. v Nelson***, 169 AD3d 110, 116 [2d Dept 2019]; *see also* ***Forcucci v Board of Educ. of Hamburg Cent. Sch. Dist.***, 151 AD3d 1660, 1660 [4th Dept 2017]).

In ***Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.***, the trial court dismissed a CPLR article 78 petition sua sponte for lack of standing. The Fourth Department wrote: " '[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances' " (159 AD3d 1560, 1560 [4th Dept 2018]). Because lack of standing is not a jurisdictional defect, dismissal here was an improvident exercise of discretion.

Nonetheless, in ***Dawes v State***, the Third Department repeated that although a defense may be waived if not raised by pre-answer motion or answer, a court may grant leave to assert the defense in an

amended pleading, absent undue prejudice or surprise (*see* 167 AD3d 1099, 1100 [3d Dept 2018]).

General Rule:

A motion to dismiss is made upon the pleadings, while a motion for summary judgment is made based upon evidence.

A motion to dismiss is made upon the pleadings, whereas the motion for summary judgment is made upon evidence (*see* ***Nonnon v City of New York***, 9 NY3d 825, 827 [2007]; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635 [1976]). On a motion to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true and deny the motion unless no reasonable view of the facts would entitle the plaintiff to recovery (*see* ***219 Broadway Corp. v Alexander's, Inc.***, 46 NY2d 506, 509 [1979]). On a motion for summary judgment, the movant must establish that there is no dispute as to any material fact and that he or she is entitled to judgment as a matter of law (*see* ***Friends of Thayer Lake LLC v Brown***, 27 NY3d 1039, 1043 [2016]). Notably, upon hearing a motion to

dismiss, a party may submit evidence that could be considered upon summary judgment, and the court may on notice to the parties treat the motion as one for summary judgment (*see* CPLR 3211 [c]). Moreover, a party may generally move for summary judgment at any time after issue has been joined (*see* CPLR 3212 [a]). However, the court may deny the motion, or allow further discovery, where it appears that the facts essential to justify opposition may exist but cannot then be stated (*see* CPLR 3212 [f]).

Recent Developments:

Premature motions for summary judgment are disfavored.

In the premises liability case ***Reid v City of New York***, the First Department determined that the defendants' motion for summary judgment was properly denied as premature because it was brought before defendants had "provided full responses to discovery demands pertinent to the issues of ownership, control and maintenance of the premises" (*see* 168 AD3d 447, 448 [1st Dept 2019]).

Similarly, in the premises liability case ***Beck v. City of Niagara Falls***, the Fourth Department held that the defendant's motion for summary judgment was premature "because discovery, including the depositions of the parties involved in the incident, had not been completed . . . and plaintiffs, in opposing defendant's cross motion as premature pursuant to CPLR 3212 (f), made the requisite evidentiary showing to support the conclusion that facts essential to justify opposition may exist but could not then be stated" (169 AD3d 1528, 1529 [4th Dept 2019], *amended on rearg*, 97 NYS3d 546 [4th Dept 2019]).

The Fourth Department further elucidated the standard, reasoning that the party opposing summary judgment as premature must "make an evidentiary showing supporting the conclusion that facts essential to justify opposition may exist but cannot then be stated . . . [and] must demonstrate that the discovery sought would produce evidence sufficient to defeat the motion . . . and that facts essential . . . were in the movant's exclusive knowledge and possession and

could be obtained by discovery" (***Weiss v Zellar Homes, Ltd.,*** 169 AD3d 1491, 1493 [4th Dept 2019]).

A defendant who has a case-ending defense, such as one founded upon documentary evidence, can assert such a defense upon a motion to dismiss. However, by making a pre-discovery motion for summary judgment, the defendant may take advantage of a more favorable standard of review. In the recent slip-and-fall case of ***Bartlett v City of New York***, the City of New York moved for summary judgment on the ground that it did not own the area where the accident occurred. The City enjoyed a standard of review more favorable than if it had moved to dismiss, which it could have done. Although there had been no discovery, "plaintiff failed to demonstrate that discovery might lead to relevant evidence [with respect to] ownership or control of the accident site" (169 AD3d 629, 630 [2d Dept 2019]).