New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

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

NYSBA

LEGISLATIVE AMENDMENT

Jurisdictional Limit of New York City Civil Court Raised from $25,000 to $50,000

Legislative Amendment Makes Conforming Changes in Accord with Constitutional Amendment

Via a November 2021 ballot initiative, a constitutional amendment was approved by the voters with respect to the jurisdiction of the New York City Civil Court under the New York State Constitution, Article VI, Section 15(b). The amendment, increasing the jurisdictional limit of the Civil Court from $25,000 to $50,000, became effective on January 1, 2022.

However, for this change to be effective, legislative amendments were required to make conforming changes throughout the New York City Civil Court Act. Such amendments were signed into law on August 17, 2022. The law is retroactive to January 1, 2022, the effective date of the constitutional amendment, however, to ensure that actions seeking more than $25,000 and less than $50,000 that were commenced before the legislation's effective date will not be dismissed for lack of jurisdiction.

The relevant sections amended include NYCCA § 201 (jurisdiction in general); § 202 (actions involving chattels); § 203 (real property actions); § 205 (interpleader actions); § 208 (counterclaims); § 211 (joinder of causes of action); § 212-a (declaratory judgment actions); and § 213 (rescission or reformation).

The increase in the jurisdictional limit is well overdue, and perhaps a number closer to $100,000 would have been more appropriate. More important, efforts must be made to streamline all litigations involving sums less than $250,000. The costs of representation to individuals and small companies are prohibitive and makes these cases almost impossible to litigate in a reasonable and cost-effective manner.

CASE LAW DEVELOPMENTS

Conflict as to Whether Guarantee of Both Payment and Performance Qualifies Under CPLR 3213

Fourth Department Says "Yes," First Department Says "No"

As we have covered in the past, CPLR 3213 provides an expedited combined commencement motion practice procedure to resolve a very select group of cases. One concerns an action based on an "instrument for the payment of money only"; the other on a judgment. With respect to the former, generally if the instrument requires extrinsic evidence (outside proof) it would not qualify. *See Weissman v. Sinorm Deli*, 88 N.Y.2d 437 (1996).

Recently, *Counsel Fin. Holdings LLC v. Sullivan Law, L.L.C.*, 2022 N.Y. Slip Op. 04861 (4th Dep't Aug. 4, 2022), highlighted a conflict between the First and Fourth Departments. The issue is whether a guarantee of both payment and performance can qualify as an instrument for the payment of money only. In finding such a guarantee suitable for CPLR 3213 treatment, the Fourth Department stated:

> Defendants also contend that the guaranty is not an instrument for the payment of money only because, in addition to guaranteeing Sullivan Law's obligation to make payment under the note, it contains language obligating the guarantors to guarantee performance under the note. We decline to follow the First Department precedent advanced by defendants, and we conclude that the guaranty's references to ensuring the performance of the note's

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obligations do not negate its status as an instrument for the payment of money only. In any event, the guaranty 'required no additional performance by plaintiff[ ] as a condition precedent to payment [nor] otherwise made [the guarantors'] promise to pay something other than unconditional' (citations omitted)").

Id. at *3.

The First Department has found to the contrary. *See, e.g., JFURTI, LLC v. First Capital Real Estate Advisors, L.P.,* 165 A.D.3d 419, 421 (1st Dep't 2018) ("[T]he guaranty does not qualify because it is a guaranty for both payments and performance (citation omitted)").

Does CPLR 214-g Apply to a Resident for Abuse Occurring Outside the State?

The Fourth Department Thinks So

In the August 2022 *Digest*, we referred to the Second Department decision in *S.H. v. Diocese of Brooklyn,* 205 A.D. 3d 180 (2d Dep't 2022), in which the court 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. We noted that the court emphasized that the legislature intended that the Child Victims Act (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* and that CPLR 214-g does not apply extraterritorially.

In *Shapiro v. Syracuse Univ.*, 2022 NY Slip Op 04835 (4th Dep't Aug. 4, 2022), the Fourth Department agreed that CPLR 214-g did not override the borrowing statute. Thus, with respect to a non-resident plaintiff, CPLR 202 applied and his claims were untimely under Massachusetts' three-year statute of limitations. However, two plaintiffs (Shapiro and Sweet) were New York residents, and, as to them, CPLR 202 would not apply, but CPLR 214-g did.

The *Shapiro* decision makes no reference to the initial issue discussed in *S. H.* as to whether CPLR 214-g applies to a nonresident where the abuse occurred outside of New York. As noted above, *S.H.* emphasized both the (non)residency of the plaintiff and that the abuse occurred outside the state. Implicitly, *Shapiro* holds that CPLR 214-g applies to a New York resident even where the abuse occurred outside the state. Query whether the converse should be true; that is, should CPLR 214-g apply to a nonresident where the abuse occurred here? It would seem that New York should have an interest not only in New York survivors, but also in holding the perpetrators of abuse responsible for their actions within its jurisdiction.

How Are Those Executive Orders Working Out?

A Mixed Scorecard

In prior editions of the *Digest*, we dealt extensively with the impact of the Governor's Executive Orders issued during the Covid-19 pandemic. Our conclusion was that the net effect of the orders was to toll (rather than merely to suspend) the statute of limitations. We were encouraged by the decision in *Brash v. Richards,* 195 A.D.3d 582 (2d Dep't 2021), concluding that it was a toll. *See* David L. Ferstendig, *We Thought It Was a Toll, We Hoped It Was a Toll,* 728 N.Y.S.L.D. 4 (2021). For the most part, subsequent decisions have agreed. *See, e.g., Matter of Roach v. Cornell Univ.*, 2022 N.Y. Slip Op. 04601 (3d Dep't July 14, 2022) ("As noted by the Second Department in *Brash v Richards*, the March 20, 2020 Executive Order expressly used the word 'toll' and, 'although the . . . executive orders issued after [this one] did not use [that same word, they] all . . . stated that the Governor 'hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,' made in the prior executive orders. ' We agree with the Second Department that 'these subsequent executive orders continued the toll that was put in place by Executive Order . . . No. 202.8' and the statute of limitations began to run on November 4, 2020. As the claim accrued when the toll was in effect and the toll extended to November 3, 2020, petitioner had four months from that date to commence the instant proceeding. He failed to do so until March 11, 2021, a week too late, rendering the proceeding time-barred (citations omitted))"); *Landwehrle v. Bianchi*, 2022 N.Y. Misc. LEXIS 3094 (Sup. Ct., N.Y. Co. June 24, 2022) ("Moreover, all service and filing deadlines in pending actions, including limitations periods, were tolled between March 20, 2020 and November 3, 2020 (citations omitted)"); *Cain v. Cnty. of Niagara,* 2022 U.S. Dist. LEXIS 38140 (W.D.N.Y. March 2, 2022) ("This is a toll despite Executive Law sec. 29-a not expressly giving the Governor authority to toll limitations periods"); *Taylor v. State*, 73 Misc.3d 1212(A) (N.Y. Ct. Cl. 2021); *Payne v. King Neptunes NY, LLC*, 73 Misc.3d 1210(A) (Sup. Ct., Warren Co. 2021) (holds it is bound by *Brash* decision). *But see Baker v. 40 Wall St. Holdings Corp.*, 74 Misc. 3d 381 (Sup. Ct., Kings Co. 2022) ("Plaintiff's counsel misinterprets the *Brash* decision, which explains that the Governor did not toll all statutes of limitation, but only suspended them, due to the COVID-19 Pandemic, and that he terminated the suspension on November 3, 2020. Here, the statute of limitations did not run until April 30, 2021, and as such, was not affected in any way by the Governor's Executive Orders. The court is cognizant that several court decisions have interpreted *Brash* as plaintiff's counsel has, but is not bound by them, and does not agree with those interpretations (citation omitted)").

Briefly, below, we review some of the reported applications of the Executive Orders:

1. They apply to the summary judgment motion deadline. *Manouel v. Dembin,* 202 A.D.3d 441, 441 (1st Dep't 2022) ("Although defendant Ralph Erbaio moved for summary judgment more than 120 days after the note of issue was filed, his motion was timely in light of the pandemic-related Executive Orders tolling motion deadlines (citations omitted)").
2. They do not toll FOIL deadlines. *Matter of Oustatcher v. Clark*, 198 A.D.3d 420, 421–22 (1st Dep't 2021) ("We find that respondents' first contention, that EO 202.8 tolled all FOIL deadlines, is unpersuasive. By its terms, EO 202.8 tolls legal 'process[es] or proceeding[s] as prescribed by the procedural laws of the state' (emphasis added). The FOIL framework and deadlines

for agency responses to requests are not 'prescribed by the procedural laws,' such as the CPLR and CPL. In the context of FOIL requests, legal 'proceedings' ensue only when parties are unable to agree on a response to a request, and resort to the courts via CPLR article 78 proceedings. The conduct of article 78 proceedings are 'prescribed by the procedural laws' of the CPLR. FOIL requests and responses are not so prescribed. Hence, respondents' position that EO 202.8 tolls their obligation to respond to FOIL requests, is erroneous. Respondents' assertion that they cannot set a date certain until EO 202.8 is lifted, is likewise also unsustainable. We also reject respondents' fallback position, that beyond EO 202.8's ostensible toll, the broader Covid-19 crisis, and the accompanying EOs and AOs limiting operations and mandating remote work, have made it practically impossible for them to respond to the subject FOIL requests (citation omitted)").

3. The First Department rejected the defendant's argument that intervening Covid-19 Executive Orders, which allegedly impacted its trial preparation, could be analogized to a change of law that would change its prior determination (under CPLR 2221(c)(2)). *TavArez v. Ronad Holding Corp.*, 202 A.D.3d 423, 424 (1st Dep't 2022) ("The court's original order deciding plaintiff's motion to preclude was issued in September 2019, prior to the issuance of the Covid-19 Executive Orders in the Spring of 2020, and the Covid-19 Executive Orders have no bearing on the issue of whether the court properly decided plaintiff's original motion to preclude. The statutory requirements of a motion to preclude were not changed in any way by the issuance of the Covid-19 Executive Orders (citations omitted)").
4. "Supreme Court was the appropriate forum for this action to recover rental arrears because the Executive Orders implemented in response to the pandemic precluded the landlord from commencing a nonpayment proceeding in Civil Court during the relevant period, compelling the landlord to commence this action." *A&L 1664 LLC v. Jaspar Hospitality LLC,* 201 A.D.3d 512, 512 (1st Dep't 2022).
5. As we previously reported, the orders did not justify a delay in a Chief Administrative Judge's ruling on objections "because the time for the court to rule on objections in a proceeding like this one that had already been 'commenced' and where the operative documents had already been 'filed' and 'served' was not affected by the Governor's order." *Matter of Liu v. Ruiz*, 200 A.D.3d 68, 76 (1st Dep't 2021). *See also* David L. Ferstendig, *Governor's Executive Orders Did Not Justify Delay in Ruling*, 735 N.Y.S.L.D. 4 (2022)).
6. The toll applies to available administrative relief and an Article 78 proceeding. *North Star Mech. Corp. v. N.Y. City Dist. Atty's Off.*, 2022 N.Y. Slip Op 31948(U) (Sup. Ct. N.Y. Co. April 11, 2022).
7. In dicta, a trial court opined that the toll applies to arbitrations. *Arch Ins. Co. v. American Tr. Ins. Co.*, 2022 N.Y. Slip Op. 31244(U) (Sup. Ct., N.Y. Co. April 11, 2022) ("While the Court is precluded from reaching the dispute between the parties regarding the scope of Executive Order No. 202.8, the Court writes separately to note that, contrary to Respondent's assertions, there is support for Petitioner's argument that Executive Order No. 202.8 applies to legal actions beyond court proceedings… [T]he Executive Order also tolled filing deadlines in arbitration proceedings that are statutorily mandated by a regulation such as § 5105").
8. Executive Order 202.8 did not toll deadlines set forth in discovery orders. *Little v. Steelcase, Inc.*, 206 A.D.3d 1597 (4th Dep't 2022).

Supplemental Bill of Particulars With Respect to Continuing Special Damages and Injuries Can Be Served Without Leave Up to 30 Days Before Trial

And You Are Not Limited to Just One

Bills of particulars, while applicable in all actions, are particularly prevalent in the area of personal injury litigation. The device is a creature of the New York State courts. There is nothing comparable in the federal courts. Once a bill of particulars is served there are at least two ways in which they may be "modified."

CPLR 3042(b) provides that "[i]n any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue." In addition, CPLR 3043(b) provides for the service of a supplemental bill of particulars "with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities."

Apart from their different timing issues, the key distinction between these two is that the former (amending) permits the assertion of new theories of liability or new injuries.

As set forth above, the amended bill can be served without leave of court *once* before the note of issue is filed. Thus, if the party wants to serve an amended bill after the filing of the note of issue *or* seeks to serve a second amended bill, court leave is required. Conversely, a supplemental bill can be served post note of issue up until 30 days before trial. In addition, CPLR 3043(b) does not contain a limitation on how many supplemental bills of particulars may be served without leave, and thus multiple submissions are permitted. *See Ali v. JS 39, LLC*, 2022 N.Y. Slip Op. 04889 (2d Dep't Aug. 10, 2022) (After filing note of issue, plaintiff-decedent served second supplemental bill of particulars. "Contrary to the defendants' contention, the second supplemental bill of particulars did not allege new injuries, but rather set forth the continuing consequences of the same injuries which were previously alleged. Further, since the decedent served the second supplemental bill of particulars more than 30 days prior to trial, leave of court was not required (citations omitted)").

GBL § 13 Prohibits Service on Sabbatarians on Saturday With Malice, But Not on a Jewish Holiday Falling on a Day Other Than Saturday

But Come On, Do the Right Thing!

General Business Law § 11 provides that

> [a]ll service or execution of legal process, of any kind whatever, on the first day of the week is prohibited, except in criminal proceedings or where service or execution is specially authorized by statute. Service or execution of any process upon said day except as herein permitted is absolutely void for any and every purpose whatsoever.

Thus, service cannot generally be made on Sunday, although there are limited circumstances where service can be effected via a court order. *See* Judicial Law § 5.

There is a similar but not identical provision applicable to a Sabbatarian, that is, a person who keeps Saturday as a holy day "and does not labor on that day." General Business Law § 13 prohibits such service, but qualifies that it must be shown to have been done maliciously. The malicious component can be satisfied by showing that the party attempting service was aware that the other party was a Sabbatarian. *See, e.g., JPMorgan Chase Bank, N.A. v. Lilker*, 153 A.D.3d 1243, 1245–46 (2d Dep't 2017) ("The knowledge of a plaintiff or its counsel is imputed to the process server by virtue of the agency relationship. In support of their motion, the defendants submitted an August 26, 2013, letter from their counsel which advised the plaintiff's counsel's law firm that the defendants are 'observant, Orthodox Jews,' who cannot be served on a Saturday, together with a fax transmission report indicating a successful transmission. This proof was sufficient to establish, prima facie, that the plaintiff's counsel had knowledge that the defendants were protected from Saturday service by General Business Law § 13 (citations omitted)").

It is significant to note that the statute only applies to service on Saturday and not, for example, on a Jewish holiday occurring on a day other than Saturday. *See Deutsche Bank Natl. Trust Co. v. Goldstone*, 197 A.D.3d 1148 (2d Dep't, 2021) ("[C]ontrary to the defendant's contention, service of process upon the defendant on October 15, 2014, which was a Wednesday [and a Jewish holiday], did not violate General Business Law § 13, which prohibits malicious service of process on a Saturday upon persons who observe Saturday as a holy time (citation omitted)").

That does not mean that common decency should not apply and counsel should avoid both commencement and interlocutory service on religious holidays. Disagree, but do not be disagreeable.

Asserting Jurisdictional Defenses Reflexively

Can We Find Ways to Discourage This Practice?

Generally, jurisdictional objections or defenses fall into two basic categories: basis and notice. With respect to both, they must be asserted in a pre-answer motion or in the answer or are waived. Moreover, if a defendant moves to dismiss under CPLR 3211(a) on any other ground, the jurisdictional objections must also be included or are waived. Finally, a service objection has an additional requirement: if it is included in the answer, a motion for judgment on this objection must be made within 60 days of service of the answer.

The problem confronting many plaintiffs – and I represent defendants more often, but can recognize a problem when I see one – are defendants who may be in a minority but who, as a matter of course, assert jurisdictional defenses regardless of their merit (or even where they are clearly non-meritorious). This is primarily because of the maxim "what do I have to lose"; courts do not appear to discourage or sanction attorneys who engage in this behavior. I remember a time when courts made it clear that they would not tolerate such conduct, and, as a result, attorneys were circumspect in asserting such defenses.

The service objection has a time limitation, the 60-day rule, which should avoid having that objection linger, especially where a plaintiff acts with alacrity to effect service early in the 120-day period following commencement. However, it should be pointed out that in many instances this issue arises not in the context of vacating a default judgment but where the defendant has somehow received the complaint. It is true that, as a general proposition, if the plaintiff follows the service rules properly, the service will be effective regardless of whether the defendant actually receives notice. *Bossuk v. Steinberg*, 58 N.Y.2d 916, 918–19 (1983) ("It is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice (*Dobkin v Chapman*, 21 NY2d 490, 502). It suffices that the prescribed method is one 'reasonably calculated, under all the circumstances, to apprise [the] interested [party] of the pendency of the action' (*Mullane v Central Hanover Trust Co.*, 339 U.S. 306, 314)"). Conversely, where the plaintiff fails to follow the service laws strictly, the service will generally be deemed insufficient even if the defendant receives notice. *Feinstein v. Bergner*, 48 N.Y.2d 234, 241 (1979) ("[N]otice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."). Nevertheless, with respect to the latter situation, if there is no statute of limitations issue, should a court be allowed to look past a minor service defect and require the defendant to answer? For example, where the leave component element of CPLR 308(2) service is properly effected, and the defendant has received notice, should a defect in the mailing component be overlooked (but not as to declare the defendant in default)?

The greater problem concerns the basis objection, which seemingly has no time limitation, after its assertion in an answer. It can sit as a defense and await resolution even until trial. Certainly, a plaintiff can bring such an affirmative defense to the fore by a CPLR 3211(b) motion to strike the defense. However, perhaps courts again should be discouraging the reflexive, without grounds assertion of jurisdictional defenses, at least at first by strongly condemning the practice and, if it continues, to start awarding sanctions. In addition, should a defendant be required to bring the issue to a resolution after fact discovery is completed but well before trial?

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