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

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CASE DEVELOPMENTS

To Preserve or Not to Preserve, That Is the Question

Majority and Dissent of Court of Appeals Disagree as to Whether the Defendant Preserved Her Arguments Under Domestic Relations Law § 240 in Custody Battle

Cole v. Cole, 2020 N.Y. Slip Op. 03489 (June 23, 2020), concerns a custody dispute in which the trial court awarded joint legal custody and primary physical custody of young children to the father. The court's primary basis for doing so was its conclusion that it was in the children's best interests for the father to have physical custody because the children expressed a "firm" preference to live with him based on "reasons [that were] germane and [were] supported by evidence of record."

Domestic Relations Law (DRL) § 240(1)(a) provides that where allegations of domestic violence are proven by a preponderance of the evidence, the court is required to "consider the effect of such domestic violence upon the best interests of the child" and to provide its conclusions "on the record." In this case, the mother (defendant) alleged domestic abuse by the father (plaintiff) and challenged the award of custody to the father, arguing that the trial court did not consider her domestic violence claim. The question was whether the mother preserved her claim under DRL § 240(1)(a).

In a very brief opinion, a majority of the Court of Appeals concluded she did not, and thus

> the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of this statute or whether defendant proved allegations of domestic violence "by a preponderance of the evidence" (Domestic Relations Law § 240 [1] [a]) – issues that are essential to the arguments defendant now raises. Record evidence supports the affirmed custody award.

Id. at *1.

In Judge Rivera's dissent, joined by Judge Wilson, she pointed to the following facts: (1) in the family offense petition, the mother made a sworn allegation of domestic violence by the father against her (there is nothing in the statute stating "whether domestic violence allegations must be made and proven in the custody action itself or in any sworn statement"); (2) the petition was admitted into evidence at the divorce proceeding, where the father sought custody; (3) the mother testified about the alleged abuse, with additional corroborating evidence; and (4) the father did not contest her claim, although he noted that the mother withdrew the petition (after obtaining a protection order and the father's agreement to leave the marital residence voluntarily). As a result, the dissent insisted, the trial court was required to consider the mother's allegations of abuse to determine whether they were established by a preponderance of the evidence. However, because the trial court's decision made no reference to the allegations, it was not possible to determine from the record whether the court had made such an assessment. Thus, the dissent believed the matter should be remitted to the trial court.

The dissent asserted that the mother preserved her DRL § 240(1)(a) claim:

> [T]he court was presented with sworn allegations of father's domestic violence, thus triggering the court's obligation under Domestic Relations Law § 240(1)(a) to consider whether the allegations were proved by a preponderance of the evidence. The statute gives no indication but that it is self-executing—that it operates, like any other procedural rule, without the need for a party to parrot its language to the trial court. Further, there is no credible argument that the court was unaware that domestic violence is a statutorily prescribed

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> factor in its best interest of the children analysis, given that this standard is well-established . . .
>
> Our preservation rules require only that a party raise their claim at the first opportunity, which in this case was before the Appellate Division, after the trial court issued its custody determination. Mother did just that, arguing on appeal that the trial court failed to properly consider her allegations of domestic violence in its best interest of the children analysis, that she had proved the allegations by a preponderance of the evidence and that father did not admit evidence to controvert her allegations of abuse.

Id. at *17–19.

Finally, the dissent noted that everyone appearing before the Court – the mother, father, and the children's attorney – assumed that the mother's claim was properly before the Court and argued points relevant to that claim.

Must a Motion for an Extension of Time to Serve Under CPLR 306-b Be Denied if Made After an Order Granting a Motion to Dismiss?

Majority of Second Department Says It Depends on Whether a Judgment Has Been Entered

CPLR 306-b provides that the failure to serve within the applicable period (120/15 days) will result in the dismissal of the action, unless the Court extends the time to serve "upon good cause shown or in the interest of justice." Thus, when confronted with a defendant's motion to dismiss under CPLR 306-b, good practice is for the plaintiff to cross-move seeking an extension of the time to serve.

But what happens if the plaintiff does not seek an extension of time to serve the defendant until *after* the defendant's motion to dismiss is granted? Can the Court still entertain plaintiff's motion? In *State of New York Mtge. Agency v. Braun*, 182 A.D.3d 63 (2d Dep't 2020), a majority of the Second Department distinguished between those cases where a judgment has been entered and those where none has. In the former situation, the plaintiff's motion should not be entertained; in the latter, the motion can be heard, rejecting the notion that an action was no longer pending. "'An action is deemed pending until there is a final judgment' (citations omitted)." *Id*. at 68.

The court relied on the statutory language, which does not require the denial of the plaintiff's motion after an order granting the dismissal motion. Moreover, CPLR 306-b provides no time frame for a motion to extend the time for service. In contrast, the court pointed to CPLR provisions containing time requirements, such as a CPLR 2221(d)(3) motion to reargue (30 days), a CPLR 3212 summary judgment motion (the 30/120 day rule), and a CPLR 5015(a) motion to vacate an order or judgment on excusable default grounds (one year).

The Second Department maintained that cases out of the First and Second Departments, which appeared to be to the contrary, were distinguishable or non-binding. The majority rejected the dissent's complaint that the majority's decision permits a plaintiff to ignore an order granting a motion to dismiss when moving for an extension. In fact, a plaintiff's delay in making a motion to extend is a factor that a court is to consider in whether to grant an interest of justice extension. Nevertheless, although acknowledging that "better practice" would be for a plaintiff to move before an order of dismissal is issued, the majority stressed that "a plaintiff's delay in moving pursuant to CPLR 306-b to extend the time for service until after the issuance of an order granting a motion to dismiss should not deprive the court of its discretion to extend the time to serve a defendant in a pending action." *Id*. at 77.

The majority also rejected the dissent's concerns about procedural issues caused by the court's decision, that

> "[t]he dates of entry of judgment, service of a motion to extend, and entry of any order resolving the plaintiff's motion to extend will become critical in determining the jurisdiction of the motion court or appellate court." The dissent's procedural fears are overstated and unfounded. Courts are empowered to vacate orders or judgments on the grounds codified in CPLR 5015(a) as well as for sufficient reason and in the interest of substantial justice. In appropriate instances, an order, or even a judgment, may be vacated where it is inconsistent with the relief being granted (citations omitted).

Id. at 77–78.

Ultimately, the majority ruled that the plaintiff was entitled to an extension in the interest of justice.

The dissent maintained that once an action is dismissed, the plaintiff can no longer seek an extension of time to serve; the language of CPLR 306-b expressly provides the court with two options: dismiss the action without prejudice OR extend the time for service in the existing action, yet the majority rewrites the statute "by replacing the word 'or' with the word 'and,' such that the motion court can dismiss the action and later extend the plaintiff's time to serve"; the plaintiff here should have cross-moved for the extension when the defendant moved to dismiss or at the least sought an extension before the court determined the dismissal motion; CPLR 306-b does not refer to a "judgment" or a "pending action"; the majority and the decisions upon which it relies "misapprehend the meaning and significance of orders directing dismissal and judgments," allow a plaintiff to attack a dismissal order without complying with CPLR 2221 (applicable to motions to reargue or renew) or appealing, and violate the principle of judicial economy (compelling parties to engage in an additional round of motion practice "on the often-difficult question of whether an extension of time to serve a defendant is warranted for good cause or in the interest of justice").

The dissent noted that the majority's errors began in the court's decisions in *Cooke-Garrett v. Hoque*, 109 A.D.3d 457 (2d Dep't 2013), and *US Bank N.A. v. Saintus*, 153 A.D.3d 1380 (2d Dep't 2017), in which it ruled "that the timeliness of a CPLR 306-b motion to extend depends, in part, upon whether and when a clerk enters judgment." These decisions, the dissent contends, "run contrary to the Court of Appeals' statement in *Leader v. Maroney, Ponzini & Spencer* that CPLR 306-b 'empowers a *court* faced with the dismissal of a viable claim' the option of granting the plaintiff an extension of time to serve the defendant (citation omitted). A *court* is no longer faced with a dismissal if it has, as here, months before already directed dismissal of the complaint." *Braun*, 182 A.D.3d at 84. The dissent found the majority's conclusion, in essence, that an "order is nondeterminative

until such time as a judgment is entered upon it *by the clerk* defies the expectations of the parties in understanding the status of the litigation." *Id*. at 85. Moreover, the relatively ministerial nature of entering a judgment raises issues as to whether its filing while plaintiff's motion is pending would somehow vitiate that motion.

Preservation Again – This Time With Respect to a Notice of Appeal

Fourth Department Majority and Dissent Disagree as to Whether Notice of Appeal Properly Preserved Contention

In the March 2019 edition of the *Digest*, we discussed *Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 N.Y.3d 645 (2019), where the Court of Appeals discussed the pitfalls of limiting language in a motion seeking leave to appeal:

> "Ordinarily when the court grants a motion for leave to appeal all issues of which the court may take cognizance may be addressed by the parties." However, where "the party seeking leave specifically limits the issues to be raised, it is bound thereby and may not thereafter raise other questions" because "[t]o permit otherwise necessarily disadvantages the opposing parties, who might have joined issue or even cross-moved for leave to appeal as to additional issues had adequate notice been given" (citation omitted).

Id. at 650–51.

Similar concerns of limiting language arise when filing a notice of appeal. *See, e.g*., *Martin v. Silver*, 170 A.D.3d 505, 506 (1st Dep't 2019) ("We lack jurisdiction to entertain plaintiff's arguments as to the trial court's grant of defendant's motion in limine, preclusion of plaintiff's expert, or refusal to admit the out-of-state records of one of her doctors. Plaintiff's notice of appeal does not refer to or otherwise incorporate those determinations and those determinations did not necessarily affect the final judgment (citations omitted).").

In *Cline v. Code*, 175 A.D.3d 905, 909 (4th Dep't 2019), a motor vehicle personal injury action, the notice of appeal stated that the plaintiff "hereby appeals to the Appellate Division, Fourth Department, from the . . . [o]rder and [j]udgment . . . entered . . . on May 21, 2018, denying [p]laintiff's [c]ross[m]otion for [s]ummary [j]udgment. Plaintiff appeals from each and every part of said [o]rder denying [p]laintiff's [c]ross [m]otion." The issue was whether the appellate court had jurisdiction to consider whether the trial court properly granted defendant's summary judgment motion or was limited to considering the order denying plaintiff's cross-motion.

The majority and the dissent disagreed as to how to reconcile the broader and more limiting language. The majority pointed to the language seeking to appeal from "each and every part" of the order, concluding that the notice of appeal did not "contain language restricting the appeal to only a specific part thereof," and thus the appeal was not limited to the review of the denial of plaintiff's cross-motion. With respect to the language specifically referencing the order denying the cross-motion, the majority felt that it was merely descriptive of the order and judgment. The court found support for its position in the contents of plaintiff's cross-motion, in which

> plaintiff expressly sought as part of the requested relief "[a]n [o]rder denying defendant's [m]otion for [s]ummary [j]udgment in its entirety." Thus, given the lack of language specifically limiting the appeal to that part of the order and judgment denying the cross motion, and considering that the relief sought in the cross motion included the denial of defendant's motion, and that granting the other relief sought by plaintiff in the cross motion and on appeal from the denial thereof, i.e., partial summary judgment on the issue of serious injury, would necessarily require denial of defendant's motion for summary judgment dismissing the complaint, we conclude that plaintiff did not limit her appeal to challenging only that part of the order and judgment that denied her cross motion for summary judgment while leaving unchallenged that part of the order and judgment granting defendant's motion for summary judgment dismissing the complaint (citations omitted).

Id. at 906-07.

The dissent relied on the limiting language in the notice of appeal, which

> unambiguously conveys that plaintiff limited her appeal to challenging only that part of the order and judgment that denied her cross motion for summary judgment. Plaintiff even referenced that portion of the order and judgment, "[p]laintiff's [c]ross [m]otion," twice and made no reference to any other part of the order and judgment. This repeated language compels the conclusion that plaintiff did not seek to challenge the court's granting of defendant's motion.

Id. at 909.

The dissent questioned the majority's conclusion that the "each and every part" language broadened the appeal because it "ignores" the language following that phrase which limited it to the order denying plaintiff's cross-motion. "It is one thing to broadly construe ambiguous language; it is another thing entirely to do so in the face of plain, express limiting language to the contrary." *Id*. The dissent took issue with the majority's characterization of the limiting language as "descriptive" in nature, stating that it could not conceive of a "coherent or consistent basis for ascertaining what language is descriptive, and what language actually bears on our jurisdiction." *Id*. at 910.

So, to avoid this quagmire, we provide the same advice we gave in March 2019: be careful not to unnecessarily limit your issues on appeal. Quite an ironic admonition considering the amount of criticism lawyers receive for talking or writing too much!

CPLR 205 Applies to Action Initially Removed to Out-of-State Federal Court But Transferred to New York Federal Court

We have dealt with CPLR 205(a) many times in the *Digest*. It provides that if an action is timely commenced and is terminated in a manner other than as set forth in the statute, the plaintiff is authorized to bring a second action based upon the same transaction or occurrence, or series of transactions or occurrences, within six months of termination of the first action.

It is clear that CPLR 205 applies where the first action was commenced in a New York federal court. *See 423 S. Salina St. v. Syracuse*, 68 N.Y.2d 474, 481 (1986) (*citing* Weinstein, Korn & Miller), *cert. denied,* 481 U.S. 1008 (1987). Conversely, it has been held that CPLR 205 is inapplicable to actions

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commenced out-of-state. *See, e.g.*, *Deadco Petroleum v. Trafigura AG*, 151 A.D.3d 547 (1st Dep't 2017).

But what happens if the first action was removed out of state to a federal court (lacking jurisdiction over the defendant), and was subsequently transferred to a New York federal court? A recent First Department case holds that CPLR 205(a) did apply there:

> Plaintiff's prior action, which was removed to the U.S. District Court for the District of Massachusetts on May 27, 2011, was transferred from that court—which lacked general personal jurisdiction over defendants—to the Southern District of New York (SDNY). 28 USC §1631 provides in pertinent part, "Whenever a civil action is filed in a court … and that court finds that there is a want of jurisdiction, the court shall … transfer such action … to any other such court … in which the action … could have been brought at the time it was filed …, and the action … *shall proceed as if it had been filed in … the court to which it is transferred on the date upon which it was actually filed in … the court from which it is transferred.*" Hence, the motion court properly treated plaintiff's prior action as if it had been filed in the SDNY as of May 2011 (emphasis added by court) (citations omitted).

Federal Home Loan Bank of Boston v. Moody's Corp., 176 A.D.3d 518, 518–19 (1st Dep't 2019) (*citing* Weinstein, Korn & Miller).

Computer Printout from Department of State Website Inadmissible and Insufficient to Establish Corporation's Principal Office for Venue Purposes

CPLR 503(c) provides that a domestic or authorized foreign corporation is deemed to be a resident for venue purposes "of the county in which its principal office is located." For a domestic corporation, the certificate of incorporation designates that county, even if that corporation might maintain an office or facility in another country. *See Kidd v. 22-11 Realty, LLC*, 142 A.D.3d 488 (2d Dep't 2016). However, a computer printout from the Department of State website has been held to be inadmissible, because "it was not certified or authenticated, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record." *O.K. v. Y.M. & Y.W.H.A. of Williamsburg, Inc.*, 175 A.D.3d 540, 541 (2d Dep't 2019).

Signing of Order to Show Cause Does Not Signify That the Relief Sought Was Not Utterly Meritless and Thus Not Frivolous

22 N.Y.C.R.R. Part 130 concerns costs and sanctions for frivolous conduct. In *Matter of Citigroup Global Mkts., Inc. v. Fiorilla*, 178 A.D.3d 567 (1st Dep't 2019), the trial court denied respondent's application to vacate a judgment as "frivolous" and "invited" the petitioners to make a sanctions motion. The petitioners obliged and the court granted the motion.

One of the arguments made by the respondent (Fiorilla) was that the trial court's earlier signing of the order to show cause on the vacatur application signified the court's "assessment that the application was not utterly meritless, and therefore not frivolous." The First Department found that argument unavailing:

> Assuming that Supreme Court subjected the order to show cause application to at least a minimal quantum of scrutiny sufficient to ensure that it could grant the relief sought, Supreme Court's signing of the order did not connote any approval of the substance of the motion. Instead, the most that can be said on the existing paper record is that the signing of the order to show cause signified the court's agreement that, if everything in the papers were accurate, it would be possible to grant Fiorilla the relief he sought. Indeed, the frivolousness of the papers is not apparent on their face. To the contrary, their frivolousness becomes evident only when taken in context, and only with a knowledge of the history of the parties' dispute. Such a determination, particularly in this procedurally complex dispute, would require a level of merits scrutiny that is not warranted on an application for an order to show cause, which, in the end, "is simply a substitute for a notice of motion as a device for bringing on a special proceeding" (citations omitted).

Id. at 569–70.

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