2018 CPLR UPDATE INCLUDING SUMMARY JUDGMENT IN THE WAKE OF RODRIGUEZ V. CITY OF NEW YORK

Submitted By:

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RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE

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

Does General Municipal Law § 50-e Require That Defendant Employees of Municipal Entity Be Named in Notice of Claim?

There is currently a conflict on whether employees of a municipal entity who are named as defendants in actions against their municipal employers must also be named in the notice of claim. The Second Department has "held that the plain language of General Municipal Law § 50-e(2) does not require a notice of claim to '[list] the names of the individuals who allegedly committed the wrongdoing.'" *Williams v. City of New York*, 153 A.D.3d 1301, 1305, 62 N.Y.S.3d 401, 406 (2d Dep't 2017); *see Blake v. City of New York*, 148 A.D.3d 1101, 1105–06, 51 N.Y.S.3d 540, 545 (2d Dep't 2017). The Third and Fourth Departments agree. *See Pierce v. Hickey*, 129 A.D.3d 1287, 1289, 11 N.Y.S.3d 321, 323 (3d Dep't 2015); *Goodwin v. Pretorius*, 105 A.D.3d 207, 216, 962 N.Y.S.2d 539, 546 (4th Dep't 2013). The First Department, has held that "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim." *Tannenbaum v. City of New York*, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, 5 (1st Dep't 2006); *see Alvarez v. City of New York*, 134 A.D.3d 599, 22 N.Y.S.3d 362 (1st Dep't 2015)(explaining the rule and its rationale); Siegel & Connors, New York Practice § 32.

II. CPLR 103. Form of civil judicial proceedings

Action Converted to a Special Proceeding under CPLR 103(c)

The bringing of a special proceeding when an action is appropriate does not require a dismissal. Rather, if the court has obtained jurisdiction over the parties, it can convert the special proceeding into an action. *See* Siegel & Connors, New York Practice § 4. CPLR 103(c) is usually invoked by a party that has mistakenly brought a special proceeding when an action was required, but it can work the other way. In *Jackson v. Bank of Am., N.A.*, 149 A.D.3d 815, 818, 53 N.Y.S.3d 71, 75 (2d Dep't 2017), for example, the plaintiffs moved pursuant to CPLR 103(c) to convert their cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR 5239 and 5240. The Second Department affirmed the order granting the motion on the authority of CPLR 103(c), noting that the fact that plaintiffs

sought certain relief that is not available in a special proceeding under CPLR Article 52 did not require that the action be dismissed in its entirety. *See also CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462 (2d Cir. 2018)(in federal action, court cited to CPLR 103(c) in permitting plaintiffs to pursue turnover order by mere motion rather than via a special proceeding or separate action); *see* Siegel & Connors, New York Practice § 510.

III. CPLR 201. Application of article [Limitations of Time]

Court Upholds Provision Shortening Statute of Limitations to 1 Year Following Completion of Services Rendered under the Agreement

In R&B Design Concepts Inc. v. Wenger Const. Co., Inc., 2016 WL 10746770 (Sup. Ct., Nassau County 2016), *aff'd on other grounds*, 153 A.D.3d 864, 60 N.Y.S.3d 364 (2d Dep't 2017), the defendant moved to dismiss under CPLR 3211(a)(5), relying on a provision in the agreement that shortened the statute of limitations to one year after substantial completion of plaintiff's work.

The court cited to CPLR 201, which permits parties to agree to shorten the statute of limitations period prescribed in CPLR Article 2 as long as it is done by "written agreement." The court rejected plaintiff's argument that the contract was one of adhesion, noting that each page of the agreement was initialed by plaintiff's representative. Furthermore, the court found no indication that plaintiff did not have an opportunity to adequately review the agreement and there was no evidence of high pressure tactics or deceptive language contained within the agreement. Finally, the court found the one-year contractual period to be reasonable.

Although plaintiff commenced the action approximately 18 months after the work was substantially complete, well within the 6 year period generally applicable in contract actions, *see* CPLR 213(2); § 35, the court granted defendant's motion to dismiss for failure to comply with the shortened statute of limitations.

Plaintiff Saved by the General Construction Law, On Two Counts!

When the last day of the statute of limitations falls on a Saturday, Sunday, or public holiday, the time for commencing the action is extended to "the next succeeding business day." *See* General Construction Law § 25–a; Siegel & Connors, New York Practice § 34.

In *Wilson v. Exigence of Team Health*, 151 A.D.3d 1849, 57 N.Y.S.3d 602 (4th Dep't 2017), the action was commenced via e-filing on Tuesday, October 13, 2015. Defendant moved to dismiss the complaint under CPLR 3211(a)(5), arguing that the statute of limitations expired 3 days earlier on October 10, 2015. The Fourth Department reversed supreme court's order granting the motion and reinstated the complaint. The General Construction Law needed to be turned to twice here. First, for the rule that states that when a time period expires on a Saturday, it is extended until "the next succeeding business day." Gen. Constr. Law § 25–a. Then section 24 of the law came to the rescue, as it designates the second Monday in October, known as Columbus Day, as a holiday. In 2015, Columbus Day was happily celebrated on Monday, October 12, meaning that the action was timely commenced on the next business day, Tuesday, October 13.

IV. CPLR 202. Cause of action accruing without the state.

Court of Appeals to Resolve Whether Foreign Statute of Limitations Will Govern Claim Under Contract with Broad New York Choice of Law Provision

In *2138747 Ontario, Inc. v. Samsung C & T Corp.*, 144 A.D.3d 122, 123, 39 N.Y.S.3d 10, 11 (1st Dep't 2016), the First Department ruled that "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" does not preclude the application of CPLR 202, New York's borrowing statute. The Court of Appeals affirmed, ruling that "CPLR 202…applies when contracting parties have agreed that their contract would be 'enforced' according to New York law." _ N.Y.3d _, 2018 WL 2898710 (2018).

V. CPLR 203. Method of computing periods of limitation generally

CPLR 203(g) Amended, in Conjunction with CPLR 214-a, to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

Effective January 31, 2018, CPLR 203(g) was amended to add a new paragraph (2), with the previously existing material now included in CPLR 203(g)(1). CPLR 203(g)(2) is part of a package of legislation that extends periods within which to serve a notice of claim and to commence an action in certain medical, dental, and podiatric malpractice actions. The amendments only apply "where the action or claim is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission." CPLR 203(g). In these actions, the time within which to commence an action or special proceeding or to serve a notice of claim, *see* Siegel & Connors, New York Practice § 32, "shall not begin to run until the later of either (i) 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, … or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition." CPLR 203(g)(2); *see* Siegel & Connors, New York Practice § 42 (discussing continuous treatment doctrine in medical malpractice actions).

There is a maximum built into the amendment adding CPLR 203(g)(2). If relying on the first time period above, no action can be commenced beyond seven years from the date of the misdiagnosis. There is no maximum time period imposed on the application of the continuous treatment rule.

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

CPLR 205(a) now provides:

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

> demonstrate a general pattern of delay in proceeding with the litigation.

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

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

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

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

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

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

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

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

In *Guzy v. New York City*, 129 A.D.3d 614 (1st Dep't 2015), the plaintiff commenced Action #1 against the New York City Transit Authority in the Superior Court of New Jersey in July 2013. That action was dismissed based on lack of personal jurisdiction.

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

In *Deadco Petroleum v. Trafigura AG*, 151 A.D.3d 547, 58 N.Y.S.3d 16 (1st Dep't 2017), Action #1 in a California federal court was timely commenced, but was dismissed based on a forum selection clause designating the New York courts as the exclusive forum for any litigation. After Action #2 was commenced in New York, the First Department ruled that "the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a 'prior action' within the meaning of that provision."

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

CPLR 214-a Amended Effective January 1, 2018 to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

CPLR 214-a has long contained a discovery rule in medical malpractice actions based on a foreign object left in the body. *See* Siegel & Connors, New York Practice § 42. That exception has now been placed under a new paragraph (a) and a new discovery rule, governing a doctor's negligent failure to diagnose cancer or a malignant tumor, has been placed in new paragraph (b). Under CPLR 214-a(b):

> where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) 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, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.

By its terms, it will only apply to an action based on a "negligent failure to diagnose cancer or a malignant tumor," and not to an action based on negligent treatment of cancer or a malignant tumor that has, in fact, been identified. What about the situation in which the doctor actually diagnoses the cancer, but negligently fails to communicate that diagnosis to the patient

and treat the condition? *See Young v. New York City Health & Hospitals Corp.*, 91 N.Y.2d 291, 293, 670 N.Y.S.2d 169, 171, 693 N.E.2d 196, 198 (1998)(mammogram report revealing nodular densities in breast and recommending a biopsy to rule out malignancy never communicated to plaintiff). Many other aspects of the amendment are addressed in Siegel & Connors, New York Practice § 42 (July 2018 Supplement).

Parents' Claim for Wrongful Birth Accrued on Birth of Impaired Child, Even Though Defendants' Treatment Concluded More Than 6 Months Earlier

In *B.F. v. Reproductive Medicine Associates of New York, LLP*, _ N.Y.3d _, 2017 WL 6375833 (2017), the Court noted that in *Becker v. Schwartz*, it had "recognized a new cause of action permitting parents to recover the extraordinary expenses incurred to care for a disabled infant who, but for a physician's negligent failure to detect or advise on the risks of impairment, would not have been born (46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 386 N.E.2d 807 [1978])." In *B.F.*, the issue was "whether the statute of limitations for such an extraordinary expenses claim runs from the date of the alleged negligence or the date of birth." The Court held that the "[d]ue to its unique features, … the cause of action accrues upon, and hence the limitations period runs from, the birth of the child."

Previously, the Court held that if the child is injured by medical malpractice while in the womb, the child's malpractice claim starts at birth. *LaBello v. Albany Medical Center Hosp.*, 85 N.Y.2d 701 (1995).

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

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

Devadas v. Niksarli, 120 A.D.3d 1000, 1008 (1st Dep't 2014) (derivative claim for loss of services).

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

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

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

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

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

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

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

and it employs thousands of New York State residents at those stores," while distributing "its tires for sale at hundreds of additional locations throughout New York State." *Id*. Goodyear moved to dismiss the action for lack of personal jurisdiction based on the Supreme Court's decision in *Daimler.*

The court initially ruled that CPLR 302, New York's longarm statute, could not provide a basis of personal jurisdiction over Goodyear because it manufactured and sold the tire out of state and the plaintiffs' injuries were sustained in Virginia.

Turning to general jurisdiction under CPLR 301, which was the stuff of the Supreme Court's 2014 decision in *Daimler*, the court relied on plaintiffs' unrefuted allegations that Goodyear had operated numerous stores in New York since approximately 1924 and employed thousands of workers who engaged in daily activities in those stores. Based on this conduct, the *Aybar* court held that Goodyear's activities within New York were "so continuous and systematic that the company is essentially at home here," and therefore subject to general jurisdiction. *Id*. at *3.

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

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

SCOTUS Stands by *Daimler* Holding

In *BNSF Ry. Co. v. Tyrrell*, _ U.S. _ , 137 S.Ct. 1549 (2017), the Supreme Court reaffirmed its holding in *Daimler*, once again announcing "that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere." In *BNSF*, two suits involving plaintiffs injured while working for defendant were commenced in Montana state courts, and then consolidated.

The Court, in an opinion by Justice Ginsburg, the author of *Daimler*, observed that defendant BNSF "is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State." The Court acknowledged that BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana, yet concluded that "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts…. 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'."

While "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," that in-state business "does not suffice to permit the assertion of general jurisdiction over claims like [plaintiffs'] that are unrelated to any activity occurring in Montana."

Justice Sotomayor, who concurred in part and dissented in part, observed:

> The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.

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

Longarm Jurisdiction Sustained Against Foreign Corporation

CPLR 302(a)(1)'s "transacts any business" clause played a starring role in *D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292 (2017), where plaintiff, a Spanish limited liability company, entered into an oral agreement with defendant, a winery located in Spain. Neither

plaintiff nor defendant had offices or a permanent presence in New York, but plaintiff performed services for defendant here, which included finding a distributor to import defendant's wine into the United States. Defendant paid plaintiff commissions for wine sold through the distributor for a period of time, but then stopped, which triggered the lawsuit in New York County Supreme Court.

Addressing the first part of the jurisdictional inquiry under CPLR 302(a)(1), the Court agreed with the appellate division's determination that defendant transacted business in New York. While the oral agreement between the parties was formed in Spain, it required plaintiff to locate a United States distributor to import defendant's wine. To achieve this goal, defendant accompanied plaintiff to New York on several occasions to attend wine industry events at which plaintiff introduced defendant to a New York-based distributor.

The Court emphasized that defendant was physically present in New York on several occasions and that its activities resulted in "the purposeful creation" of the exclusive distribution agreement with the New York distributor. It is interesting to note that the Court particularly focused on defendant's transactions in New York with the distributor, rather than the plaintiff. *Compare Fischbarg v. Doucet*, 9 N.Y.3d 375, 377 (2007) (holding that "defendants' retention and subsequent communications *with plaintiff* in New York established a continuing attorney-client relationship in this state and thereby constitute the transaction of business under CPLR 302(a)(1)")(emphasis added).

Defendant's conduct also satisfied the second part of the jurisdictional inquiry under the longarm statute because plaintiff's claim arose from defendant's business activities in New York with both the plaintiff and the New York based distributor.

Business Corporation Law Section 1314

One may wonder what the *D&R Global* action was doing in the New York State court system given that the plaintiff and defendant were both foreign corporations with no offices or permanent presence in New York and their contract was formed in Spain. A statute in the Business Corporation Law, section 1314(b), governs in such situations and requires that the action

satisfy one of five grounds set forth therein. *See* Siegel & Connors, New York Practice § 29. The fourth ground in Business Corporation Law section 1314(b) allows such suits to proceed if the foreign corporation would be subject to personal jurisdiction under CPLR 302. Having found jurisdiction under CPLR 302(a)(1) satisfied as against defendant, the *D&R Global* Court ruled that there was "subject matter jurisdiction over the parties' dispute under Business Corporation Law § 1314(b)(4)."

This quote is somewhat startling. If one of the five grounds in Business Corporation Law section 1314(b) is not met in an action between two foreign corporations, does that mean the supreme court lacks subject matter jurisdiction to entertain the matter, even if the parties have consented to New York jurisdiction in a forum selection clause? *See* Siegel & Connors, New York Practice § 28. Can this ground be raised at any time, or even sua sponte, as with most matters falling under the umbrella of subject matter jurisdiction? Could a supreme court judgment be subsequently deemed void based on the action's failure to satisfy section 1314(b), or can the parties waive the defect? These issues go hand in hand with the rigid law of subject matter jurisdiction. *See* Siegel & Connors, New York Practice § 8.

X. Commercial Division of Supreme Court.

Amendments to Commercial Division Rules

Several amendments were made to the Rules of the Commercial Division, 22 NYCRR 202.70, which are tracked in Siegel & Connors, New York Practice § 12A, a new section added to the Sixth Edition. For example, the Commercial Division recently adopted the following new measures:

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), the Federal Rules of Civil Procedure, or any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provision

> To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF."

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSEY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCMENT OR TERMINATION THEREOF."

APPENDIX D. COMMERCIAL DIVISION SAMPLE CHOICE OF LAW PROVISION

Purpose

The purpose of this sample choice of law provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to having New York law apply to their contract, or any dispute under the contract.

This sample provision is not intended to modify governing case law or to replace any parts of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, or any other applicable rules or regulations. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties which use this sample provision must meet any requirements of applicable law.

The Sample Choice of Law Provision

To express their consent to have New York law apply to the contract between them, or any disputes under such contract, the parties may include specific language in their contract, such as: “THIS AGREEMENT AND ITS ENFORCEMENT, AND ANY CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD TO NEW YORK'S PRINCIPLES OF CONFLICTS OF LAW.”

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

There continues to be frequent expansion of e-filing throughout the state. These developments are tracked in Siegel & Connors, New York Practice § 63A, entitled “Commencement of Actions by Electronic Filing (“E-Filing”),” a new section added to the Sixth Edition.

By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued mandatory e-filing in certain additional actions in the following counties:

Supreme Court, Albany County-Tax certiorari proceedings (excluding RPTL 730 proceedings).

Supreme Court, Bronx County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial matters, Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Broome County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, name change applications, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Cortland County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Essex County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Jefferson County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78

proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Lewis County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Livingston County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Monroe County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Nassau County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Ontario County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Orange County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene

Law matters, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Oswego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, in rem tax foreclosures, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Otsego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Putnam County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Queens County-commercial actions have been added to the list of actions in which e-filing is mandatory.

Supreme Court, Richmond County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, applications to extend mechanics liens, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Suffolk County-The categories of action for mandatory e-filing have substantially changed and are now as follows: "Mandatory in part" (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary) for consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, civil forfeiture proceedings, Election Law proceedings,

emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, and name change applications.

Supreme Court, Tompkins County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Warren County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Washington County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Surrogate's Court-Mandatory e-filing has now been recently authorized in the Surrogate's Court in Allegany, Cattaraugus, Genesee, Niagra, Orleans, Oswego, Suffolk, Ulster and Wyoming Counties for all probate and administration proceedings and related miscellaneous proceedings. *See* Administrative Order AO/192/18 dated May 22, 2018.

By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued consensual e-filing in certain additional counties for various types of actions including: Chenango, Delaware, Essex, Jefferson, Lewis, Madison, Monroe, New York, Oswego, Putnam, Seneca, Tioga and Wayne.

Parties to matrimonial actions should take note of Appendix B to Administrative Order AO/192/18. The appendix sets forth additional rules and conditions for the consensual electronic filing of matrimonial actions in supreme court.

By Administrative Order AO/292/17 dated November 8, 2017, the Chief Administrative Judge authorized a pilot program for consensual e-filing in civil actions commenced by e-filing in Supreme Court, New York County and subsequently removed to the New York City Civil Court pursuant to CPLR 325(d). Any party to such action can opt out of e-filing by serving on all parties, and filing with the court, a declination of consent within 20 days of entry of the order of removal.

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

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

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

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

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

The status of e-filing, including the actions to which it applies and the pitfalls associated with it, are discussed in further detail in Siegel & Connors, New York Practice § 63A.

E-filing Comes to the Appellate Division Effective March 1, 2018

Effective March 1, 2018, the Appellate Division has instituted e-filing in certain appellate matters through the New York State Courts Electronic Filing system (NYSCEF). The joint Electronic Filing Rules of the Appellate Division are contained in 22 N.Y.C.R.R. Part 1245. The actions in which e-filing in the Appellate Division is required as of March 1, 2018 differ for each Department. They are as follows:

> **First Department:** All appeals in commercial matters originating in the Supreme Court, Bronx and New York Counties.
>
> **Second Department**: All appeals in matters originating and electronically filed in Supreme and Surrogate's Courts in Westchester County.
>
> **Third Department**: All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.
>
> **Fourth Department**: All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial Department.

Things have started off slowly, but the above listings will be supplemented in each Department as the e-filing program expands. Lawyers handling appeals must be certain to check the most current listings at the NYSCEF website: www.nycourts.gov/efile.

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

Service on the Sabbath with Knowledge That Person Served Observes the Sabbath Constitutes Malice Voiding Service

Service of process on a Saturday can be set aside and deemed a nullity if it is "maliciously procure[d]" to be served on one who "keeps Saturday as holy time." Gen. Bus. Law § 13; *see* Siegel & Connors, New York Practice § 63. In *JPMorgan Chase Bank, Nat. Ass'n v. Lilker*, 153 A.D.3d 1243 (2d Dep't 2017), supreme court denied the defendants' motion pursuant to CPLR 5015(a) and 317 to vacate a default judgment of foreclosure and sale, and to dismiss the complaint for lack of personal jurisdiction, based on a violation of General Business Law section 13.

According to the affidavits of service, after four unsuccessful attempts at personal service, the process server served the defendants by "affix and mail" service under CPLR 308(4). The affixation portion of the service was accomplished on a Saturday afternoon when the process server affixed two copies of the summons, complaint, and related documents to the door of the subject premises. In support of their motion to vacate the default judgment and dismiss the complaint, plaintiffs argued that personal jurisdiction was not secured over them because service of process was carried out in violation of General Business Law section 13, since, despite knowledge by the plaintiff's counsel that they are observant, Orthodox Jewish persons who adhere to the Sabbath, the affixation portion of service under CPLR 308(4) was improperly performed on a Saturday.

The Second Department held that General Business Law section 13 "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." Furthermore, under the statute, "[t]he knowledge of a plaintiff or its counsel [that the person to be served observes the Sabbath]

is imputed to the process server by virtue of the agency relationship." In support of their motion, the defendants submitted a letter from their counsel allegedly forwarded almost 8 weeks prior to service of process advising plaintiff's counsel that the defendants are "observant, Orthodox Jews," who cannot be served on a Saturday. Plaintiff's counsel denied receiving the letter and the Second Department reversed supreme court, ruling that a hearing on the dispute was necessary to ascertain if service was made in violation of General Business Law section 13.

Delivery to Defendant's Mother at Multiple Dwelling Building Where Defendant Resided, but Not at Defendant's Apartment, Is Not Proper Service

In *Thacker v. Malloy*, 148 A.D.3d 857 (2d Dep't 2017), "the plaintiff failed to meet her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process." The evidence at the traverse hearing 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. The defendant resided in the same multiple-dwelling building as his mother, but "his apartment was on a higher floor, and it was separate and distinct from his mother's apartment." Therefore, the court ruled that, "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 place." *See* CPLR 308(2)(requiring delivery of the summons "within the state to a person of suitable age and discretion at the actual place of business, *dwelling place or usual place of abode of the person to be served*").

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

Can Corporation's Designation of Secretary of State as Agent for Service of Process Be Deemed Consent to Personal Jurisdiction in New York?

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus.

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

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

The plaintiffs argued that Whirlpool and the other defendants were "subject to general personal jurisdiction in New York on a theory of consent by registration with the State of New York." The defendants countered that "the consent-by-registration theory of general personal jurisdiction is no longer viable in light of *Daimler*." The *Famular* court held that "a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise." *See also Amelius v. Grand Imperial LLC*, 2017 WL 4158854 (Sup. Ct., New York County 2017)("For the dual reasons that the statutes do not adequately apprise foreign corporations that they will be subject to general jurisdiction in the courts of this State and that foreign corporations are required to register for conducting a lesser degree of business in this State than the Supreme Court of the United States has ruled should entail general jurisdiction, this Court finds that Yelp is not subject to general jurisdiction merely because it has registered to do business here."; *but see Aybar v. Aybar*, 2016 WL 3389889,

at *1 (Sup. Ct., Queens County 2016)(deeming Goodyear and Ford to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process).

XIV. CPLR 312-a. Personal service by mail.

Service By First Class Mail Plus Acknowledgement Is Fraught With Danger

The Third Department's recent decision in *Komanicky v. Contractor*, 146 A.D.3d 1042 (3d Dep't 2017), contains several lessons on the subject of service of process. *Komanicky* was a medical malpractice action naming 16 defendants who plaintiff attempted to serve via first class mail pursuant to CPLR 312-a. This method of service only works if defendant sends back the acknowledgement of service within 30 days after its receipt. CPLR 312–a(b); *see* Siegel & Connors, New York Practice § 76A. The only possible penalty for failing to send back the acknowledgment is that the defendant may be required to pay "the reasonable expense of serving process by an alternative" method of service under CPLR 308. CPLR 312–a(f).

None of the 16 defendants in *Komanicky* returned the acknowledgement. Plaintiff was then required to serve process via alternative methods and elected to personally serve defendants under CPLR 308(1), but the personal service did not occur within 120 days of the filing of the initiatory papers. CPLR 306–b.

The Third Department affirmed the order granting defendants' pre-answer motion to dismiss the complaint on several grounds, including lack of personal jurisdiction due to improper service. *See* CPLR 3211(a)(8). The court noted that "[t]o the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR 306–b, such affirmative relief should have been sought by way of a cross motion on notice." *See* CPLR 2215.

While a motion to extend the 120-day period most certainly should be made before it expires, it can be made after the period has run or in response to a motion to dismiss for lack of proper service. *See* Siegel & Connors, New

York Practice § 63 ("Extending Time for Service"). The extension can be sought via a cross motion, but should not be sought informally in answering papers served in response to a motion to dismiss. Several decisions, including *Komanicky*, have rejected that approach. *See Matter of Ontario Sq. Realty Corp. v LaPlant*, 100 A.D.3d 1469 (4th Dep't 2012)(petitioner "was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the [petition with a notice of petition or an order to show cause] upon [respondent] pursuant to CPLR 306–b").

XV. CPLR 403. Notice of petition; service; order to show cause.

Omission of Return Date in Notice of Petition Can Be Disregarded under CPLR 2001

In *Oneida Public Library Dist. v. Town Bd. of Town of Verona*, 153 A.D.3d 127 (3d Dep't 2017), petitioner brought a special proceeding to challenge respondents' separate rejections of a bonding resolution that would have financed the construction of a new library. Petitioner filed a notice of petition and verified petition on November 30, 2015 and personally served these documents on the respondents on the same day. The notice of petition did not set forth a return date as required by CPLR 403(a), which provides: "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition."

The Third Department had previously taken a somewhat strict stand in such matters, ruling that the omission of a return date was a fatal defect beyond the reach of CPLR 2001's powers of dispensation. *See, e.g., Matter of Common Council of City of Gloversville v. Town Bd. of Town of Johnstown*, 144 A.D.2d 90, 92 (3d Dep't 1989) (service of "notice of appeal," instead of "notice of petition" with return date, failed to result in acquisition of personal jurisdiction that "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" under CPLR 2001).

Applying a kinder, gentler interpretation of CPLR 2001, the Third Department recognized that "the primary purpose of a petition is to give notice to the respondent that the petitioner seeks a judgment against [a] respondent so that it may take such steps as may be advisable to defend the

claim." The "return date accomplishes this purpose by notifying the responding party when responsive papers must be served and when the petition will be heard ."

The court found that the appellate record supported the contention that respondents had sufficient notice of the petition, especially because "respondents' counsel conceded at oral argument before Supreme Court that they had 'plenty of time to respond' and, on appeal, they d[id] not contend that they suffered any prejudice." *Id.* Therefore, the *Oneida Public Library* court ruled that the omission of a return date on the notice of petition should have been disregarded by supreme court as a mere technical infirmity under CPLR 2001. *See also Bender v. Lancaster Cent. School Dist.*, 155 A.D.3d 1590 (4th Dep't 2017)(holding that the omission of a return date in a notice of petition does not "deprive a court of personal jurisdiction over the respondent….[S]uch 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"); *Kennedy v. New York State Office for People With Developmental Disabilities*, 154 A.D.3d 1346 (4th Dep't 2017) (reversing judgment dismissing petition on jurisdictional grounds because the notice of petition served and filed by petitioner omitted a return date in violation of CPLR 403(a), Fourth Department reinstated the petition and remitted the matter to supreme court "to exercise the discretion afforded to it under CPLR 2001").

XVI. CPLR 501. Contractual provisions fixing venue.

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

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

Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust.

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

Similarly, in *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D.3d 1015, 991 N.Y.S.2d 765 (1st Dep't 2014), the First Department affirmed supreme court's order granting defendants' motion to change the venue of the action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County. Citing to *Molino*, the court concluded that there was no basis for disregarding the venue agreement because "[p]laintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching." The action was actually "transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County"! *See also Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, 131 A.D.3d 1121 (2d Dep't 2015) (affirming order granting that branch of the defendant's motion which was pursuant to CPLR 501 and 511 to change the venue of the action from Suffolk County to Greene County).

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

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

Upon the decedent's admission to the facility, her daughter, the plaintiff, signed an "Admission Agreement" that contained a forum selection clause stating that "[e]ach of the parties to this Agreement irrevocably (a) submits to the exclusive jurisdiction of the courts of the State of New York in the County of Suffolk ... for purposes of any judicial proceeding that may be

instituted in connection with any matter arising under or relating to this Agreement." The Agreement also provided that "[i]n addition to the parties signing this Agreement, the Agreement shall be binding on the heirs, executors, administrators, distributors, successors, and assigns of the parties."

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

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

Court Orders Hearing to Determine Validity of Nursing Home's Forum Selection Clause Signed by Decedent

In *Howard v. Dewitt Rehabilitation and Nursing Center, Inc.*, 2018 WL 452009 (Sup. Ct., New York County 2018), the court distinguished *Puleo* and ruled that the record raised:

> issues of fact as to whether the forum selection clause in the Agreement is invalid as the product of overreaching. In particular, while in *Medina* supra and *Puleo* supra. the nursing home admission agreement was signed, respectively, by the nursing home resident's attorney-in fact and daughter, in this case the nursing home resident signed the agreement. Moreover, contrary to Dewitt's position, the absence of medical evidence that decedent was incapacitated at the time she signed the Agreement, is not conclusive since plaintiff has

> submitted evidence that when decedent was admitted to Dewitt, she had a tracheotomy tube, which severely limited her ability to communicate, and did not have her glasses, without which she could not read. This evidence is sufficient to warrant a hearing as to whether the forum selection clause should be invalidated as the product of overreaching.

Therefore, the court ordered a hearing to determine "the validity of the forum selection clause in the Agreement and, in particular, the circumstances surrounding decedent's execution of the Agreement, including her mental and physical condition at the time she executed the Agreement."

XVII. CPLR 503. Venue based on residence.

(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

This new amendment, which went into effect on October 23, 2017, apparently cannot be invoked in actions commenced prior to that date. See Chapter 366 of the Laws of 2017, § 2 ("This act shall take effect immediately and shall apply to actions commenced on or after such date.").

The amended provision bring New York venue practice closer to that in the federal courts, but there are still several significant distinctions. 28 U.S.C. § 1391 governs venue in federal courts and the statute was substantially amended in 2011. Section 1391(a)(1) provides that it will "govern the venue of all civil actions brought in district courts of the United States," except where a special venue provision in another law may govern. *See* 28 U.S.C. § 1400(b) (patent venue statute). The amended section 1391(b) eliminates prior distinctions between actions grounded in federal question jurisdiction and diversity jurisdiction. In both categories, venue may be laid in the district of any defendant's residence as long as all defendants reside in the

same state. So provides section 1391(b)(1). Note that this provision does not authorize venue in the plaintiff's own district of residence, as § 1391 had done before its amendment in the Judicial Improvements Act of 1990 (Pub.L. 101-650).

Alternatively, under section 1391(b)(2), venue may be laid in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" or where "a substantial part of property that is the subject of the action is situated."

Paragraph (3) of section 1391(b) can't be invoked unless the options of paragraphs (1) and (2) prove unavailing. It permits venue in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."

Venue in federal actions with corporate parties is a bit more involved. For a discussion of venue in these instances, see Siegel & Connors, New York Practice (6th ed. 2018). Essentially, if the plaintiff is a corporation, it usually has to bring suit in the defendant's district or in the district where the claim arose. But if the defendant is a corporation, the plaintiff's choice of venue expands. For venue purposes, the corporate defendant is deemed a resident of (and may be sued in) any district in which it is amenable to personal jurisdiction with respect to the claim in question. 28 U.S.C. §§ 1391(a), (c); *see TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, _ U.S._, 137 S. Ct. 1514, 1517 (2017)(discussing 28 U.S.C. § 1391, but "hold[ing] that a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute [28 U.S.C. § 1400(b)]").

XVIII. CPLR 1003. Nonjoinder and misjoinder of parties.

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

The 1996 amendments to CPLR 305(a) and 1003 allow the plaintiff to add additional parties to an action without court leave if the plaintiff acts no later than the 20th day after the defendant's service of the answer. *See* Siegel & Connors, New York Practice § 65. If a party is improperly added outside the time frames in CPLR 1003, she had better raise a prompt objection. In *Wyatt*

v. City of New York, 46 Misc. 3d 1210(A), 2015 WL 232918 (Sup. Ct., New York County 2015), the court ruled that plaintiffs added MTA Bus Company as a defendant without court leave outside the time periods in CPLR 1003. Nonetheless, the court concluded that defendants waived their right to assert the issue because they failed to plead a proper objection in either their original or amended answer to the amended complaint. *Id.* at *5.

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

The decision is discussed in further detail in section 65 Siegel & Connors, New York Practice.

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

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

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

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

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

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

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

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

The dissent in *Artibee* observed:

> the majority's holding creates anomalous situations that I do not believe were intended by the legislature: (1) a defendant in Supreme Court cannot shift liability to the nonparty State, but a state defendant in the Court of Claims can shift liability to a private party; and (2) a

> plaintiff in the Court of Claims will face apportionment with the State pointing to an empty chair, but a plaintiff in the Supreme Court will not face apportionment where the empty chair is the State.

In an analogous context, courts have held that where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant, the liability of the bankrupt tortfeasor can been "apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16." *See, e.g., Kharmah v. Metropolitan Chiropractic Ctr.*, 288 A.D.2d 94, 94–95 (1st Dep't 2001). Given *Artibee's* conclusion that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction, this area of the law needs to be reexamined. *Artibee*, 28 N.Y.3d at 747-48.

XX. CPLR 2101. Form of papers.

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

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

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

The new rule is discussed in further detail in Siegel & Connors, New York Practice § 201.

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

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

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

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident

attorneys, thereby eliminating a service-of-process concern." *See Connors*, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," New York Law Journal, May 24, 2016, at 3 (addressing the interplay between the new Part 523 allowing temporary practice in New York State and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State).

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

The April 17, 2017 edition of the NYLJ reported:

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

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as

required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002).

The *Arrowhead* court concluded that:

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

The court dismissed the complaint without prejudice. The First Department affirmed. *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909, 2018 WL 358301 (2018).

The decision, and its impact, is discussed in further detail in Siegel & Connors, New York Practice § 202.

XXI. CPLR 2103. Service of papers.

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

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

Effective January 1, 2016, lawyers may deposit interlocutory papers in mailboxes outside New York thanks to an amendment to CPLR 2103(f)(1),

which now defines "[m]ailing" as depositing the interlocutory paper with the "United States Postal Service *within the United States*." (emphasis added)

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

The amendment to CPLR 2103 is discussed in further detail in Siegel & Connors, New York Practice § 202.

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

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

Tomeo v. Beccia, 127 A.D.3d 1071 (2d Dep't 2015) highlights one of the pitfalls of the statute. In *Tomeo*, the plaintiff failed to raise a triable issue of fact in opposition to defendant's prima facie showing on its motion for summary judgment. "The affirmation of the plaintiff's expert, Dr. Richard Quintiliani, did not constitute competent evidence, because Quintiliani was not authorized by law to practice medicine in New York State." Therefore, defendant hospital was granted summary judgment dismissing the action against it. *See Sul-Lowe v. Hunter*, 148 A.D.3d 1326, 48 N.Y.S.3d 844 (3d Dep't 2017)(unsworn affidavits by physicians who averred that they were licensed in Massachusetts, but did not claim to be licensed in New York, were without probative value).

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

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

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

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

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

The *Sanchez* court did not discuss the point, but a cross-motion for summary judgment that is served after the statutory deadline in CPLR 3212(a) can be entertained if it is sufficiently related to a timely motion for summary judgment. *See* Siegel & Connors, New York Practice § 279. The close

relationship between a timely motion for summary judgment and an untimely cross-motion can provide "good cause" for a court to entertain the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244 (1st Dep't 2006). In *Sanchez*, those branches of defendant's cross-motion seeking relief against the nonmoving defendants could not rely on this doctrine to establish good cause.

More recently, in *Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603, 56 N.Y.S.3d 55 (1st Dep't 2017), a codefendant made a cross-motion for summary judgment against another codefendant to dismiss a contractual indemnification claim against it. The supreme court granted the motion, but the First Department reversed, concluding that the cross-motion should have been denied as untimely since it was made after the applicable deadline for summary judgment motions and the codefendant failed to show "good cause" for the delay. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Furthermore, the court observed that the "purported cross motion…was not a true cross motion" because it was not made against a moving party. *Rubino*, 150 A.D.3d at 604, 56 N.Y.S.3d at 57.

XXIV. CPLR 2219. Time and form of order.

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

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

XXV. CPLR 2220. Entry and filing of order; service.

Appeal from Order That Was Not Filed or Entered "Must Be Dismissed"

CPLR 2220(a) provides that "[a]n order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable…." In *Merrell v. Sliwa*, 156 A.D.3d 1186 (3d Dep't 2017), the court noted that "an appeal is not properly before this Court if the order appealed from 'was not "entered and filed in the office of the clerk of the court where the action is triable" '(People v. Davis, 130 A.D.3d 1131, 1132 [3d Dep't 2015])." The order at issue in *Merrell*, which dismissed petitioner's application, was neither entered nor filed and, therefore, the appeal was dismissed.

The court noted:

> petitioner provided us with a copy of the order that reflects that it was "received" by the Albany County Clerk's office. However, there is no indication that the order was filed or entered as required by CPLR 2220. We note that Supreme Court's order explicitly stated that it was transferring the papers to the Albany County Clerk and returning the original order to counsel for respondents. Significantly, Supreme Court notified the parties that the signing of the order did not constitute entry or filing or relieve them of the obligation to do so pursuant to CPLR 2220.

XXVI. CPLR 2221. Motion affecting prior order.

Court Treats an Order Denying a Motion to Reargue as a Grant of the Motion, with the Original Determination Adhered To, and Entertains Appeal

While an order denying a motion for reargument is not appealable, in rare instances an appellate court may elect to treat a denied motion to reargue as one that was granted with the original determination adhered to, so as to preserve an appeal from the order. *See Jones v. City of New York*, 146 A.D.3d 690, 690, 46 N.Y.S.3d 57, 59 (1st Dep't 2017); *HSBC Mortg. Corp.*

(USA) v. Johnston, 145 A.D.3d 1240, 43 N.Y.S.3d 575 (3d Dep't 2016). In *Lewis v. Rutkovsky*, ___ A.D.3d ___, --- N.Y.S.3d ----, 2017 WL 3707298 (1st Dep't 2017), the First Department ruled that while the supreme court "purported to deny the motion to reargue," it nonetheless considered the merits of the defendants' contention that inclement weather on the due date for summary judgment motions provided good cause for the delay in making the motion. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Therefore, the *Lewis* court ruled that supreme court, "in effect, granted reargument, then adhered to the original decision." That paved the way for the First Department to not only deem the order appealable, but to reverse supreme court's determination that the motion for summary judgment was untimely.

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

Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates

with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

XXVIII. CPLR 2308. Disobedience of subpoena.

Issuance of Warrant Directing Sheriff to Bring Witness Into Court Discretionary

CPLR 2308(a) lists the penalties applicable to the disobedience of a judicial subpoena. One of the penalties listed is the issuance of "a warrant directing a sheriff to bring the witness into court." CPLR 2308(a). In *Cadlerock Joint Venture, L.P. v. Forde*, 152 A.D.3d 483, 54 N.Y.S.3d 878 (2d Dep't 2017), the Second Department emphasized that the imposition of this penalty is within the discretion of the court. In *Cadlerock*, the supreme court denied the plaintiff's motion under CPLR 2308(a) for the issuance of a warrant of arrest to bring the defendant before the court based on his alleged failure to comply with a postjudgment judicial subpoena duces tecum and a prior order of contempt. The Second Department ruled that the denial of this relief was within the court's discretion, and affirmed the order of the supreme court, which declined to issue the warrant "finding that the plaintiff could avail itself of 'all other remedies pursuant to the CPLR to collect' a judgment in favor of the plaintiff and against the defendant." *Id.*

XXIX. CPLR 2309. Oaths and affirmations.

Plaintiff Afforded Third Opportunity to Correct of Out-of-State Affidavit to Conform to CPLR 2309(c)

Lawyers continue to have problems complying with CPLR 2309(c)'s requirements when submitting affidavits signed outside New York State. In *JPMorgan Chase Bank v. Diaz*, 56 Misc.3d 1136, 57 N.Y.S.3d 358 (Sup. Ct., Suffolk County 2017), the plaintiff submitted an out-of-state affidavit of service in support of an application for a default judgment in a mortgage foreclosure action. The court denied the application because it did not contain a certificate of conformity as required by CPLR 2309(c), but allowed a second application, where the defect was still not remedied.

Rather than attempting to comply with the statute, "plaintiff argue[d] that 'it was inappropriate for the Court to, *sua sponte*, [raise the CPLR § 2309(c) issue] on the Defendants' behalf,' and that, pursuant to the provisions of CPLR 2001, a certificate of conformity is not required with an out-of-state affidavit of service." The court rejected the argument, ruling that CPLR 2001 could not be invoked to permit the court to disregard a defect in an out-of-state affidavit of service.

While acknowledging that the absence of a certificate of conformity is typically not treated as a fatal defect, the court distinguished the situation before it which involved "jurisdiction over the defendant in the first instance." In this setting, the court ruled that CPLR 2001 could not support "disregard[ing]" the defect in proof of proper service because it would prejudice a substantial right of the defendant.

Plaintiff's motion for a default judgment and order of reference in the foreclosure action was denied, but plaintiff was "afforded one final opportunity" to correct the defect. Maybe the third time will be the charm!

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

Defendant Can Demand Complaint after Receiving Summons and CPLR 305(b) Notice, Even Though Service Is Not "Complete" Under CPLR 308(2)

In *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 150 A.D.3d 427, 55 N.Y.S.3d 1 (1st Dep't 2017), plaintiff commenced a securities fraud action against 26 defendants with a summons and CPLR 305(b) notice and made service pursuant to CPLR 308(2), the "deliver and mail" method of service. *See* Siegel & Connors, New York Practice § 72. Service is not "complete" under this method until 10 days after the filing of proof of service. CPLR 308(2); *see id.* A defendant in *Wimbledon* served a demand for the complaint under CPLR 3012(b) before plaintiff had filed proof of service, and plaintiff contended that the demand was a "nullity" because service was not yet complete. Risky business indeed!

Defendant called plaintiff's bluff, refused its request to allow service of the complaint late the following month, and moved to dismiss the action on the 21st day after service of its demand. Plaintiff ultimately served a complaint approximately one month later. Nonetheless, the supreme court granted the defendant's motion to dismiss the action pursuant to CPLR 3012(b) and denied plaintiff's cross motion pursuant to CPLR 3012(d) for an extension of time to serve its complaint.

The plaintiff appealed, seeking mercy from the First Department. The appellate division agreed with supreme court that CPLR 3012(b) permitted defendant to serve a demand for a complaint after being served with a summons and CPLR 305(b) notice. While service under CPLR 308(2) was not technically "complete," the court reasoned that "[t]he time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates."

The First Department did, however, reverse to the extent of granting plaintiff's cross motion under CPLR 3012(d) for an extension of time to serve the complaint.

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

CPLR 3012(d) addresses an "[e]xtension of time to appear or plead" and permits the court to extend "the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." While the statute does not expressly require it, the Second Department has repeatedly held that a defendant must not only provide a reasonable excuse for the delay in appearing, but also must "demonstrate a potentially meritorious defense to the action." *KI 12, LLC v. Joseph*, 137 A.D.3d 750, 26 N.Y.S.3d 573 (2d Dep't 2016); *see HSBC Bank USA, N.A. v Powell*, 148 AD3d 1123 (2d Dep't 2017). The First Department does not require a defendant to demonstrate the existence of a meritorious defense on an application under CPLR 3012(d). *See Hirsch v. New York City Dept. of Educ.*, 105 A.D.3d 522, 961 N.Y.S.2d 923 (1st Dep't 2013).

The issue is explored in further detail in Siegel & Connors, New York Practice § 231.

XXXI. CPLR 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions.

Certificate of Merit Based Upon Affidavit of Plaintiff's Physical Therapist Insufficient to Satisfy CPLR 3012-a

CPLR 3012-a generally requires that the certificate of merit demonstrate that the attorney for the plaintiff has consulted with a "physician," "dentist," or "podiatrist." In *Calcagno v. Orthopedic Assocs. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (3d Dep't 2017), defendants moved for dismissal of the action based upon the plaintiffs' failure to timely comply with the requirements in CPLR 3012-a. In response to the motion, the plaintiffs submitted a certificate of merit based upon an affidavit of plaintiff's physical therapist, who opined, "as a physical therapist," that defendants' actions were "departures from good and accepted medical practice." Plaintiffs also cross-moved for an extension of time to file and serve the certificate. The supreme court granted defendants' motion to

dismiss the action and denied plaintiffs' cross motion, finding that plaintiffs' certificate of merit was inadequate.

The Third Department affirmed, finding the certificate defective because "by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons." The court found no merit to plaintiffs' contention that the certificate should be deemed adequate because it was also based on medical reports, plaintiff's testimony, and the pleadings.

Plaintiffs conceded that the certificate of merit was filed approximately 17 months late. On this point, the court relied upon its 1999 decision in *Horn v. Boyle*, 260 A.D.2d 76, 699 N.Y.S.2d 572 (3d Dep't 1999), in noting that the mere failure to timely file a CPLR 3012-a certificate does not support dismissal of the action. *See* Practice Commentary C3012-a:2 ("Consequence of Failing to File and Serve the Certificate"). Nonetheless, because plaintiffs failed to provide a reasonable excuse for the delay and to establish the merits of the action, the court ruled that they were not entitled to an extension of time under CPLR 2004. In other words, the action had to be dismissed because CPLR 3012-a could not be satisfied.

CPLR 3012-a Is Substantive Law That Applies in Diversity Action in Federal Court

In Finnegan v. University of Rochester Medical Center, 180 F.R.D. 247, 249 (W.D.N.Y. 1998), the court ruled that "a state statute requiring a certificate of merit is substantive law that applies in a federal diversity action." More recently, a federal district court in the Sothern District reached the same conclusion in a medical malpractice action. *Crowhurst v. Szczucki*, 2017 WL 519262, at *2–3 (S.D.N.Y. 2017). The *Crowhurst* court ruled that plaintiff's failure to submit a certificate of merit, or to excuse the submission, warranted dismissal of the medical malpractice claim. The court dismissed the complaint without prejudice to allow the plaintiff to cure this defect, and the additional failure to allege the citizenship of the parties, through the submission of an amended complaint.

XXXII. CPLR 3015. Particularity as to specific matters.

CPLR 3015(e) Defect Permitted to be Cured by Amendment

CPLR 3015(e) imposes special pleading requirements on business plaintiffs who must be licensed by the consumer affairs departments of New York City and certain other downstate suburban counties. In 2012, the statute was amended to require the plaintiff to plead that she was duly licensed at the time the services were rendered, rather than at the time the litigation was commenced. *See* Siegel & Connors, New York Practice § 215.

In the main practice commentary to CPLR 3015, we note that if any defect connected with the statute proves to be only a pleading omission, remediable by amendment, an amendment should be the cure rather than dismissal. *See* Commentary C3015:1 ("Special Provisions for Certain Matters"); Siegel & Connors, New York Practice § 237. That was the approach taken by the court in *Best Quality Swimming Pool Serv., Inc. v. Pross*, 54 Misc. 3d 919, 43 N.Y.S.3d 867 (Sup. Ct., Nassau County 2016), where the court granted plaintiffs' cross-motion to amend the complaint to plead the license held by one of the plaintiffs and denied defendant's motion to dismiss.

XXXIII. CPLR 3016. Particularity in specific actions.

First Department Concludes That Plaintiffs' Failure to Allege Applicable Saudi Law with Particularity Warranted Dismissal of Claim

In *Edwards v. Erie Coach Lines Co.*, 17 N.Y. 3d 306, 929 N.Y.S. 2d 41 (2011), the Court observed that the failure to plead foreign law should not ordinarily prove fatal given that the court can on its own volunteer to give the foreign law judicial notice under CPLR 4511(b). In *MBI Intern. Holdings Inc. v. Barclays Bank PLC*, 151 A.D.3d 108, 57 N.Y.S.3d 119 (1st Dep't 2017), however, the First Department observed that "the motion court properly dismissed [plaintiff's breach of fiduciary duty] claims pursuant to CPLR 3211(a)(7) and CPLR 3016(e), for plaintiffs have failed to allege with particularity the applicable Saudi law and only generally discuss the Saudi concepts of 'hawalas' and 'wakalas' without citation to any law (see CPLR 3016[e])."

XXXIV. CPLR 3019. Counterclaims and cross-claims.

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

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

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

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

A fractured Court of Appeals affirmed, with a plurality, a concurrence, and a dissent. *Paramount Pictures Corp. v Allianz Risk Transfer AG*, _ N.Y.3d _, _N.Y.S.2d _, _ N.E.2d _, 2018 WL 942329 (2018). The plurality ruled that Paramount's state court action was barred by res judicata because the claim asserted therein should have been asserted as a compulsory counterclaim in the prior federal action.

Failure to Raise Counterclaim for Legal Fees in State Court Malpractice Action Does Not Bar Assertion of Claim in Federal Court

What happens when we examine the problem from the opposite direction posed by *Paramount Pictures*, where a defendant in a New York State Court action does not assert a related counterclaim, and then tries to pursue relief in a federal court action? The issue arose in *In re Ridgmour Meyer Properties, LLC*, 2016 WL 5395836 (Bankr. S.D.N.Y. 2016), where a law firm represented the debtor and filed a claim for over $300,000 in the bankruptcy proceeding. The debtor and several proponents of the bankruptcy plan objected to the claim and sued the law firm in state court for legal malpractice. Following dismissal of the state court malpractice lawsuit, the law firm filed a motion in bankruptcy court seeking to reopen the chapter 11 case and to direct the debtor to pay the claim.

The debtor argued that the law firm, which did not assert a counterclaim for its fees and expenses in the state court malpractice action, was precluded from pursuing the claim in the bankruptcy court under the doctrine of res judicata. Quoting from the First Department's *Paramount Pictures* decision, the court rejected the argument and noted that "New York is a permissive counterclaim jurisdiction," which generally permits a party to bring a claim in an action that it could have injected as a counterclaim in a prior action. While such claims are not barred by the doctrine of res judicata, they can be hindered by the doctrine of collateral estoppel if a factual determination in the prior action precludes the plaintiff in the subsequent action from proving all of the elements of her claim. *See Henry Modell & Co. v. Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of New York*, 68 N.Y.2d 456, 462-63 n. 2, 510 N.Y.S.2d 63, 66 n. 2, 502 N.E.2d 978, 981 n. 2 (N.Y. 1986); Siegel & Connors, New York Practice § 224.

XXXV. CPLR 3020. Verification.

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

In *Austin v. State*, 49 Misc.3d 282 (Ct. of Claims 2015), the State moved to dismiss the claim, which was verified by decedent's mother, on the ground

that it did not comply with the verification requirement in section 8-b of the Court of Claims Act.

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

Although the option of an attorney's verification was not available to the claimant in *Austin*, the court observed that the administrator of the estate "stands in the shoes" of the deceased for purposes of bringing a lawsuit. *See* CPLR 1004 (permitting the executor or administrator of a decedent's estate to sue on behalf of decedent).

XXXVI. CPLR 3025. Amended and supplemental pleadings.

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

Several trial courts have denied motions to amend for failure to include a copy of the proposed pleading, as is required by the 2012 amendment to CPLR 3025(b). *See* Siegel & Connors, New York Practice § 237. We now have authority from the appellate division reaching the same conclusion. In *Drice v Queens County District Attorney*, 136 A.D.3d 665, 23 N.Y.S.3d 896 (2d Dep't 2016), for example, the Second Department cited several of its prior cases in concluding that "the supreme court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve an amended complaint, since he did not provide a copy of his proposed amended complaint, and the proposed amendments were palpably insufficient or patently devoid of merit." *See also G4 Noteholder, LLC ex rel. Wells Fargo Bank, Nat. Ass'n v....*, _ A.D.3d _, 2017 WL 4159236 (2d Dep't 2017)("Moreover, relief pursuant to CPLR 3025(b), which requires the movant to include any proposed amendment or supplemental pleading

with the motion, was properly denied, as [defendant] failed to include any proposed amended pleadings").

XXXVII. CPLR 3101. Scope of Disclosure.

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g., Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and

accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "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." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the

Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

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

Plaintiff, Who Failed to Comply With Expert Disclosure Deadline in Scheduling Order, Precluded from Offering Expert Proof, Resulting in Dismissal of Action

In *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095 (3d Dep't 2018), *lv. denied*, 2018 WL 2055723, the Third Department affirmed the order granting defendant's motion for summary judgment dismissing the complaint based, in part, on plaintiff's failure to provide timely expert disclosure. After issue was joined and years of ongoing discovery, the supreme court issued a scheduling order requiring that the parties exchange expert disclosure by May 1, 2015, and that dispositive motions be filed by August 1, 2015, and set a trial date in November 2015. Defendant complied with the order by timely serving expert disclosure on plaintiffs' then-counsel, but plaintiffs failed to do so.

Defendant moved for summary judgment in July 2015 based upon, among other grounds, plaintiffs' complete lack of expert disclosure and failure to submit any expert proof that plaintiff's injures and damages were caused by defendant's actions. Defendant contended that plaintiffs should be precluded from presenting any expert proof. While plaintiff submitted several expert affidavits in response to defendant's motion, the court refused to consider them because of plaintiff's failure to comply with the expert disclosure deadlines.

The Third Department emphasized that plaintiffs failed to comply with the deadlines in the scheduling order and first identified their experts, and submitted their affidavits in opposition to defendant's summary judgment motion, over one year after the deadline for expert disclosure. Plaintiffs did not request an extension "or provide a viable excuse or good cause for failing to comply over this protracted period, and the numerous adjournments were granted at their request with the express condition that the court-ordered discovery and disclosure schedule was not being

extended." In that the supreme court did not abuse its discretion in precluding plaintiffs from submitting the expert affidavits in opposition to the motion for summary judgment, the Third Department affirmed the order granting defendant summary judgment.

The Third Department also reaffirmed its interpretation of CPLR 3101(d)(1)(i) as "requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony." *See Schmitt*, 151 A.D.3d at 1255 (discussed below).

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

In *Schmitt v. Oneonta City School Dist.*, 151 A.D.3d 1254 (3d Dep't 2017), plaintiffs noticed the deposition of a treating doctor to preserve his testimony for trial. During the EBT, plaintiffs attempted to offer the treating doctor "as an expert in the field of orthopedic surgery." Defendant objected, citing plaintiffs' failure to provide any expert disclosure under CPLR 3101(d)(1)(i).

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

The court rejected plaintiffs' argument that the transcript of the doctor's videotaped testimony could serve as a substitute for the required CPLR 3101(d)(1)(i) disclosure. As for the appropriate remedy, the court determined that there was no indication that the disclosure violation was willful and, therefore, that preclusion was not appropriate. The court ruled

that if plaintiffs wanted to use the treating doctor "as an expert witness (or as both a fact witness and as an expert witness), they must—within 30 days of the date of this Court's decision—tender an expert disclosure that satisfies all of the requirements of CPLR 3101(d)(1)(i) and—within 60 days of the date of this Court's decision—produce [the doctor] (at their expense) for the purpose of being deposed as an expert."

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

XXXIX. CPLR 3103. Protective orders.

CPLR 3103(b) Only Provides for Stay of "Disclosure of the Particular Matter in Dispute"

CPLR 3103(b) imposes a stay of disclosure when a motion is made for a protective order. *See* Siegel & Connors, New York Practice § 353. In *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 46 N.Y.S.3d 18 (1st Dep't 2017), the defendants failed to comply with an order directing disclosure and the court imposed sanctions pursuant to both CPLR 3126 and Part 130. The First Department affirmed this order, and an additional order finding that defendants had waived their right to serve paper discovery demands by disregarding deadlines in two case management orders. Defendants argued that the sanction in the latter order was disproportionate because they had previously moved for a protective order, which stayed disclosure under CPLR 3103(b).

The First Department emphasized that the language in the statute provides that "[s]ervice of a notice of motion for a protective order shall suspend *disclosure of the particular matter in dispute*." *Vandashield*, 146 A.D.3d at 556, 46 N.Y.S.3d at 24. Therefore, the court reasoned, "[d]efendants' motion for a protective order against *plaintiffs'* discovery demands did not stay their obligation to serve their own discovery demands." *Id.* at 556, 46 N.Y.S.3d at 24-25.

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

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

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

The federal district court noted that, upon removal, "state procedure law is inapplicable to the action." *See* Fed.R.Civ.P. 81(c)(1) (Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court"). Under the federal rules, absent a stipulation or court order, the "method of discovery may be used in any sequence." Fed.R.Civ.P. 26(d)(3)(A). Defendants did not cite a stipulation or court order and the court rejected defendants' contention that CPLR 3106(a) applied in federal court. Therefore, the court granted plaintiffs' motion and ordered the defendants' depositions to be conducted within 45 days.

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

Third Department Outlines Standards for Issuing Order of Preclusion

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

six occasions and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations.

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

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

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

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

While the action was not dismissed, we wonder if there are any options left for plaintiff bank? *See Citibank, N.A. v. Bravo*, 55 Misc.3d 879 (Sup. Ct., Tompkins County 2017)("Defendants' motion is granted and the complaint is dismissed, with prejudice; the mortgage which plaintiff seeks to foreclose in this action is discharged and cancelled, the notice of pendency filed in this action is cancelled, and the Tompkins County Clerk is ordered to mark her records accordingly.")

CPLR 3126 Preclusion Order Reversed Because of Absence of "Willful and Contumacious" Conduct by Incarcerated Defendant and His Lawyer

In *Crupi v. Rashid*, 157 A.D.3d 858, 67 N.Y.S.3d 478 (2d Dep't 2018), plaintiff commenced an action to recover on a promissory note by a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. The supreme court, "sua sponte, precluded the incarcerated defendant, Syed Rashid, from testifying at trial." On appeal, the Second Department acknowledged that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion," but cautioned that "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious."

The Second Department reversed the order of preclusion because "there [was] no evidence demonstrating either that the incarcerated defendant… willfully and contumaciously failed to be deposed, or that his attorney failed to secure his deposition."

Defendants Precluded from Introducing Facebook Printouts Unless Person Who Procured Them Is Produced for a Deposition

The decision in *Lantigua v Goldstein*, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dep't 2017), addressed a disclosure dispute in a medical malpractice action in which plaintiff was confronted at his deposition with printouts of 13 pages that allegedly were from his Facebook account. The printouts depicted a gentleman of many pursuits who "allegedly talked about going out to a bar, having a great workout, and crossing the Williamsburg Bridge three times."

The plaintiff acknowledged that he had used a Facebook account, but denied that the printouts were from his account and denied making the statements.

The plaintiff then served disclosure requests of his own, seeking information about the individual who obtained the printouts and requesting a deposition of this witness. When responses were not forthcoming, plaintiff moved to, among other things, preclude the defendants from offering as evidence at trial the printouts of the Facebook pages.

The Second Department reversed the supreme court, ruling that the defendants should be precluded from offering as evidence at trial the printouts of Facebook pages that were marked at plaintiff's deposition unless those defendants produced the person who obtained the printouts for a deposition. The court emphasized that the plaintiff denied that the printouts were from his Facebook account, and he had no other means to disprove their authenticity.

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

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

In *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't 2015), the First Department rejected the supreme court's conclusion that correspondence such as emails do not suffice as "documentary evidence" for purposes of CPLR 3211(a)(1), and cited several decisions in which it has "consistently held otherwise." *See Amsterdam Hospitality Group, LLC v. Marshall–Alan Assoc., Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dept.2014) ("emails can qualify as documentary evidence if they meet the 'essentially undeniable' test."); *see also Kany v. Kany*, 148 A.D.3d 584, 50 N.Y.S.3d 337 (1st Dep't 2017).

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

fail to meet the requirements for documentary evidence" on a CPLR 3211(a)(1) motion).

XLIII. CPLR 3212. Motion for Summary Judgment.

Court of Appeals Rules That Plaintiff Is Entitled to Partial Summary Judgment on Liability Without Demonstrating Freedom from Comparative Fault

This important issue has generated conflicting decisions in the appellate division, i.e., whether a plaintiff is entitled to partial summary judgment on liability even though plaintiff may be charged with some comparative fault. *See* Siegel & Connors, New York Practice § 280. The issue also generated substantial conflict in the Court of Appeals with a 4-3 decision in *Rodriguez v. City of New York*, _ N.Y.3d _, 2018 WL 1595658 (2018). The majority held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even where the defendant has raised an issue of fact regarding plaintiff's comparative fault. "Placing the burden on the plaintiff to show an absence of comparative fault," the Court concluded, "is inconsistent with the plain language of CPLR 1412." That section designates comparative fault as an "affirmative defense to be pleaded and proved by the party asserting the defense." *See* Siegel & Connors, New York Practice §§ 168E, 223. Therefore, requiring the plaintiff to prove an absence of comparative fault to establish entitlement to partial summary judgment on liability is contrary to the statutory scheme.

Timeliness of Cross Motion for Summary Judgment

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

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

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

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

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

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

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

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

CPLR 3212(a) speaks in terms of when a summary judgment motion may be "made" and provides that the court may set a deadline for making such motions, as long as that date is no earlier than thirty days after the filing of the note of issue. Pursuant to CPLR 2211, a motion is "made" when the motion or order to show cause is "served," not when it is "filed." *See* § 243; McKinney's Practice Commentaries to CPLR 2211, C2211:4 ("When Motion on Notice Deemed 'Made'"). Lawyers making motions for summary

judgment in the Sixth Judicial District must take pains to not only make, i.e., serve, their motions for summary judgment within 60 days from the filing of the note of issue, but also to file them within that time frame. We suspect that there are other local or individual rules in the state that require the "filing" of a motion for summary judgment, rather than its mere service, within a specific time frame. Lawyers need to watch for those too. Finally, the filing may also be required under the terms of a stipulation. *See* Siegel & Connors, New York Practice § 279.

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

Hearsay May Be Considered in Opposition to Motion for Summary Judgment As Long As It Is Not the Only Evidence Submitted

A rule has developed that occasionally permits the court to consider incompetent evidence, such as hearsay, in opposition to a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. Recently, the courts have emphasized that hearsay evidence may be considered to defeat a motion for summary judgment as long as it is accompanied by some other competent evidence. *See City of New York v. Catlin Specialty Insurance Company*, 158 A.D.3d 586, _ N.Y.S.3d _ (1st Dep't 2018).

Affirmations in Compliance with CPLR 2106 May Be Used In Lieu Of, or In Addition To, Affidavits on a Motion For Summary Judgment

Affidavits from those having personal knowledge of the facts are a primary source of proof on a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. In this regard, CPLR 3212(b) provides that "[a]

motion for summary judgment shall be supported by affidavit…." We have been informed that lawyers have recently argued that a summary judgment that fails to include an affidavit violates the statute and must be denied. Affirmations in compliance with CPLR 2106 can also be used on a motion for summary judgment, as that provision states that an affirmation "may be served or filed in the action *in lieu of and with the same force and effect as an affidavit*." CPLR 2106(a), (b) (emphasis added); *see* § 205.

XLIV. CPLR 3215. Default judgment.

Answer with Counterclaim, Verified by Defendants' Attorney, May Not Be Used as Proof of Claim on Default Judgment Application

In *Euzebe-Job v. Abdelhamid*, 2017 WL 1403896 (Sup. Ct., Kings County 2017), an automobile accident case, plaintiffs failed to serve a reply in response to defendants counterclaim and defendants applied for a default judgment. The court stressed that "[w]hile counterclaims are not specifically mentioned anywhere in CPLR 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 (2nd Dept 2011)." *See* Siegel & Connors, New York Practice § 294.

To demonstrate proof of the facts constituting its claim, as required by CPLR 3215(f), defendants submitted the answer with counterclaim, which was verified by the defendants' attorney pursuant to CPLR 3020(d). In that the attorney did not possess personal knowledge of the underlying facts supporting the counterclaim, the court ruled that "the verified answer with counterclaim may not be used in lieu of an affidavit by the movants pursuant to CPLR 105 (u)." *See* Siegel & Connors, New York Practice § 246. The application was denied without prejudice.

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

In *Country Wide Home Loans, Inc. v. Dunia*, 138 A.D.3d 533, 28 N.Y.S.3d 319 (1st Dep't 2016), the supreme court granted defendant's motion

pursuant to CPLR 3215(c) to dismiss plaintiff's foreclosure action because plaintiff failed to move for a default judgment within one year of defendant's default. This is the classic "default within the default" scenario in which a plaintiff who fails to "take proceedings" to enter a default judgment within one year after the default occurs forfeits the right to proceed with the action. *See* Siegel & Connors, New York Practice § 294 ("Time for default application"). Remarkably, with the stakes seemingly so high, the defendant's motion was granted on default without any opposition. Plaintiff then moved for renewal under CPLR 2221.

The First Department affirmed the denial of plaintiff's motion to renew. In that the order was granted on default, the court held that the proper remedy for plaintiff was a motion to vacate under CPLR 5015(a)(1), not a motion to renew under CPLR 2221. *See also Hutchinson Burger, Inc. v. Bradshaw*, 149 A.D.3d 545 (1st Dep't 2017); *Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term 2016).

We report the decision here because we have seen recent decisions in which parties have sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. The proper vehicle to challenge an order entered on default is CPLR 5015(a)(1). *See* Siegel & Connors, New York Practice § 427.

XLV. CPLR 3217. Voluntary Discontinuance.

CPLR 3211(a) Pre-Answer Motion to Dismiss Does Not Terminate Plaintiff's Right to Unilaterally Discontinue Action

CPLR 3217(a)(1) provides that "[a]ny 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 added).

In *Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808, 58 N.Y.S.3d 769 (4th Dep't 2017), several defendants made CPLR 3211 pre-answer motions to dismiss plaintiff's supplemental complaint and sought

sanctions. Prior to the return date of the motions, plaintiff served voluntary notices of discontinuance pursuant to CPLR 3217(a)(1) with respect to all defendants. The supreme court ruled that the plaintiff's voluntary discontinuance was untimely, granted the motions to dismiss, and imposed sanctions on plaintiff.

The Fourth Department reversed, ruling that the CPLR 3217 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)" and therefore did not cut off plaintiff's option of unilaterally discontinuing as of right pursuant to CPLR 3217(a)(1). The court concluded that "[i]t is clear from the language used throughout the CPLR that the Legislature did not intend a CPLR 3211 motion to be considered a 'responsive pleading.'"

The supreme court's order imposing sanctions against the plaintiff is, therefore, deemed a "nullity" and the appeal from it is deemed "academic."

The First Department has held that the service of a CPLR 3211(a) motion to dismiss terminates the plaintiff's right to unilaterally discontinue an action under CPLR 3217(a)(1). *BDO USA, LLP v. Phoenix Four, Inc.*, 113 A.D.3d 507, 979 N.Y.S.2d 45 (1st Dep't 2014); see Siegel & Connors, New York Practice § 297.

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

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

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

The plaintiff must now bring the following forms, among others, to the conference: "the mortgage and note or copies of the same; standard

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

CPLR 3408(f) now provides:

> Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
>
> 1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
>
> 2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and
>
> 3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.
>
> Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

XLVII. CPLR 5015. Relief from judgment or order.

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

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

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

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

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

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

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

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

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

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

In *Mahoney v. Brockbank*, 142 A.D.3d 200, 205, 35 N.Y.S.3d 459, 463 (2d Dep't 2016), *lv. granted* 2017 WL 1224136 (2017), the parties in a personal injury action resolved the issue of liability by stipulation. Almost 2 ½ years

later, a trial was held on the issue of damages. The issue presented on appeal was whether, pursuant to CPLR 5002, prejudgment interest on the award should be computed from the date of the jury verdict on the issue of damages or, instead, from the date of the stipulation on the issue of liability. The Second Department concluded that the supreme court correctly computed prejudgment interest from the date of the jury verdict because a stipulation as to liability does not trigger the accrual of category II interest under CPLR 5002.

XLIX. CPLR 5222. Restraining notice.

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

In *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014), the Court held that the "'separate entity' rule prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor's assets held in foreign branches of the bank."

The decision is discussed in further detail in Siegel & Connors, New York Practice §§ 487, 491, 510.

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

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

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

be paid to her and not the judgment debtor. In that the judgment creditor's use of CPLR 5225 and 5227 in *Colonial Surety* was "in furtherance of both legal and equitable relief," the court ruled that it was not entitled to a jury trial. *See* CPLR 4102(c).

The decision is discussed in further detail in Siegel & Connors, New York Practice § 510.

LI. CPLR 5231. Income execution.

CPLR 5231 Amended to Address Income Executions

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

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

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

receiving or will receive money," which is most typically the judgment debtor's employer.

The amendments to CPLR 5231 are discussed in further detail in Siegel & Connors, New York Practice § 502.

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

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

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

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

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

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

LIV. CPLR 6312. Motion papers; undertaking; issues of fact [for preliminary injunctions]

Matter Remitted to Supreme Court to Fix an Undertaking Required by CPLR 6312(b)

CPLR 6312(b) requires that a plaintiff provide an undertaking in an amount to be fixed by the court as a precondition to obtaining a preliminary injunction. *See* Siegel & Connors, New York Practice § 329. Sometimes the parties and the court forget this important statutory requirement, which cannot be waived. *Confidential Brokerage Servs., Inc. v. Confidential Planning Corp.*, 85 A.D.3d 1268, 1270, 924 N.Y.S.2d 207, 209 (3d Dep't 2011). If a preliminary injunction is granted, but an undertaking is not fixed by the court, an appellate court will typically remit the matter to the supreme court to set an appropriate undertaking, as occurred recently in *Mobstub, Inc. v www.staytrendy.com.*, 153 A.D.3d 809, 60 N.Y.S.3d 356 (2d Dep't 2017).

LV. CPLR 7501. Effect of arbitration agreement.

Court Enforces Arbitration Clause in Nursing Home Admission Agreement

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

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

LVI. CPLR 7803. Questions raised.

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

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

LVII. CPLR 7804. Procedure.

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

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

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

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

Court of Appeals Outlines Elements Required to Establish Civil Contempt

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

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

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

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

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

For further discussion of civil contempt, see Siegel & Connors, New York Practice §§ 481-484.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 37(e), adopted in 2006, was replaced in its entirety and is now entitled "Failure to Preserve Electronically Stored Information." Rule 37(e)(2) only allows the court to presume that lost information was favorable to a party, or to charge the jury with an adverse inference instruction, upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." The Advisory Committee notes emphasize that the amendment "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

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

The amendment to Rule 37 is discussed in further detail in Siegel & Connors, New York Practice § 638.

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

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

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

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

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

LXIV. Issues Regarding Removal of Actions from State to Federal Court

The potential pitfalls of any delay in seeking removal when an action is commenced in New York State court with a CPLR 305(b) notice are demonstrated in *Jones Chemicals, Inc. v. Distribution Architects Int'l*, 786 F. Supp. 310 (W.D.N.Y. 1992), where the arguable basis of federal jurisdiction

was the diversity of citizenship of the parties. The defendants were served with a summons and CPLR 305(b) notice setting forth some information that did indicate the potential existence of diversity jurisdiction, including the plaintiff's residence, the names of co-defendants, etc. There was nothing on the face of the summons and notice, however, to indicate that federal jurisdiction was certain. The defendants were nevertheless held subject to the 30-day removal period running from service of the summons with notice, with the court holding that they had a duty to investigate promptly after service so as to be able to act within the 30 days.

Duty to Investigate Federal Jurisdiction?

Although the *Jones* decision has not been overruled or criticized by other courts, it may not square with some more recent holdings. The Second Circuit has since held that a defendant has no independent duty to investigate whether a case is removable. *See Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001). "If removability is not apparent from the allegations of an initial pleading or subsequent document, the 30-day" period in 28 U.S.C. § 1446(b) does not begin to run. *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 143 (2d Cir. 2014)(discussing 30 day removal periods under 28 U.S.C. §§ 1446(b)(1) and (b)(3) in Class Action Fairness Act cases). However, defendants must still "apply a reasonable amount of intelligence in ascertaining removability." *See Whitaker*, 261 F.3d at 206; *see also Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013). While the "reasonable amount of intelligence" standard "does not require a defendant to look beyond the initial pleading for facts giving rise to removability," *Whitaker*, 261 F.3d at 206, the line is not always clearly drawn.

Some corporate defendants with inefficient bureaucracies can find themselves in perpetual forfeit of federal jurisdiction if they do not set up a system for transmitting summonses and their accompanying papers—in New York practice, either the CPLR 305(b) notice or the complaint—into the hands of their lawyers promptly, so that a possible removal to federal court can be timely considered. Lawyers regularly representing a client sued frequently in state courts should remind the client at periodic intervals of the timeliness issues regarding removal and recommend a process that ensures an immediate forwarding of the initiatory papers.

Starting the Removal Clock

Another problem, unique to the diversity case because of its monetary threshold, is how to time removal if the action is for money and the complaint does not state the sum demanded. The defendant is then unable to determine whether the case involves more than $75,000, the current requirement for federal subject matter jurisdiction in diversity cases. 28 U.S.C. § 1332(a). The predicament exists in personal injury and wrongful death actions—numerous categories in New York practice—because CPLR 3017(c) explicitly forbids the inclusion of an explicit monetary sum in the complaint in those categories of actions.

The remedy for the curious defendant in that situation is to use the supplemental demand procedure supplied by CPLR 3017(c). It permits the defendant to serve a demand on the plaintiff for a statement of the sum sought, and requires the plaintiff to respond within 15 days. Assuming the response asks for more than $75,000, the response constitutes the "other paper"—a paper other than the complaint—that § 1446(b)(3) also recognizes as an alternative starting time for the 30-day removal period.

In *Moltner v. Starbucks Coffee Co.*, 624 F.3d 34 (2d Cir. 2010), the personal injury complaint alleged several injuries but, as required by CPLR 3017(c), no monetary amounts were stated. D requested a supplemental demand for the damages sought under CPLR 3017(c), and P sent a letter in response stating entitlement to damages not to "exceed $3 million." D removed the case less than two weeks afterwards. The Second Circuit concluded that these steps satisfied the 30-day period for removal dictated by 28 U.S.C. § 1446(b). Under the law of inferences, a $3 million dollar statement, in any form, can be deemed on the upper side of $75,000.

The court concluded that "the time for removal runs from the service of the first paper stating on its face the amount of damages sought." *Moltner*, 624 F.3d at 35. The court rejected plaintiff's argument that defendant, "applying 'a reasonable amount of intelligence' to its reading of the complaint, should have deduced from the complaint's description of her injuries that the amount in controversy would exceed $75,000." *Id.* at 37. Rather, the court opted for a "bright line rule" and held that "the removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought." In *Moltner*, that "paper"

was plaintiff's letter sent in response to defendant's CPLR 3017(c) demand stating that the amount sought would not exceed $3 million.

An important lesson to be drawn from the *Moltner* decision is that the removal period in a personal injury or wrongful death action may be triggered by something other than a response to a supplemental demand served pursuant to CPLR 3017(c). In *Warfield v. Conti*, 2010 WL 2541168 (S.D.N.Y. 2010), for example, the court ruled that the 30-day removal period began to run when plaintiff's counsel sent defendants' counsel a letter asserting that plaintiff had suffered severe permanent injuries and demanding the defendants' full primary policy, which had a $300,000 limit, and any excess and/or additional policy under which they may be covered.

There are pitfalls faced when removing an action too soon. In *Noguera v. Bedard*, 2011 WL 5117598 (E.D.N.Y. 2011), for example, the court remanded the action to Supreme Court, Kings County for lack of subject matter jurisdiction. The district court concluded that defendants' notice of removal did not properly allege the amount in controversy, relying on the Second Circuit's conclusion in *Moltner* that "the amount in controversy is not established until the 'plaintiff serves the defendant with a paper that that explicitly specifies the amount of monetary damages sought.'" *Noguera*, 2011 WL 5117598 at *1. The court noted that CPLR 3017(c) provides "defendants with an explicit remedy in the face of plaintiff's failure timely to respond to the *ad damnum* demand: the state court, on motion, may order plaintiff to respond." *Id.* at *2. In *Noguera*, plaintiff's time to respond to the CPLR 3017(c) demand had not yet expired at the time the action was removed. The court indicated that removal might ultimately be appropriate after plaintiff provides a response to the CPLR 3017(c) demand.

The Second Circuit has recently cautioned district courts to "'construe the removal statute narrowly, resolving any doubts against removability.'" *Stemmle v. Interlake Steamship Co.*, 198 F. Supp. 3d 149, 156 (E.D.N.Y. 2016). Therefore, a defendant seeking removal of an action to federal court must take great pains to ensure that the removal papers are in order. *Hughes v. Target Corporation*, 2017 WL 2623861 (E.D.N.Y. June 15, 2017)(remanding action to state court because "a barebones, general pleading does not suffice to establish that this action involves an amount in controversy adequate to support federal diversity jurisdiction.").

LXV. Monitoring the Docket

In *Sable v. Kirsh*, 2017 WL 4620997 (E.D.N.Y. 2017), plaintiff filed a complaint against defendant on July 27, 2015. The court did not issue a summons, although the complaint was served on the defendant.

On March 21, 2016, the clerk issued a notice requesting the plaintiff's counsel "to inform the Court within ten (10) days of this notice, why an order should not be entered dismissing this action for failure to prosecute pursuant to FED. R. CIV. P. (or "Rule") 41(b)."

The Court received no response from either party by the requested date and on April 1, 2016 issued an order dismissing the case for failure to prosecute pursuant to FED. R. CIV. P. 41(b) and directed the clerk to close the case. On April 6, 2016, the clerk entered a judgment, which stated "that Plaintiff Michael Sable take nothing of Defendant Edward Kirsh; that this action is dismissed pursuant to FED. R. CIV. P. 41(b) for failure to prosecute; and that this case is hereby closed."

According to plaintiff, he learned about the Court's actions in May, 2016. When plaintiff confronted his attorney at the time, the attorney asserted that he did not receive any emails from the court. In June 2016, plaintiff asked his attorney to file a motion to vacate the judgment. After numerous unsuccessful attempts to contact his attorney, plaintiff filed a grievance with the Second Department.

The plaintiff then hired a new attorney who filed a motion to vacate the default judgment pursuant to Rule 60(b)(1) and 60(b)(2).

The court noted that under Rule 60(b), a party can be relieved from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or

> discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

See Siegel & Connors, New York Practice § 629 (6th ed. 2008) ("Vacating Defaults in Federal Court").

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order." FED. R. CIV. P. 60(c).

The court ruled that the motion to vacate was untimely, as it was filed on July 6, 2017, "ninety-one days after the one-year period ended." The court refused to apply the doctrine of "equitable tolling" to extend the one year period, observing that "lack of due diligence on the part of plaintiff's attorney is insufficient to justify application of an equitable toll." *South v. Saab Cars USA*, 28 F.3d 9, 12 (2d Cir. 1994).

The court went on to note that:

> the negligence of a party's attorney is insufficient grounds for relief under Rule 60(b)(1). *See Nemaizer*, 793 F.2d at 62; *see also U.S. ex rel. McAllan v. City of New York*, 248 F.3d 48, 53 (2d Cir. 2001) (noting that "parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders" (internal citations omitted)). "[A]n attorney's actions, whether arising from neglect, carelessness or inexperience, are attributable to the client, who has a duty to protect his own interests by taking such legal steps as are necessary. To rule otherwise would empty the finality of judgments rule of meaning." *Nemaizer*, 793 F.2d at 62-63 (citing *Ackerman v. United States*, 340 U.S. 193, 197-98, 71 S.Ct. 209, 95 L.Ed. 207 (1950)); *see also Carcello v. TJX Companies, Inc.*, 192 F.R.D. 61, 65 (D. Conn. 2000) ("[A] client makes a significant decision when he selects counsel to represent him. Once this selection has been made, the client cannot thereafter avoid the consequences of that counsel's negligence. Rather, his recourse is limited to starting anew, assuming the statutes of limitations and other applicable laws permit, or pursuing a negligence action against counsel." (internal citations and quotations omitted)); *Klein v. Williams*, 144 F.R.D. 16, 18 (E.D.N.Y. 1992)

(noting that "[a] client is not generally excused from the consequences of his attorney's negligence, absent a truly extraordinary situation" (internal citations and quotations omitted)).

Moreover, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect.' " *Pioneer Inv. Servs., Inc. v. Brunswich Assocs. Ltd. P'ship*, 507 U.S. 380, 391-92, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). "[T]his is because a person who selects counsel cannot thereafter avoid the consequences of th[at] agent's acts or omissions." *Nemaizer*, 793 F.2d at 62 (citing *Link v. Wabash*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8.Led.2d 734 (1962)).

In the case at issue, it was Mr. Rosenberg's "ultimate responsibility to prosecute his client's claim, keep track of deadlines and respond to motions filed on the docket." *Lapico v. Portfolio Recovery Assocs.*, LLC, No. 06-cv-1733, 2008 WL 1702187, at *3 (D. Conn. Apr. 11, 2008) (internal citations omitted). His alleged inability to properly file a complaint, respond to the orders of this Court and communicate with his client is a failure to observe the clear, unequivocal rules that govern an attorney's conduct and this Court. See e.g., NEW YORK RULES OF PROFESSIONAL CONDUCT, Rules 1.3, 1.4; FED. R. CIV. P. 4. Furthermore, the Plaintiff has failed to cite a single case with similar circumstances, where a court in this circuit has found that similar conduct constitutes excusable neglect. Where, as here, a party's attorney fails to adhere to an unambiguous rule, Second Circuit jurisprudence precludes recovery. *See e.g., Klein*, 144 F.R.D. at 18; *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250–51 (2d Cir. 1997). For this reason, the undersigned concludes that the Plaintiff's claim lacks merit sufficient to justify granting a Rule 60(b)(1) motion.