# New York State Law Digest

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

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## CASE LAW DEVELOPMENTS

### Fourth Department Rules that the Child Victims Act's Revival Provisions Are Not Unconstitutional

**Finds that it Comports with New York's Due Process Clause**

In prior editions of the Law Digest, we dealt with elements of the Child Victims Act (CVA), which opened a one-year, extended to a two-year, window for previously barred civil claims by survivors of child sex abuse. In *PB-36 Doe v. Niagara Falls City Sch. Dist.*, 182 N.Y.S.3d 850 (4th Dep't 2023), the defendants moved to dismiss, arguing that the claims were time-barred because the CVA revival provisions were unconstitutional under New York State's Due Process clause and thus could not revive plaintiffs' claims. The trial court denied the motion.

The Fourth Department affirmed. It noted that a revival statute satisfies New York's Due Process clause "if it was enacted as a reasonable response in order to remedy an injustice." The Appellate Division addressed the second prong first, finding that the CVA remedied an injustice. The court quoted from the New York State Court of Appeals decision in Matter *of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377 (2017), concerning the difficulty in assessing a particular injustice; thus, reliance on the legislature's determination is necessary:

> [T]he Court of Appeals recognized that, "[i]n the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government."

*PB-36 Doe*, 182 N.Y.S.3d 850 at *2.

The Appellate Division found that here the legislature considered and analyzed the injustice element:

> Here, as evidenced by the legislative history of the CVA, the legislature considered the need for "justice for past and future survivors of child sexual abuse" and the need to "shift the significant and lasting costs of child sexual abuse to the responsible parties." Specifically, the legislative history noted the significant barriers those survivors faced in coming forward with their claims, including that child sexual abuse survivors may not be able to disclose their abuse until later in life after the relevant statute of limitations has run because of the mental, physical and emotional injuries sustained as a result of the abuse. As explained in the Senate Introducer's Memorandum in Support, "New York currently requires most survivors to file civil actions . . . against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average." Because the statutes of limitations left "thousands of survivors" of child sexual abuse unable to sue their abusers, the legislature determined that there was an identifiable injustice that needed to be remedied (citations omitted).

*Id.* at *3–4.

The court rejected the defendants' contention that the injustice was vitiated by the fact that some survivors may not have encountered the barriers noted and could have brought timely claims. It stated that the Court of Appeals has never required that *all* plaintiffs covered by a revival statute be unable timely to commence an action for the statute to satisfy New York's Due Process Clause. Instead, the Court of Appeals has concluded

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> in its review of a different claim-revival statute, that the legislature "properly determined that it would be more fair for all plaintiffs to uniformly now have [additional time] to bring their actions, rather than for the courts to begin drawing arbitrary lines" excluding certain plaintiffs based on their ability to sue under the relevant statutes of limitations (citations omitted).

*Id.* at *5.

Finally, the court found that CPLR 214-g, as extended, was a reasonable response, seeking to remedy the survivors' injustice caused by the prior limitation period, which extinguished their claims. The court pointed to other states that had established revival periods in favor of child sexual abuse survivors for periods of two years or longer, an indefinite period or on an age-based approach.

## Another Application of the COVID Toll Addressed: Notice of Claim Served Under Unconsolidated Laws § 7107 Found to Be Timely

### Key Fact is That Deadline for Service of this Notice of Claim Is Tethered to Commencement of the Action, Not Accrual of the Cause of Action

One of the important issues that we have covered over the past few years has been whether the governor's Executive Orders during COVID acted as a toll or merely suspended time limitations. Three of the four Departments of the Appellate Division have found it to be a toll, and we understand that the issue is presently before the Fourth Department. As to the possible (continuing) implications of a toll, we refer you back to our past treatments in the July 2020, November 2020 and July 2021 editions of the *Law Digest.*

*Espinal v. Port Auth. of N.Y. & N.J.,* 2023 N.Y. Slip Op. 00844 (2d Dep't Feb. 15, 2023), delves into the application of the toll to a notice of claim, a bit different from the classic and more widely known and applied General Municipal Law § 50-e. Here, the court addressed Unconsolidated Laws § 7107, which provides for conditions precedent for commencing an action against the Port Authority of New York and New Jersey. It requires that an action against the Port Authority be commenced within one year after the cause of action accrued AND that a notice of claim be served on the Port Authority at least 60 days before the action is commenced. Both of the timing requirements in this statute—to commence and to serve the notice of claim—are conditions precedent, which has its own ramifications. *See e.g., Yonkers Contracting Company, Inc. v. Port Authority Trans-Hudson Corporation*, 93 N.Y.2d 375, 378 (1999) ("Case law distinguishes between a Statute of Limitations and a statutory time restriction on commencement of suit. The former merely suspends the remedy provided by a right of action, but the latter conditions the existence of a right of action, thereby creating a substantive limitation on the right . . . The requirement to bring an action within one year under Unconsolidated Laws § 7107 is such a condition precedent to suit, which cannot be tolled under CPLR 205(a).").

In *Espinal,* the plaintiff sustained injuries on May 7, 2019, timely commenced the action on November 4, 2020, and served the notice of claim on August 14, 2020, 82 days before commencing the action. The Port Authority argued that, although the Executive Orders tolled the (May 7, 2020) deadline to commence the action, they did not do so with respect to the notice of claim, because that deadline to serve the notice of claim had already expired when the initial Executive Order was issued. Thus,

> the tolling of the deadline to commence this action had no effect on the deadline to serve the notice of claim. The Port Authority contends, in effect, that under section 7107, a notice of claim must be served no more than 305 days (one year minus 60 days) after a cause of action accrues.

*Id.* at *6–7.

The court rejected the Port Authority's interpretation, noting that GML 50-e, not implicated here, requires the notice of claim to be filed within 90 days after the claim accrues. However, "the plain language of section 7107 makes the deadline to serve a notice of claim dependent upon the date of *commencemen*t, unlike other statutes . . .." *Id.* at *7. Thus, because the plaintiff served the notice of claim more than 60 days prior to the commencement of the (timely) action on November 4, 2020, he satisfied the condition precedent to suit in section 7107.

## *Espinal* Ruling Does Not Apply to Other Types of Notices of Claim Whose Deadlines Are Tied to Accrual of the Cause of Action

### But All Hope is Not Lost

As noted above, the *Espinal* court went out of its way to distinguish the notice of claim under Unconsolidated Laws § 7107, in which the deadline for service of the notice of claim is "tethered" to the commencement of the action, as opposed to other notices of claim, whose timing for service runs from when the cause of action accrues.

Those proceeding under the General Municipal Law can seek an extension of time to serve the notice of claim (under GML § 50-e (5)) up until the running of the underlying statute of limitations, *including any tolls*. *Cohen v. Pearl River Union Free School Dist.,* 51 N.Y.2d 256 (1980). Thus, it would appear that where a notice of claim was untimely at the time the Executive Orders went into effect, the plaintiff would have been able to seek an extension until the statute of limitations ran, that is, one year and 90 days, *plus* the period covered by the toll.

### *Espinal* Court Points Out the Differing Approaches to COVID Crises in New York and New Jersey That Can Have Significant Impact

The Second Department in *Espinal* pointed out that in contrast to the New York toll covering the period of March 20, 2020 through November 3, 2020, New Jersey's Governor

> did not enact a similar executive order suspending or tolling court procedural rules such as statutes of limitations or time limitations to serve notices of claim. However, the Supreme Court of New Jersey issued omnibus orders declaring legal holidays from March 16, 2020, through May 10, 2020. In *Barron*, the Superior Court of

> New Jersey, Appellate Division, held that these omnibus orders did not toll time limitations, but instead created "legal holidays," which allowed the filing of pleadings such as a complaint or notice of claim on the next business day after the expiration of the omnibus orders that was not a Saturday, Sunday, or legal holiday (citations omitted)

*Espinal*, 2023 N.Y. Slip Op. 00844 at *5–6.

It is important to note, therefore, that if you had a borrowing statute issue—a nonresident suing in New York in connection with a cause of action accruing in New Jersey—when doing the calculations of the whole body of law of each, the applicable New Jersey limitation period would not get tolled under New Jersey law. And, as we previously reported in the December 2022 *Law Digest*, New York's COVID toll is not to be considered when assessing New Jersey's limitation period. *See Afanassieva v. Page Transp., Inc.*, 2022 U.S. App. LEXIS 28462 (2d Cir. 2022) (*citing Weinstein, Korn & Miller*).

## Appellate Division Refuses to Consolidate Actions Where One Was the Subject of a Pending (Undecided) Meritorious Motion to Dismiss

### Commonality Not Enough; You Need a "Viable" Action

In *HSBC Bank USA, N.A. v. Francis,* 2023 N.Y. Slip Op. 00992 (2d Dep't Feb. 22, 2023), the question presented was whether the plaintiff could seek to consolidate an action that appeared to be untimely pursuant to a meritorious *pending* dismissal motion, with a second timely action. Under the facts of this case, the Second Department declined the plaintiff's invitation.

In 2008, the plaintiff's predecessor in interest brought a mortgage foreclosure action. After the defendant failed to appear, an order of reference and judgment of foreclosure and sale was obtained. Later the judgment was vacated to be replaced by a corrected judgment. However, a judgment was never entered, and the underlying action was never discontinued or dismissed.

In 2017, the plaintiff commenced this action to foreclose the same mortgage. The defendant answered, then moved, among other things, to dismiss on untimeliness grounds. The plaintiff cross-moved to consolidate the 2008 and 2017 actions. The trial court granted the consolidation cross-motion, reasoning that the requirements for consolidation had been met since "the cases arose from identical facts and circumstances, involved common questions of law and fact, and involved causes of action to foreclose on a residential mortgage." *Id.* at *3. Moreover, consolidation would avoid duplication of trials and the possibility of inconsistent verdicts.

The Appellate Division disagreed. It noted that the granting of consolidation is not automatic where there is commonality of fact or law. Moreover, the discretion of the trial court to consolidate or join actions is not "unfettered" and can be reviewed under an improvident exercise of discretion standard.

Here, the Second Department ruled, in an issue of apparent first impression, that generally consolidation should not be granted where one of the cases is not "viable" because it is subject to a *pending (undecided)* meritorious motion to dismiss. The court found that the statute of limitations defense to this action was meritorious because the 2008 action "called due the entire debt" and the six-year limitation period had elapsed before this action was commenced (2017). The Appellate Division rejected the plaintiff's argument, accepted by the trial court, that once the 2017 action was consolidated with the timely 2008 action, the statute of limitations defense failed. It cautioned that permitting consolidation in such a circumstance would permit an "end around" to one of the actions' legal defenses:

> [I]n our view, a precondition for merging two or more actions is that each action should itself be viable, meaning that neither is confronted with a pending—and apparently meritorious—motion to dismiss. Once the defendant here met her burden of establishing, prima facie, that the time in which to commence the 2017 action had expired, it became the plaintiff's burden to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. The plaintiff could not meet that shifted burden by merely asserting that the 2017 action will become timely once it is merged with the timely 2008 action. The purpose of consolidation under CPLR 602(a) is not to provide a party with a procedural end run around a legal defense applicable to one of the actions. In our opinion, in such instances, judicial discretion should not be used to cure the untimeliness of one action by tethering it to a related timely action. We hold, as an issue of apparent first impression that, in this case, the Supreme Court improvidently exercised its discretion in granting consolidation and that, in general, consolidation should be denied where one of the cases to be consolidated is subject to a meritorious motion to dismiss.

*Id.* at *8–9.

The court noted that consolidation was also inappropriate because the actions were at vastly different stages. In the 2008 action, an order of reference and a judgment of foreclosure and sale had been entered, though the judgment was vacated. Moreover,

> the defendant failed to appear in the 2008 action but answered in the 2017 action. Were the actions merged, would the defendant be properly viewed as having defaulted in appearing in that merged action, or would she be properly viewed as having appeared in it? These two cases should not be consolidated where the defendant has defaulted in one but appeared and answered in the other.

*Id.* at *11.

## Court Cannot *Sua Sponte* Direct Parties to Arbitrate

### A Request from One of the Parties is Required

One of the issues in P.*S. Fin., LLC v. Eureka Woodworks, Inc.*, 2023 N.Y. Slip Op. 00877 (2d Dep't Feb. 15, 2023), re-

lated to the powers of a court to direct parties to arbitrate. Specifically, the issue was where a court finds that an arbitration provision in the relevant agreement governs, can it direct the parties to arbitrate when none of the parties request it? The Second Department answered the question in the negative.

The trial court here had determined that based on provisions in the agreement, it did not have jurisdiction, *sua sponte* directed the parties to arbitrate, and dismissed the action. The Appellate Division found that the trial court erred in concluding that the mere existence of an arbitration clause authorized dismissal; only an arbitration and award justifies a dismissal. The Second Department stated that nothing in the CPLR or the Federal Arbitration Act requires a court to direct arbitration where it believes there is an applicable arbitration provision without a request by one of the parties. Simply stated, the Second Department concluded (as numerous federal courts have) that there is no basis for a court to order a dismissal *sua sponte.* "To be sure, both New York and federal policy favor arbitration. In our view, however, a policy favoring arbitration does not authorize courts to create special rules to promote arbitration (citations omitted)." *Id*. at *14.

The court asserted that because the right to arbitrate emanates from the contract, a court should enforce those provisions as they would with respect to contractual rights in general. Thus, a party can modify, waive, or abandon a right to arbitrate. In fact, the court here found that the plaintiff, PSF, by its conduct, waived its right to arbitrate. For example, PSF chose to bring this action, rather than to seek to enforce the arbitration provision. In addition, PSF never moved to compel arbitration or reference arbitration in its motion for summary judgment in lieu of complaint. Finally, PSF later moved to add an additional defendant, and moved a second time for summary judgment, without requesting arbitration. Finally, any demand to arbitrate made by PSF after the trial court directed arbitration "does not change the fact that PSF had waived the right to arbitrate before the court's directive." *Id*. at *17.

### Regardless, the Trial Court Should Have Stayed, Rather Than Dismissed the Action

In a footnote, the *P.S. Fin.* court noted that even where parties are properly directed to arbitrate, the proper procedure is for the court to stay the action, rather than dismiss it, pending the arbitration. The proper motion here is not one to dismiss but to compel arbitration. CPLR 7503(a) provides that if an application to compel is granted, "the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration." *See also Weinstein, Korn & Miller,* ¶ 7503.18 (David L. Ferstendig ed., 2023).

Moreover, there are certainly times after an arbitration that court intervention is necessary—for example, a motion to confirm or vacate an arbitration award. *See Weinstein, Korn & Miller*, ¶ 7510.00 (David L. Ferstendig ed., 2023) ("If an application related to the arbitration, such as a motion to compel arbitration, CPLR 7503(a), has been made in a pending action or in a special proceeding, the motion to confirm is made in that same action or special proceeding. CPLR 7502(a)(iii).").

## Discontinuance Ineffective to Restart Limitation Period in Mortgage Foreclosure Action

### Newly Enacted Foreclosure Abuse Prevention Act Requires Such a Result

The Foreclosure Abuse Prevention Act (FAPA) (L. 2022, ch. 821) was signed into law on December 30, 2022. It intended to address "(1) an ongoing problem with abuses of the judicial foreclosure process and lenders' attempts to manipulate statutes of limitations"; and (2) "recent court decisions which, contrary to the intent of the legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present legislation is to clarify the meaning of existing statutes, and to rectify these erroneous judicial interpretations thereof."

The sponsors' memorandum specifically referred to two decisions that the legislation sought to overrule. One was *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1 (2021), which we dealt with in detail in a prior edition of the *Law Digest*. *See Court of Appeals Gives Primer on What It Requires to Accelerate a Debt and Revoke an Acceleration in Mortgage Foreclosure Actions,* 725 N.Y.S.L.D. 1-2 (2021). Relevant here was the Court of Appeals' ruling in *Freedom* that where a debt is accelerated via the commencement of a foreclosure action, the voluntary discontinuance of that action acts to revoke the prior acceleration.

In *GMAT Legal Title Trust 2014-1 v. Kator*, 2023 N.Y. Slip Op. 00990 (2d Dep't Feb. 23, 2023), a mortgage foreclosure action, the plaintiff initially argued that the commencement of the earlier 2007 action did not validly accelerate the debt because the plaintiff in that action, a purported assignee, had no standing to bring the action. However, CPLR 213(4) was amended under FAPA to provide that a plaintiff is "estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." The Second Department stated that the action was voluntarily discontinued and was not dismissed based on such an expressed judicial determination.

The plaintiff then argued that the voluntary discontinuance of the 2007 action reset the limitation period. The court noted that plaintiff's premise was based on the ruling in *Freedom* that was nullified by FAPA. Specifically, CPLR 3217(e) was added providing that "[i]n any action on an instrument described under [CPLR 213(4)], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute."

Regardless, the court added that, apart from and prior to the amendment, the discontinuance here would have been ineffective to restart the statute of limitations because it occurred after the six-year limitation period.

*Wishing each of you a happy, peaceful and meaningful holiday season.*

**David**



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