New York State Law Digest

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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

AMENDMENTS TO UNIFORM RULES

Back in the February and March 2021 editions of the *Law Digest*, we discussed the significant amendments being made, effective February 1, 2021, to the Uniform Rules for the Trial Courts, 22 N.Y.C.R.R. Part 202. We opined that "the effectiveness of the new statewide rules will depend on the attorneys' cooperation and the judges' interest in enforcing them." We expressed some skepticism about certain rules which we felt would have limited applicability in a large number of cases in general civil practice. We did not anticipate, however, the severity of the backlash from the legal community. What particularly perturbed many practitioners was the fact that they felt that very little input was sought from those "on the ground" and what they felt were unnecessary, irrelevant, or counter-productive rules.

In fact, major concerns were advanced by the New York State Bar Association and others to the rules. Unfortunately, very few amendments were ultimately made. Where changes were made, they were primarily directed to providing the court with some discretion whether to follow the rule or to permit parties to agree to vary from the rules. Practitioners should also be aware of section 202.1 of the Uniform Rules (22 N.Y.C.R.R. § 202.1), which provides that, for good cause shown and in the interests of justice, a court can waive compliance with any of the Uniform Rules other than sections 202.2 and 202.3, "unless prohibited from doing so by statute or by rule of the Chief Judge."

As for the specific changes, effective July 1, 2022, note the following:

Print Type, Margins, and Bookmarks: § 202.5(a)(2) was clarified to limit the bookmarking requirement for electronically submitted memoranda of law, affidavits, and affirmations of more than 4500 words to instances where a computer software program is used, and to provide discretion to the court to remove the requirement ("unless otherwise directed by the court").

Word Count Limits: § 202.8-b(a), concerning the length of papers, was amended with reference to the number of words permitted to clarify that the word count applies where papers are prepared by the use of a computer. Subsection (c) was similarly amended. Subsection (d) was added to provide that typewritten or handwritten affidavits, affirmations, briefs, or memoranda of law in chief are limited to 20 pages each and reply affidavits, affirmations, and memoranda of law are limited to 10 pages each and are not to contain arguments that do not respond or relate to those made in the memoranda in chief.

New subsection (e) provides that where a party opposing a motion makes a cross-motion, the affidavits, affirmations, briefs, or memoranda of law are to be limited to 7000 words each when prepared by computer or 20 pages each for typewritten or handwritten papers. The reply papers, including affidavits, affirmations, briefs, or memoranda of the party making the principal motion, are limited to 4200 words when prepared by computer or 10 pages when typewritten or handwritten. (Note that prior subdivision (d) was relettered to (f).)

Statements of Material Facts: § 202.8-g, relating to Statements of Material Facts for a Summary Judgment Motion, was one of the most contentious rules, as adopted, and was substantially amended. Most significant, subdivision (a) now provides that the statements of material facts *may* be directed by the court, removing the prior mandatory language. Subparagraph (c) was also amended to make clear that any of the statements that are not controverted *may* be deemed admitted and only for the purposes of the motion, not the entire action. In addition, the subsection now provides: "The court may allow any such admission to be amended or withdrawn on such terms as may be just."

A new subsection (e) was added, providing multiple remedies to the court where a party fails to provide the required statements. Thus, if the motion's proponent fails to include the statements, the court can order compliance and adjourn the motion, deny the motion without prejudice to renewal upon compliance, or can take such other action as may be just and appropriate. Where the opponent of a motion fails to provide the required

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counter-statements, the court can similarly order compliance and adjourn the motion; can, after notice to the opponent and an opportunity to cure, deem the assertions in the proponent's statement to be admitted for the purposes of the motion; or may take such other action as may be just and appropriate.

Interrogatory Limit: § 202.20 added the alternative that the parties can agree to a different number of interrogatories, rather than the 25-figure provided by the rule.

Privilege Logs, Meet and Confer: § 202.20-a(b), concerning privilege logs, now makes discretionary ("may") the prior requirement of memorializing agreements and protocols in a court order.

Production of Documents: § 202.20-c(c), with respect to document responses, amends the prior rule, which *required* the response to *verify* each individual request, to now provide that the response shall contain, at the conclusion, the affidavit of the responding party attesting to the information required by the rule (i.e., whether responsive documents in its possession, custody or control are complete or that there are no responsive documents to the request).

Pre-trial Memoranda and Exhibit Binders: § 202.20-h removes the *requirement* concerning the submission of pretrial memoranda at the pretrial conference and leaves it to the court's discretion to direct such compliance. Similar discretion is provided to the court with respect to the submission of an indexed binder or notebook, or the electronic equivalent of trial exhibits. Where required, counsel "shall" provide a copy to each attorney. The court can change the procedure for the submission of memoranda ("Unless otherwise directed by the court").

Nonjury Trial Direct Testimony by Affidavit: § 202.20-i was changed by removing the court requirement. Instead, upon a party's request, the court can permit such testimony.

Settlement Conferences, Pretrial Conferences and Undisputed Expert Testimony: § 202.26(c) now limits the court's right to direct consultation among counsel regarding expert testimony to non-jury trials or hearings. Thus, it now does not apply to jury trials.

Pre-Marking of Exhibits: § 202.34, as amended, provides the court with the discretion to be able to remove the requirement of pre-marking exhibits ("Unless otherwise directed by the court") and states that the court "should" rule at the earliest possible time on any objections to contested exhibits.

Scheduling Witnesses: § 202.37 now makes clear that the estimates of the length of testimony and the order of witnesses provided by counsel are advisory only and that the court can permit witnesses to be called in a different order.

There were also significant changes made with respect to matrimonial actions; see § 202.16 and § 202.16-b.

CASE LAW DEVELOPMENTS

Majority of First Department Holds that Plaintiff Cannot Amend Complaint After Appellate Division Dismissed It

Finds Entry of Judgment Not Determinative Factor

The issue in *Favourite Ltd. v. Cico,* 2022 N.Y. Slip Op. 03987 (1st Dep't Jun 21, 2022) is an interesting one that deeply divided the court: whether the trial court could grant plaintiff leave to file an amended complaint (here the third) after the Appellate Division had dismissed the prior complaint with a direction to enter judgment. A narrow majority held that the trial court lacked such discretion.

The facts in this case are a bit long and winding. What was a consistent theme was possible standing (capacity) issues, which ultimately led to the filing of a series of amended complaints. Of significance here was the Appellate Division's March 20, 2020 order dismissing the second amended complaint on standing grounds, with a direction to enter judgment. The plaintiff's subsequent motions for leave to reargue and leave to appeal were both denied by an August 13, 2020 order. Plaintiff also moved to dismiss defendants' counterclaims, which had been asserted in an answer filed prior to the Appellate Division's March 20, 2020 order. While that motion was pending, but over nine months after the Appellate Division order, plaintiff moved for leave to file a third amended complaint. In June 2021, the trial court granted plaintiff's amendment and dismissed the defendants' breach of contract and declaratory judgment counterclaims. Defendants appealed from the June 2021 order.

A majority of the First Department here noted that "[s]tanding and capacity related dismissals are not on the merits, and the proposed third amended complaint purportedly cured the defect, except that here there was no existing complaint to amend. Our dismissal presented a unique procedural scenario that deprived Supreme Court of discretion to grant leave to amend the second amended complaint (citation omitted)." *Id*. at *15. The majority maintained that after its "outright dismissal," there was no longer any pending action when plaintiff sought leave to file the third amended complaint. Significantly, the court held that the absence of an entered judgment did not impact its analysis:

> The entry of a subsequent judgment is a mere ministerial act. Our dismissal order was binding on the parties until vacated or set aside on further appeal. There was no further appeal of our decision. Hence, under the circumstances, plaintiffs' only remedy was to commence a new action, which they failed to do (citations omitted).

Id. at *15–16.

The majority rejected the dissent's "unsupported" argument that the defendants' failure to enter judgment after the "unconditional dismissal order" permitted the trial court to grant the plaintiff's motion, cautioning that "such a process, would lead to the absurd result of a party, and not the Appellate Division determining whether and when a case is dismissed, according to when the party choses [sic] to enter the judgment." *Id.* at *16, n. 4. The court insisted that its dismissal order was a "final determination," even if it was not on the merits, and became "effective as of the date of the order, not the later, unfixed date when a ministerial judgment is entered, if ever." *Id.* at *19. The majority distinguished between the unconditional dismissal here and one that contains further directives, which might require a prompt entry of judgment. It emphasized that

> the finality of an Appellate Division's dismissal order should be derived from clear rule of law and not depend on the vagaries of litigants or individual court clerks.

> Clear rule of law provides individuals with certainty, clarity, and predictability as to when a case is no longer active. Vesting court clerks with the ultimate wherewithal to decide when a case is no longer active and pending, after an order of the Appellate Division has dismissed the complaint, undermines the principal of finality which is essential to the orderly operation of our judicial system.

Id. at *20.

The court pointed to the fact that "[t]he Court of Appeals considers an Appellate Division dismissal order to be final – even where dismissal is not on the merits and even where no judgment has been entered." *Id.* at *17–18.

The majority insisted that the statute of limitations had expired by the time the plaintiff sought leave to amend the second amended complaint. It noted that the plaintiff never resorted to CPLR 205(a) by filing a timely second action and the subsequent motions for reargument and leave to appeal did not extend the six-month period. Finally, the defendants' act of filing counterclaims did *not* revive plaintiff's time-barred second amended complaint

> because the second amendment complaint was timed-barred at the time defendants filed their counterclaims as part of their answer filed on July 18, 2019. . . . Even if plaintiffs' claims arose out of the same transactions alleged in the counterclaim, this did not permit plaintiff to obtain affirmative relief based on the untimely claims. An untimely claim could only serve as a defense that is "predicated on [an] act or fact growing out of the matter constituting the cause or ground of the action . . . ." (citation omitted).

Id. at *27.

The dissent asserted that the case law relied upon by the defendants involved motions to amend after a dismissal *on the merits*; "[i]t is only after a decision has been rendered on the merits that 'new life may not be breathed into it through permissive repleading, even upon a showing of merit' because '[t]he conclusive effect of a judgment on the merits may not be fatally undermined . . . by allowing the party whose cause is dismissed a second chance to litigate the matter' (citation omitted) (*Id*. at *34)"; contrary to the majority's conclusion, entry of judgment is crucial "because '[a] judgment is the law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding' (citation omitted)" (*Id*. at *34–35); the defendants disregarded the prior order directing entry of judgment and offered no explanation for failing to submit a proposed judgment, leaving the action pending; and thus the dissent's position did not depend on the "vagaries of the individual court clerks" as the majority suggests, "but on the steps taken by the litigants."

The dissent rejected the majority's analogy to the Court of Appeals' view of finality, because "finality is a civil jurisdictional requirement of the Court of Appeals," by which the Appellate Division is not bound. The dissent disagreed that plaintiff's claims were time-barred because the plaintiffs were not adding new causes of action or theories of liability in the third amended complaint.

Update: Immediate Impact of Court of Appeals Decisions

Many times, an appellate court issues a decision but its impact is not seen for some time. In April and May 2022, however, the New York State Court of Appeals issued important decisions and their impact can be seen immediately.

In *Nemeth v. Brenntag N. Am.*, 2022 N.Y. Slip Op. 02769 (April 26, 2022), discussed in the June 2022 *Digest*, the Court held that plaintiff's proof failed to meet the causation test in an asbestos case. Specifically, the Court noted that although precise quantification of exposure to a toxic substance is not always necessary, a plaintiff must submit proof of "sufficient exposure to a substance to cause the claimed adverse health effect," using methods "generally accepted as reliable in the scientific community." In addition, the Court held that proof that a plaintiff worked "in dust laden with asbestos generated from products containing asbestos" together with "'expert testimony that dust raised from manipulating asbestos products "necessarily" contains enough asbestos to cause mesothelioma 'is insufficient.'" *Id.* at *9, n.3.

It did not take long for the First Department to react. On a single day, it issued four separate decisions relying on *Nemeth* and finding for the defendant. *See Dyer v. Amchem Prods. Inc.,* 2022 N.Y. Slip Op. 04609 (1st Dep't July 19, 2022); *Pomponi v. A.O. Smith Water Prods.* Co., 2022 N.Y. Slip Op. 04612 (1st Dep't July 19, 2022); *Matter of New York City Asbestos Litig.,* 2022 N.Y. Slip Op. 04611 (1st Dep't July 19, 2022); *Killian v. A.C. & S., Inc.*, 2022 N.Y. Slip Op. 04610 (1st Dep't July 19, 2022). In each case, the court found that the plaintiff had not met the standards set forth in *Nemeth*. Significantly, in three of the cases, the appellate division reversed denials of defendant's summary judgment motion, as opposed to a post-trial motion. In the fourth, the court overturned a verdict in excess of $100 million, directing entry of judgment in the defendant's favor.

In *Columbia Memorial Hospital v. Hinds,* 2022 N.Y. Slip Op. 03306 (May 19, 2022), discussed in the July 2022 *Digest*, the Court of Appeals ruled that the employee, not the employer, was entitled to the proceeds from demutualization. Less than two months later, in *Benoit v Jamaica Anesthesiologist*, P.C., 2022 N.Y. Slip Op. 04285 (2d Dep't July 6, 2022), the Second Department reversed a lower court judgment and remitted the matter to that court for the entry of an amended judgment, "declaring that the plaintiffs [physicians or certified registered nurse anesthetists] are entitled to their allocable shares of the cash consideration due under the conversion plan."

Update: "The Necessarily Affects" Trap

In the June 2022 edition of the *Digest*, we highlighted the dangers of waiting to appeal interlocutory orders. CPLR 5501(a)(1) permits an interlocutory order to be reviewed on appeal from a final judgment, if it is a non-final order that "necessarily affects" the final judgment. We referred to the Court of Appeals decision in *Bonzcar v American Multi-Cinema, Inc.,* 2022 N.Y. Slip Op. 02835 (April 28, 2022), where the Court held that an earlier order did not necessarily affect the final judgment because it "did not remove any issues from the case." The Court also noted a separate approach with respect to the "necessarily affects" requirement, that is, "where the prior order

'str[uck] at the foundation on which the final judgment was predicated,' we have inquired whether 'reversal would inescapably have led to vacatur of the judgment.'" *Id.* at *3

More recently, in *Stanescu v. Stanescu*, 2022 N.Y. Slip. Op. 04186 (2d Dep't June 29, 2022), a brother and sister were involved in a dispute over certain income-producing real property, held as tenants-in-common. The plaintiff-brother signed a durable general power of attorney in favor of defendant-sister, which permitted the defendant to act as plaintiff's agent in, among other things, real estate transactions and "all other matters." The defendant subsequently transferred by deed the plaintiff's 50% interest in the property to herself. This resulted in this action in which the plaintiff sought to set aside the deed and to receive a share of the rental income.

Following a non-jury trial, the plaintiff appealed the judgment in the defendant's favor and two earlier non-trial orders. One was a discovery order which resulted in preclusion. This order was reviewable as it necessarily affected the judgment. The other was a denial of plaintiff's summary judgment motion, but this order was not reviewable because

> [h]ere, the Supreme Court denied the plaintiff's motion for summary judgment, concluding, in effect, that the plaintiff failed to eliminate triable issues of fact related to the transfer of the property. The order did not strike at the foundation on which the final judgment was predicated, nor did it necessarily remove any legal issues from the case, since "[t]he parties had further opportunity to litigate those issues and in fact did so during the . . . trial (citation omitted)."

Id. at *5.

CPLR 214-g Is Unavailable to Nonresident Plaintiff Where Alleged Abuse Occurred Outside New York

For Cause of Action Accruing Outside the State, CPLR 214-g Does Not Preclude Applicability of New York's Borrowing Statute

In 2019, CPLR 214-g was added as part of a comprehensive omnibus bill signed into law as the Child Victims Act (CVA), reviving for one year previously time-barred actions arising out of a claim for child sexual abuse. The revival period was subsequently extended to two years. In *S.H. v. Diocese of Brooklyn,* 205 A.D. 3d 180 (2d Dep't 2022), in a case of first impression, the Second Department ruled that (1) CPLR 214-g is unavailable to nonresident plaintiffs where the alleged abuse occurred outside of New York; and (2) with respect to a cause of action accruing outside the state, CPLR 214-g does *not* preclude the application of New York's borrowing statute, CPLR 202.

The court noted that the legislature intended that the CVA provide relief to New York residents only, citing to the legislative history, which stressed that the CVA was meant to help New York survivors who experienced sexual abuse in the state. Furthermore, the court found that CPLR 214-g does not apply extraterritorially. First, in general, legislation is not presumed to apply outside of the state "unless expressly stated otherwise." Moreover, revival statutes are to be narrowly construed; CPLR 214-g does not contain an express provision that it applies to a nonresident whose injury occurred outside of New York; and, as discussed above, the CVA's legislative history "evinces a clear intent to benefit New York survivors of sexual abuse." The court pointed to its own ruling in a dram shop case (General Obligations Law § 11-101) and the Court of Appeals' decision in *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y. 2d 314 (2002), concerning General Business Law § 349, a consumer protection statute. Both cases held that the respective statutes did not apply extraterritorially.

CPLR 202 provides that an action based on a cause of action accruing outside of New York in favor of a non-resident cannot be commenced after the expiration of the applicable New York limitation period or the limitation period of the place outside New York where the cause of action accrued, whichever is earlier. The court noted that one of the purposes of this statute is to prevent forum shopping by nonresidents "seeking to take advantage of a more favorable statute of limitations than that which is available to them elsewhere." In this action, the plaintiff was not a New York resident and the alleged abuse and injuries sustained occurred in Florida. Thus, since plaintiff's claim was barred under Florida law, it was similarly time-barred here in New York, even if CPLR 214-g did apply extraterritorially, unless CPLR 214-g precluded the application of the borrowing statute.

Plaintiff argued that the introductory language of CPLR 214-g, "[n]otwithstanding any provision of law which imposes *a period of limitation to the contrary*," precluded the application of CPLR 202. The court countered that in analyzing similar language in the 1986 Toxic Tort Revival Statute, the First Department rejected such an interpretation, concluding that "'the introductory phrase of the revival statute ["[n]otwithstanding any other provision of law"] can only mean that the CPLR's three-year limitations period on personal injury actions [found in CPLR 214] shall not apply to claims brought within the revival period' (citation omitted)." 205 A.D. 3d at 181 (quoting *Besser v. Squibb & Sons*, 46 A.D.2d 107, 114 (1st Dept 1989), *aff'd without op*, 75 N.Y.2d 847 (1990)).

The court rejected plaintiff's argument that language found in CPLR 214-g, but not in the Toxic Tort Revival statute ("[n]otwithstanding any provision of law which *imposes a period of limitation to the contrary*"), made the First Department authority noted above irrelevant, because "CPLR 202 is part of New York's procedural law, and part of CPLR article 2, it is unlike the other statutes of limitations set forth in article 2. CPLR 202 is not a statute of limitations associated with any particular cause of action, but rather 'calls for a comparison of New York's "net" limitations period . . . and the foreign state's "net" limitations period,' the shorter of which will be applied to determine the timeliness of an action (citation omitted)." *Id.* at 182.

Finally, the court concluded that

> the CVA revival statute, . . . is meant to avoid the statute of limitations that would have ordinarily been applicable to the cause of action at issue; i.e., here, the three year period of limitations applicable to the plaintiff's negligence cause of action as set forth in CPLR 214. . . . Further, there is no reference to CPLR 202 in CPLR 214-g, nor is there any indication that CPLR 214-g was intended to override the provisions of CPLR 202; "in the absence of some manifestation of intention by the Legislature to limit the borrowing statute, the revival statute should not be interpreted to override its provisions" (citations omitted).

Id. at 182–83.

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