# 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

### On Certified Question, New York State Court of Appeals Rules That Assignment Was Ineffective Because of Failure to Provide Notice to the Insurer

**Thus, Trust-Assignee Had No Contractual Standing to Sue the Insurer**

In *Brettler v. Allianz Life Ins. Co. of N. Am.*, 2023 N.Y. Slip Op. 05958 (Nov. 20, 2023), the Court of Appeals was asked a certified question (which it reformulated) from the Second Circuit: "Where a life insurance policy provides that 'assignment will be effective upon notice' in writing to the insurer, does the failure to provide such written notice deprive the purported assignee of contractual standing to bring a claim under the Policy against the insurer?" The Court of Appeals answered that question in the affirmative.

The relevant 2008 Allianz $8 million life insurance policy was issued on the life of Dora Zupnick ("Zupnick Policy") to the Zupnick Family Trust ("Trust"). The policy provided that the owner was "solely entitled to exercise all rights of this policy until the death of the insured." It also permitted the owner to assign the policy on one condition, that is, that the owner provide notice to the insurer of the assignment (the "Notice Provision"): "You may assign or transfer all or specific ownership rights of this policy. An assignment will be effective upon Notice. We will record your assignment. We will not be responsible for its validity or effect, nor will we be liable for actions taken on payments made before we receive and record the assignment." "Notice" was defined as "[o]ur receipt of a satisfactory written request."

The Trust sold the Zupnick Policy to a Miryem Muschel in 2012 and provided Allianz with the proper notice of the assignment in writing. A year later, the insurer put the Zupnick Policy in lapse for nonpayment. Apparently, the Trust was unable to make the payment because of a bank error, which the bank acknowledged to the Trust and the insurer. In 2016, Muschel transferred the policy back to the Trust, but Allianz was *never* notified of this second assignment.

The plaintiff (Brettler), as Trustee, then brought an action against Allianz seeking a declaration that the Zupnick Policy remained "in full force and effect." The complaint, which identified the Trust as the owner of the policy, alleged that there were no outstanding premium payments when the insurer declared the policy lapsed; that the insurer failed to give timely "notice to the Trust when the Policy was in danger of lapsing" as it was obliged to do; that the insurer's final pre-lapse notification demanded a miscalculated premium and set forth an incorrect due date; and that, as a result, the lapse notice was void and the policy remained in effect.

The insurer argued that the Trust lacked standing to sue because the insurer never received the required notice under the policy of Muschel's assignment of the policy back to the Trust.

The first issue the Court of Appeals tackled in responding to the reformulated certified question was whether the relevant policy provision was an anti-assignment clause. In concluding that it was not, but rather a notice provision, it noted that the assignment provision was unilateral, it did not restrict the policy owner's power to assign and only conditioned it on providing notice to Allianz at any time, and Allianz had no right to refuse assignments. "In contrast, an anti-assignment clause prohibits unilateral assignments either by voiding the assignment entirely or by encumbering it by requiring the non-as-

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signing party to approve or consent to any assignment of the contract (citations omitted)." *Id*. at *5.

However, while Muschel could unilaterally transfer rights as against the insurer, it could only do so with proper notice to the insurer. Absent such notice, the insurer would not be bound by the assignment. The relevant policy provision language supported such an interpretation, since it permits ownership rights to be freely assignable; "it provides that '[a]n assignment will be effective upon Notice,' which makes notice a prerequisite to transfer of ownership rights as against Allianz and shields Allianz from owing contractual obligations to a party of which it is unaware"; it requires the insurer to record the assignment; "the Provision notes that '[w]e will not be responsible for its validity or effect,' which indicates Allianz takes no position on the legal effect of any agreement between the policy owner and a third-party assignee"; and significantly "the Provision states 'nor will we be liable for actions taken on payments made before we receive and record the assignment,' which confirms Allianz will not be bound by unnoticed assignments or liable for actions inconsistent with third-party agreements of which Allianz is unaware, such as payment to the record owner even after they assigned the policy." *Id*. at *8.

In this case, without such notice, Allianz was not bound by Muschel's assignment to the Trust. As a result, the Trust could not enforce any of the policyholder's contractual rights against the insurer, and the Trust lacked standing under the contract to sue Allianz.

The Court made clear that its decision should not suggest that the Purchase Agreement between Muschel and the Trust was void or that the Trust had no rights against Muschel.

## New CPLR 205-a Does *Not* Provide Six-Month Extension to Plaintiff in Mortgage Foreclosure Action

### Plaintiff Was Not the Original Plaintiff and Was Not Acting on Behalf of the Original Plaintiff

As part of a larger amendment signed into law on December 30, 2022, the Foreclosure Abuse Prevention Act (FAPA), CPLR 205-a, was added. As per the Sponsor's memorandum, the legislation was intended to deal with "(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." Thus, CPLR 205-a supplants CPLR 205 in mortgage foreclosure actions.

CPLR 205-a concerns an action upon a CPLR 213(4) instrument (bond, note, or mortgage) and provides that a second action can be commenced within six months of the termination of a prior action (including service within that time period), even if the statute of limitations has run in the interim. The language in CPLR 205-a is similar to CPLR 205, the six-month extension we have dealt with in the past, containing the same exclusions (that is, voluntary discontinuance, failure to obtain personal jurisdiction over the defendant, neglect to prosecute, and a judgment on the merits). However, it differs in a few significant ways. For example, CPLR 205-a expands the neglect exclusion expressly to include as follows: "a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment." Moreover, a successor in interest or an assignee of the original plaintiff cannot commence a new action unless it pleads and proves that it is acting on behalf of the original plaintiff. Finally, the original plaintiff is only entitled to one six-month extension.

In *B & H Fla. Notes LLC v. Ashkenazi*, 2023 N.Y. Slip Op. 05785 (1st Dep't Nov. 16, 2023), in 2013, plaintiff's predecessor, Wells Fargo, brought an action to foreclose a mortgage, which action was dismissed for lack of standing. On appeal, the First Department held that the dismissal was without prejudice.

In 2019 (prior to the enactment of CPLR 205-a), the plaintiff commenced this foreclosure action, arguing that CPLR 205(a) rendered its new complaint timely filed. Both parties moved for summary judgment. The trial court denied the defendant's motion, granted the plaintiff's cross-motion to the extent of dismissing additional affirmative defenses, and denied defendant's subsequent motion to vacate. All three orders were appealed to the First Department.

While the appeals were pending, FAPA was enacted. The First Department here noted that the amendment provided that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced." As a result, CPLR 205-a applied.

The court held that pursuant to the express language of CPLR 205-a, the plaintiff did not get the benefits of the statute because the "[p]laintiff in this action is concededly not the original plaintiff and is not acting on behalf of the original plaintiff. Accordingly, plaintiff is statutorily barred from commencing this action." *Id.* at *3.

## Failure to Follow Statutory Conditions Results in Dismissal of Action Against the Port Authority

### Failure is Jurisdictional Defect; Court Rejects Plaintiff's Argument That Port Authority's Sovereign Immunity Defense Could be Waived

Unconsolidated Laws of N.Y. § 7107 permits an action to be brought against the Port Authority of New York and New Jersey on the condition that "a notice of claim shall have been served on the port authority . . . at least sixty days before such suit, action or proceeding is commenced" and that any action "shall be commenced within one year after the cause of ac-

tion therefor shall have accrued." Section 7108 sets forth the required content of the notice of claim and the methods for serving it. The failure to comply with these conditions is a nonwaivable jurisdictional defect. *See Lyons v. Port Auth. of N.Y. & N.J.,* 228 A.D.2d 250, 251 (1st Dep't 1996).

In *Tutor Perini Bldg. Corp. v. Port Auth. of N.Y. & N.J.,* 2023 N.Y. Slip Op. 05702 (1st Dep't Nov. 14, 2023), the trial court dismissed the action because of plaintiff's failure to comply with the notice of claim requirements. The Appellate Division affirmed, finding that the failure "results in the withdrawal of the Port Authority's consent to suit, thereby depriving the court of subject matter jurisdiction." *Id.* at *1.

Although the plaintiff acknowledged that its failure resulted in the withdrawal of the Port Authority's consent to suit, it argued that that withdrawal of consent "merely results in the 'restoration of Port Authority's defense of sovereign immunity'"; that since sovereign immunity implicates the court's personal jurisdiction, the Port Authority could waive the defense through its litigation conduct; and that its failure timely to assert a defense here effected such a waiver.

The First Department rejected the plaintiff's argument:

> Plaintiff's reading of the statute would wrongly permit a plaintiff to "ignore the legislative mandate making a timely notice of claim a condition precedent to suit," including the "time requirements" that are at "the core of the statute." Because compliance with the statute is not optional, plaintiff's attempt to shift focus to the Port Authority's waiver of sovereign immunity through the "actions it took in defense of this lawsuit" necessarily fails. The statute looks only to the actions taken by plaintiff to satisfy the conditions precedent to suit. The actions taken by the Port Authority in defense of the suit are utterly irrelevant to this inquiry. Consequently, the jurisdictional defect here implicates the court's subject matter jurisdiction, not its personal jurisdiction (citations omitted).

*Id.* at *2–3.

The Court also dispensed with the plaintiff's contention that its unsworn notice of claim emailed to a nonparty developer, which was copied to the Port Authority, constituted substantial compliance with the statute:

> [T]he notice, which accuses the developer of a breach, fails to give the Port Authority a notice of claim that satisfies the content and service requirements specified in section 7108. Plaintiff's argument that the notice provided defendant with actual knowledge of the underlying facts is misplaced because "[w]hat satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the claim" (citation omitted).

*Id.* at *3.

## Beware of Dangers Associated With CPLR 312-a Service

### Service Ineffective if the Statute's Requirements Are Not Strictly Followed *or* the Defendant Merely Ignores Service

CPLR 312-a provides for mail service of initiating papers in an action. However, there are serious difficulties in utilizing this type of service, and it should never be resorted to if there is a fast-approaching expiration of the applicable statute of limitations. The reason is simple: the defendant can control whether this service is effective and simply ignore it.

CPLR 312-a(a) provides for service of the summons and "by first class mail, postage prepaid . . . together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender." Significantly, "[s]ervice is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender" (CPLR 312-a(b)(1)). An answer is then due within 20 days after the signed acknowledgement of receipt is mailed or delivered.

In *Carney v. Metropolitan Transp. Auth.*, 2023 N.Y. Slip Op. 05679 (1st Dep't Nov. 14, 2023), the plaintiff did not send the required statement of service by mail or an acknowledgment of receipt to the defendants. The Appellate Division noted that "[m]ailing the summons and complaint via first-class mail, standing alone, is insufficient to establish service because CPLR 312-a(b) specifies that 'service is complete only if [the] defendant returns a signed acknowledgment of receipt (citation omitted).'" As a result, "service '[w]as never completed and the action was never properly commenced' (citations omitted)"; and "[t]he time for NYCTA and MTA Bus Company to file an answer or move to dismiss never started running because plaintiff did not include an acknowledgment of receipt with the summons and complaint." *Id.* at *4.

It is important to stress that even if a plaintiff complies fully with the statute, a defendant can merely choose to ignore the service by not returning the acknowledgment. At that point, the plaintiff has not effected service as service has not been completed. The only penalty the defendant faces is that "the reasonable expense of serving process by an alternative method shall be taxed by the court on notice pursuant to section 8402 of this chapter as a disbursement to the party serving process, and the court shall direct immediate judgment in that amount." CPLR 312-a (f).

## While the Court of Claims Pleading Requirements May Be Relaxed in Child Victim Act Cases, Not Everything Passes Muster

### Failure to Correctly Identify the Range of Dates on Which the Alleged Negligence and Injury Occurred Held to be Insufficient

In the September 2023 edition of the *Law Digest*, we referred to the significant pleading requirements outside of the CPLR that can have jurisdictional consequences. Specifically, we noted the Court of Claims Act prerequisites to asserting a claim against the State; the statutory requirements as to the commencement of actions are to be strictly construed; and the failure to comply with filing and pleading requirements can result in a jurisdictional defect depriving the Court of Claims of subject matter jurisdiction. We discussed the decision in *Rodriguez v. State of New York*, 219 A.D.3d 520 (2d Dep't 2023), which dealt with the interplay between the Court of Claims pleading requirements (Court of Claims Act § 11(b)) and the assertion of a claim under the Child Victims Act (CVA). In *Ro-*

*driguez*, the issue was whether the claimant adequately pleaded the "time when" the claim arose. The court relied on a more relaxed standard applicable to CVA cases in finding that the date ranges provided in the claim, together with the other information set forth in it, were sufficient to satisfy the "time when" requirement. "Given that the CVA allows claimants to bring civil actions decades after the alleged sexual abuse occurred, it is not clear how providing exact dates, as opposed to the time periods set forth in the instant claim, would better enable the State to conduct a prompt investigation of the subject claim (citations omitted)." *Id*. at 522. A concurring opinion asserted that the same pleading requirements in non-CVA cases should apply in CVA cases.

But even the relaxed standards applied in CVA cases could not save the claimant in *Musumeci v State of New York*, 2023 N.Y. Slip Op. 05265 (2d Dep't Oct. 18, 2023). There, the court held that "the claimant failed to satisfy the 'time when . . . [the] claim arose' requirement of Court of Claims Act § 11(b), since the claim failed to correctly identify the range of dates on which the alleged negligence and injury occurred." *Id.* at *3.

## Fourth Department Rejects Argument That CPLR 208(b) Should Be Read Into and Limit the CPLR 214-g CVA Revival Provision

### CPLR 208(b) Reference to Claims Being Made Until Age 55 Is Irrelevant to Whether Claim Is Revived Under CPLR 214-g

In *DiSalvo v. Wayland-Cohocton Cent. Sch. Dist.*, 218 A.D.3d 1169 (4th Dep't 2023), the plaintiffs timely brought this action under the CVA during the CPLR 214-g revival period, when they were 62 years old.

The issue in the case dealt with the interaction between the CPLR 214-g revival provision and another portion of the CVA, CPLR 208(b), providing that a civil claim for childhood sexual abuse can be made on or before the plaintiff reaches the age of 55. The defendants argued that the 55-year-old age limitation in CPLR 208 should be read into and limit the CPLR 214-g revival provision, thus making plaintiffs' claims here untimely.

The Fourth Department rejected this argument. The court emphasized that there was no language in either statute suggesting such a restriction on the revival provision; neither statute references the other, "suggesting that the legislature did not intend for one provision to control the other"; and the CPLR 214-g revival applies "[n]otwithstanding any provision of law which imposes a period of limitation to the contrary," which would include the CPLR 208(b) age limit. Thus, the CPLR 208(b) limitation period does not relate to whether a CPLR 214-g action is timely. The only timing requirement under CPLR 214-g is that it was brought during the revival period. The court explained that

> the structure of the CVA suggests that the two provisions at issue here were intended to solve two different problems and were not intended to overlap with one another. The CVA "was intended primarily to revive civil claims by persons subjected to [child] sexual abuse . . . but whose claims have become time-barred, and also to provide a more generous toll for such claims in the future. The first of these goals was achieved by CPLR 214-g, and the second by amendments to CPLR 208." In other words, the CVA amended CPLR 208 (b) to prospectively and permanently allow all victims of child sexual abuse to pursue those claims until age 55, whereas CPLR 214-g was enacted to provide temporary retrospective relief for all claims—regardless of age—for a limited and discrete period of time (citations omitted).

*Id.* at 1171.

## Second and Third Departments Join Fourth Department in Holding that the CVA's Revival Provision Is Not Unconstitutional

### Finding That CVA Was Enacted as a Reasonable Response to Remedy an Injustice

In the April 2023 edition of the *Law Digest*, we discussed *PB-36 Doe v. Niagara Falls City Sch. Dis*t., 213 A.D.3d 82 (4th Dep't 2023), where the Fourth Department held that the CVA revival provision was not unconstitutional and satisfied New York's Due Process clause because "it was enacted as a reasonable response in order to remedy an injustice." The court found that that the CVA and CPLR 214-g sought 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.

The Second and Third Departments have since joined the Fourth Department in finding that the statute is not unconstitutional. *See Forbes v. Poly Prep Country Day Sch.*, 2023 N.Y. Slip Op. 05123 (2d Dep't Oct. 11, 2023); *Matarazzo v. Charlee Family Care, Inc.,* 218 A.D.3d 941, 944 (3d Dep't 2023) ("[W]e conclude that the CVA was a reasonable response to remedy an injustice, and we decline defendants' invitation to depart from this conclusion which is shared by other courts that have addressed a facial challenge before us (citations omitted)." Court also rejects as-applied constitutional challenge.).

***Have a meaningful holiday season.***

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