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

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COMMERCIAL DIVISION RULE AMENDMENT

New Commercial Division Rule Requires Interlineation of Allegations in Responsive Pleadings

A Better Solution than Marked Pleadings?

CPLR 4012 requires that the party filing the note of issue provide copies of all parties' pleadings, marked to show which allegations are admitted or controverted. Termed "marked pleadings," the marking or notations are done in accord with CPLR 3018, by noting them in the margin of the complaint, for example, an "A" (for admit), "D" (for deny), or "DKI" (for deny knowledge or information), as appropriate. These are sometimes supplemented by the notation "DUIB" (deny upon information and belief).

While CPLR 4012 does not state when the marked pleadings are to be provided to the trial court, the Uniform Rules for the Supreme Court and County Court require that they be submitted "upon the trial of the action." 22 N.Y.C.R.R. §202.35(a). That same rule requires that the party filing the note of issue also submit copies of the bill of particulars and "any statutory provision in effect at the time the cause of action arose" upon which a party relies. 22 N.Y.C.R.R. §202.35(a), (b). Finally, the rule mandates the exchange and submission to the court of trial memoranda, if so ordered. 22 N.Y.C.R.R. §202.35(c).

Now the Commercial Division has come up with its own rule, effective September 12, 2022, which is analogous to but different than marked pleadings. Rule 6 of the Commercial Division rules (22 N.Y.C.R.R. § 202.70(g), Rule 6), was amended to add a subdivision (d), which requires that in the Commercial Division every responsive pleading "interlineate each allegation of the pleading to which it is responding with the party's response to that allegation, and in doing so shall preserve the content and numbering of the allegation." To make this process easier, the rule also specifies that "[t]he party who prepared a pleading to which a responsive pleading is required shall, upon request, promptly provide a copy of its pleading in the same word processing software application in which the pleading was prepared to the party preparing the responsive pleading."

While this is probably preferable to the marked pleadings concept and makes it easier to determine to which allegations the responsive pleading is addressing, the facts on the ground suggest that responsive pleadings, in general, overwhelmingly deny or deny knowledge of the allegations in the pleadings to which they respond. Admissions lead a lonely life, only appearing infrequently for brief moments.

Practically, also, many answers respond to multiple allegations in one paragraph. Does this rule require now that each allegation be responded to separately or can responses to allegations be merged or bundled? Perhaps the greater utility would be to merely list those (few) allegations to which there is an admission or a qualified denial!

In view of recent history, will this Commercial Division rule make its way into the rules for the general trial courts?

CASE LAW DEVELOPMENTS

Second Department Tackles When Action is Submitted to the Court for CPLR 3217(b) Purposes Where the Matter is Referred to a Referee to Hear and Report

Concludes That it is the Return Date of a Motion to Confirm, Reject, or Modify the Referee's Report

CPLR 3217 governs voluntary discontinuances. CPLR 3217(a)(1) provides that a party can serve a notice of discontinuance before a responsive pleading is served or, if no responsive pleading is required, within 20 days after service of the

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pleading asserting the claim. CPLR 3217(a)(2) permits the filing of a signed stipulation of discontinuance "before the case has been submitted to the court or jury." Finally (for our purposes), CPLR 3217(b) provides for discontinuance by court order, but with the following restriction: "After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action."

In *Emigrant Bank v. Solimano*, 2022 N.Y. Slip Op. 05311 (2d Dep't Sept. 28, 2022), a residential mortgage foreclosure action, the Second Department was confronted with a question of first impression for the appellate courts: When is an action "submitted to the court" under CPLR 3217(b) where "the matter is referred to a referee to hear and report, and the report is thereafter subject to confirmation, rejection or modification by the Supreme Court"? The Second Department concluded that "the operative date for requiring both leave of court and for the parties to stipulate to the discontinuance is the return date of a motion to confirm, reject, or modify the assigned referee's report, as that is the moment when the factual issues of a case are submitted to the court for the determinative deliberative process." *Id*. at *2.

The court noted, as discussed above, the three time periods for a plaintiff to seek a discontinuance: early on, via the notice of discontinuance; after responsive pleadings, but before the case is submitted to the court or jury for the determination of the facts; and the third, touched on in this case, after the case has been submitted to the court or jury for the determination of the facts. During this period, an order alone is not sufficient; a stipulation of all appearing parties is also required. The court aptly described the predicament in which the parties find themselves at this point:

> [A]t this juncture, the requirements imposed upon the discontinuing party are double-layered. The refusal by a defendant to consent to a discontinuance, for whatever reason, operates as a veto on the issue, as it prevents the court from even reaching its discretionary authority to consider the requested discontinuance. Thus, CPLR 3217, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses.

Id. at *9.

The court concluded that where, as here, the action is referred to a court attorney referee to hear and report,

> the time that is most akin to the submission of the case to the court or the jury for a determination of the facts is the return date of the motion to confirm the referee's report. Prior to that time, the conclusion of the trial before the referee is not final as the referee, while setting forth his or her findings of fact and conclusions of law, has no authority to determine the matter. Likewise, the resulting report is not conclusive as it is subject to confirmation, rejection, or modification by the Supreme Court. The filing of a motion to confirm, reject, or modify the referee's report is subject to the due process right of each of the parties to then be heard on the motion, similar to the closing arguments that are presented prior to the commencement of the deliberative process in actions before a court or a jury. Instead, and logically, the motion's return date is the unique event that sends the referee's report and the parties' fully-submitted arguments to the court for a deliberative determination of the factual and legal issues of the case (citation omitted).

Id. at *10–11.

The court distinguished a referee to hear and *determine* who "possesses 'all the powers of a court in performing a like function,' subject to certain exceptions not applicable here." Thus, in that case, the dual order-stipulation requirement for discontinuance arises at "the conclusion of the evidentiary portion of the trial and the summation arguments of counsel, when the commencement of the deliberative phase of the case begins." *Id*. at *12.

In the instant action, the court found that the plaintiff's *filing* of a motion for an order of discontinuance *prior* to the filing of the defendant's cross-motion to confirm the referee's report was of no moment, because both motions were *returnable* on the same date:

> Upon reaching that date, the action crossed the rubicon from its pre-deliberative stage otherwise governed by CPLR 3217(a)(1) and (b), to the deliberative phase of the action governed by the further provisions of CPLR 3217(b), triggering the statutory condition that a discontinuance, at that juncture, requires both leave of court and a stipulation of all parties. In other words, the Supreme Court was already deliberating whether to confirm the referee's report by the time that the plaintiff's discontinuance motion was also before it for consideration (citation omitted).

Id. at *13–14.

Since the defendant expressly refused to consent to the discontinuance, the trial court properly determined that it could not grant the plaintiff a discontinuance.

Second Department Holds Provision in Agreement Requiring Expert Deposition in Medical Malpractice Action 120 Days Before Trial to Be Unenforceable

Finds Provision to Be Against Public Policy

In the September 2018 edition of the *Law Digest*, we discussed the conflict in the Appellate Division as to whether an expert's qualifications may be withheld in a medical, dental, or podiatric malpractice actions. To review, CPLR 3101(d)(1)(i) sets forth the information that must be disclosed with respect to experts who are expected to testify at trial. That section provides an exception in medical, dental, or podiatric malpractice actions, where a responding party may omit the expert's name. This was prompted by concerns that medical experts could be intimidated and/or discouraged by their colleagues.

Over the years, however, with advanced technology, and particularly the broad access to the internet, the provision of

the expert's qualifications required by the statute (including names of educational institutions, locations of residences and internships, areas of prior practice and dates of graduation, licensure and board certifications), has enabled demanding parties to learn the identity of the expert.

Responding counsel, particularly plaintiffs' counsel, have thus tried to limit their disclosure of an expert's qualifications. Back in 2002, the Second and Fourth Departments came to differing conclusions as to a remedy. In *Thomas v. Alleyne*, 302 A.D.2d 36 (2d Dep't 2002), the Second Department relied on the statute's language, which provides for the disclosure of an expert's qualifications "in reasonable detail" without exception. Moreover, the court noted that virtually every jurisdiction in the United States, except New York, allows for the disclosure of the expert's identity. To deal, however, with the concerns that prompted the omission of an expert's identity in a medical, dental, or podiatric malpractice action, the court held that where there is a "factual showing that there exists a concrete risk, under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial, then relief may be sought under this statute." *Id.* at 45–46. In *Kanaly v. DeMartino*, 162 A.D.3d 142 (3d Dep't 2018), the Third Department joined the Second Department.

Conversely, in *Thompson v. Swiantek*, 291 A.D.2d 884 (4th Dep't 2002), the Fourth Department permitted the responding party to withhold the expert's medical school education information and the location of his or her internships, residences, and fellowships to avoid disclosure of the expert's identity.

In *Mercado v. Schwartz*, 2022 N.Y. Slip Op. 04962 (2d Dep't August 17, 2022), the defendants sought to enforce a provision in an agreement that the defendant physician's receptionist requested an injured plaintiff to sign prior to undergoing surgery, among other routine medical releases. The provision stated that if the patient brought a medical malpractice action against the defendant physician, each party's counsel would have the right to depose the other parties' expert witness(es) at least 120 days before trial. The Appellate Division found that the provision was unenforceable for several reasons and that, regardless, the defendant waived the right to enforce it. We focus here on its determination that the provision was unenforceable as against public policy.

The court acknowledged that, in general, parties can include in their contracts provisions that are not "illegal, unconscionable, restricted by legislation, or violative of public policy" and can "agree to waive statutory rights unless a question of public policy is involved." However, "[a] contractual provision may be deemed unenforceable where 'the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy' (citation omitted)." *Id.* at *9.

In finding that the relevant provision violated public policy, the court pointed to the statutory intent in limiting the disclosure of the expert's identity, that is, the possibility that other members of the medical profession may discourage the expert from testifying. "Here, the provision requiring the plaintiffs to make their expert available for deposition, and by doing so disclose the expert's identity, 120 days before trial clearly obviates the intent of the Legislature to permit plaintiffs in medical malpractice actions to avoid disclosing the names of their experts until trial." *Id.* at *12. In addition, CPLR 3101(d)(1)(ii) permits expert witness depositions "only if all of the parties accept the offer to make an expert witness available. This provision suggests that the Legislature intended that, as the default, expert witnesses would not be deposed and that, in order to depose experts, all parties would have to 'opt in.'" *Id.* at *12–13.

Moreover, the court found that the relevant provision "directly contradicts" CPLR 3101(d)(1)(i), which enables a trial court "to 'make whatever order may be just' in the event that a party retains an expert in an insufficient period of time before the commencement of trial to provide appropriate notice." *Id.* at *13.

The court rejected the defendants' argument that the reciprocity of the provision permitting the plaintiff to depose the defendants' expert somehow made the provision balanced, since

> it is unlikely that a defendant physician's expert witness might be pressured by fellow physicians not to testify *on behalf* of the defendant. Thus, the provision constitutes a greater concession by the plaintiffs than by the defendants, and it benefits the defendants far more than it does the plaintiffs. This imbalance is amplified by the fact that, rather than the provision being part of an agreement that was negotiated at arm's length by sophisticated parties represented by counsel, here, the patient was handed the Agreement with no explanation or discussion along with several other papers that she was expected to complete in order to undergo surgery (citations omitted).

Id. at *13–14.

The court also dispensed with the defendants' argument that the provision was analogous to an enforceable arbitration agreement:

> The United States Supreme Court has held that the Federal Arbitration Act has displaced state laws prohibiting the arbitration of particular types of claims. Moreover, New York state law sets forth procedures in the event parties agree to arbitrate as an alternative method of dispute resolution. In contrast, here, the defendants have not identified any federal law that would preempt CPLR 3101(d) or any New York state law that would create an exception to its applicability here (citations omitted).

Id. at *14–15.

The court acknowledged that other jurisdictions in the United States outside of New York could find the agreement enforceable because virtually all of those jurisdictions allow the discovery of the adverse expert witness's name in medical malpractice cases via depositions or interrogatories, and many states permit the expert's deposition.

The Summary Judgment Motion Deadline and "Good Cause" Standard Revisited Yet Again

Waiting for an Affidavit From the Plaintiff's Loan Servicer Does Not Cut it, but Essential Discovery Does

Readers of the *Digest* are well familiar with *Brill v. City of New York*, 2 N.Y.3d 648 (2004). There, the Court of Appeals held that "good cause" for a late summary judgment motion under CPLR 3212(a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, non-prejudicial filings, however tardy." *Id*. at 652.

While the *Brill* decision was well intentioned, it ignored the facts on the ground. Thus, I have focused sometimes on circumstances where discovery is still ongoing or pending when the note of the issue is filed, or courts that refuse to vacate notes of issues even as they permit outstanding discovery to continue. Other concerns include where the summary judgment motion deadline can appear. They can be set forth in court orders, including preliminary and compliance conference orders, individual judge's rules, or local rules, among other places.

Today, I report on a few recent cases from the Second Department. In *Deutsche Bank Natl. Trust Co. Ams. v. Banu,* 205 A.D.3d 887 (2d Dep't 2022), the Second Department held that the plaintiff did not provide a satisfactory explanation for its delay in moving for summary judgment (eight months after the filing of the note of issue). It rejected plaintiff's excuse that its counsel was waiting for an affidavit from the plaintiff's loan servicer to file with the motion, commenting that the plaintiff failed to provide an explanation as to why it could not timely obtain the affidavit or for the three-month delay between execution of the affidavit and the making of the motion.

In *Torres v. Serlin Bldg. Ltd. Partnership*, 2022 N.Y. Slip Op. 05174 (2d Dep't Sept. 14, 2022), the court held that where the deposition deadline was 60 days (after the filing of the note of issue), the fact that a nonparty witness's deposition remained outstanding when the note of issue was filed did not constitute good cause, as defendants failed to move for summary judgment until approximately 2 1/2 months after the deposition was held on April 2, 2019. The court rejected the excuse that the defendants' attorney claimed that he received the deposition transcript on May 15, 2019, because "he offered no explanation for the delay in obtaining the transcript or the subsequent delay in moving for summary judgment." *Id*. at *3.

However, in *Fuczynski v. 144 Div., LLC,* 2022 N.Y. Slip Op. 05151 (2d Dep't Sept. 14, 2022), the same court held that the trial court had erred in finding that the discovery sought by the plaintiff in his post-deposition demands was not essential to his motion for summary judgment. As a result, the trial court should have granted the plaintiff's motion for leave to serve and file the summary judgment motion. *See also Munoz v. Agenus, Inc.,* 207 A.D.3d 643 (2d Dep't 2022) ("Here, the plaintiff established good cause for the delay in making the motion by demonstrating that the note of issue was filed while there was significant discovery outstanding which was essential to the motion, namely the depositions of himself and Stein, and that the motion was filed just one week after the discovery was completed.").

As I have noted in the past, I find the "*essential* discovery" requirement to establish "good cause" to be problematic, since (1) many times this is discovery that should have been conducted prior to the filing of the note of issue, and when some courts refuse to strike notes of issue innocent counsel must worry about a running summary judgment motion deadline; and (2) in some instances, only a prophet (we have not seen one of them for some time) can know ahead of time whether a particular court, after the fact, will conclude that the discovery was *essential*.

State Trial Judge Regrets Inability to Direct Parties to Pay the Costs of a Special Master

She Views Such Authority as Crucial

CPLR 3104, which governs the supervision of disclosure, does not permit a court to direct the parties to a litigation to pay for costs of a special master. A state court Supreme Court justice, rightfully frustrated with particularly obstreperous conduct at a deposition, maintains that "such authority is crucial to a well-functioning court system."

In *Hindlin v. Prescription Songs LLC*, 2022 N.Y. Slip Op. 32601 (Sup. Ct., N.Y. Co. July 30, 2022), a commercial case, the conduct occurred during the deposition of the sole owner and president of a counterclaim defendant, who happened to be the plaintiff's spouse. Notwithstanding the relevance of the witness's testimony, the 175-page transcript reflected 187 improper speaking objections or colloquy by the witness's counsel and an additional similarly improper 114 interruptions by plaintiff's counsel. The witness was also instructed not to answer 30 questions "without any lawful basis."

The trial court appointed a retired judge to supervise the deposition, who (graciously) volunteered to assist the court. Ultimately, the court sanctioned the attorneys and directed them to attend a CLE on civility.

However, the trial judge commented about the lack of authority permitting New York State courts to direct parties to pay for a special master. The trial judge pointed to the federal courts (Fed R. Civ Pro Rule 53) and other state courts for support.

Certainly, such a provision would be helpful in large commercial cases with well-heeled parties. But in many cases, one or both of the parties may not be in a financial position to afford the costs of a special master, which can be significant. In addition, I fear that the "threat" of the appointment of such a special master in a particular case and the accompanying costs could be used as a cudgel to force the parties to settle.

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