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

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CASE LAW DEVELOPMENTS

Court of Appeals Holds that State Climate Act Did *Not* Preempt New York City Local Law Aimed at Combatting Climate Change

Concludes Climate Act Does Not Contain Language Evincing an Intent to Preclude All Local Regulation in the Area

A local law will be preempted either where there is conflict preemption, that is, where there is a direct conflict with a state statute *or* where the legislature indicates its intent to occupy the particular field, known as field preemption.

In *Glen Oaks Vil. Owners, Inc. v. City of New York*, 2025 N.Y. Slip Op. 03101 (May 22, 2025), the issue related to field preemption. Specifically, the question was whether a state statute, New York State's Climate Leadership and Community Protection Act (the Climate Act), preempted New York City Local Law No. 97 (2019). Both are aimed at combatting climate change by reducing greenhouse gas emissions. In reversing the Appellate Division order, a unanimous New York State Court of Appeals held that the Climate Act did not preempt the field of regulating greenhouse gas emissions.

The Court noted that "[t]he State's intent to occupy a particular field can be express or implied (citation omitted); "'[a]n implied intent may be found in a "declaration of State policy by the State Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area"' (citation omitted)"; and just because the Legislature "'has enacted specific legislation in a particular field does not necessarily lead to the conclusion that broader agency regulation of the same field is foreclosed' (citation omitted)." *Id.* at 2-3.

Thus, the analysis focuses on the Legislature's intent and whether the State's action established that it wished that its regulations should preempt the possibility of discordant local regulations. Once it has been "determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law" (citations omitted).

Id. at 3.

The Court here concluded that, far from preempting the entire field of regulating greenhouse gas emissions, the Climate Act acknowledges the important role local government plays:

> [T]he Act's legislative findings evince a sense of urgency concerning the implementation of mitigation measures in general and further express the legislature's intent to "encourage other jurisdictions to implement complementary greenhouse gas reduction strategies." The Act also directs the Climate Action Council to identify and consider measures taken by other jurisdictions, including localities, when developing the Scoping Plan. The absence of any statement that local efforts would be superseded is particularly significant here given that Local Law No. 97 was enacted before the Climate Act, as well as the recognized and longstanding involvement of localities in regulating matters of environmental concern affecting the health and safety of the community, such as air pollution. Further reflecting the Act's embrace of complementary local action, . . ., it contains a savings clause stating that it does not relieve any entity from, as relevant here, compliance with other applicable local laws and regulations (citations omitted).
>
> *Id.*

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The Court insisted that although the Climate Act's stated intent was to create a "comprehensive regulatory program" to regulate greenhouse gas emissions, that "expansive language" is not conclusive, especially since there was no indication that the Legislature wanted "across-the-board uniformity" in connection with efforts to reduce emissions.

While the Court characterized the Climate Act as "ambitious in its reach," it concluded that

> the legislation is not "so broad and detailed in scope as to require a determination that it has precluded all local regulation in the area, particularly where, as here, the local law would only further the State's policy interests." We cannot conclude that the "aspirational language" in the legislative findings was intended to prevent localities from taking measures that would help the State achieve its overall emissions goals (citations omitted).

Id.

Court of Appeals Confirms That It Will Not Disturb Lower Courts' Decision to Deny or Grant a Forum Non Conveniens Motion Absent an Abuse of Discretion

Also Reminds that Although the Parties' New York Residence May Be a Factor, It Does Not Automatically Require the Denial of the Motion

Forum non conveniens, codified in CPLR 327, does not relate to subject matter or personal jurisdiction but applies where significant contacts with New York are lacking. It is a discretionary determination of the trial court, and the Court of Appeals has articulated certain relevant factors to consider, stressing the "flexibility" of the doctrine "based upon the facts and circumstances of each case." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

> Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling (citations omitted).

Id.

Recently, the Court of Appeals issued a brief opinion, reinforcing two important points. In *Haussmann v Baumann*, 2025 N.Y. Slip Op. 03009 (May 20, 2025), in affirming the dismissal of a putative shareholder derivative action, the Court stated that a decision on a forum non conveniens motion is addressed to the lower courts' discretion, and will be reviewed only if there is an abuse of that discretion. Since the courts below considered and weighed the relevant factors, there was no such abuse of discretion. In addition, the Court reiterated what is now set forth in CPLR 327(a). While the domicile or residence of a party in New York is one of the factors to be considered (one of the plaintiffs here was a New York resident), in and of itself, it does not "preclude the court from staying or dismissing the action."

You Cannot Ignore Expert Disclosure Deadline

Apparent Lack of Specific Time Frame in CPLR Does Not Excuse Non-Compliance with Court Scheduling Order and Generic Reservations Will Not Provide an Excuse

It has been a continuing mantra that the CPLR provides no time frame for expert disclosure, and that it can be provided after the fling of the note of issue, signaling the end of disclosure. This is based, in part, on language in CPLR 3101(d)(1) stating that "where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph." Nevertheless, we have pointed out that there are numerous exceptions. For example, expert disclosure in the Commercial Division is much more expansive (requiring expert reports and depositions), and provides for specific deadlines for expert disclosure (must be completed no later than four months after completion of fact discovery). In addition, expert deadlines can be found in conference orders in cases in the general trial courts, and in court, district or judge's rules. *See Weinstein, Korn & Miller, New York Civil Practice:* CPLR 3101.52d (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.).

In *Schultz v. Albany Med. Ctr. Hosp.*, 2025 N.Y. Slip Op. 02827 (3d Dep't May 8, 2025), a medical malpractice and wrongful death action, the trial court had issued an order in May, 2019 setting forth discovery deadlines. After the court extended those deadlines several times the plaintiff filed a note of issue and certificate of readiness in May 2022. The same day the plaintiff also filed his "response to expert witness," which (i) disclosed the name and curriculum vitae of a single expert, a forensic pathologist, but provided no summary of his expected testimony; and (ii) reserved the right to seek the court's permission to amend or supplement this information. Pursuant to the court's final scheduling order, in July 2022, plaintiff filed the expert's affidavit summarizing his medical opinion.

The defendant then filed its expert disclosure with respect to three experts, a gastroenterologist, an oncologist/hematologist and a pathologist. When defendant moved for summary judgment, plaintiff opposed the motion and cross-moved to supplement his expert witness disclosure by submitting for the first time the opinion of a surgeon. The trial court granted the defendant's summary judgment motion and denied the plaintiff's cross-motion.

The Third Department initially noted that while CPLR 3101(d)(1)(i) does not explicitly set forth a deadline for expert disclosure, a trial court has the discretion to impose deadlines and sanctions, including preclusion, for non-compliance "where the non-complying party fails to show good cause for its delay and/or that disclosure was not intentionally withheld." The court rejected the plaintiff's reservation in his expert disclosure

of "the right to seek the [c]ourt's permission to amend or supplement this information," as "merely generic language." More significantly, the court found that the plaintiff was "not supplementing or amending his pathologist's disclosure, which 'focus[es] on the cause, manner and investigations conducted into the death of' decedent. Instead, plaintiff is attempting to disclose a second expert, a surgeon, whose expertise is in a wholly unrelated field and whose proffered opinion does not pertain to matters addressed in the pathologist's opinion." *Id.* at 3-4.

The court added that the plaintiff had not provided an excuse "for his nondisclosure throughout the lengthy, protracted period of time permitted for discovery." *Id.* at 5.

Service on Attorney General Pursuant to Court of Claims Act §11 is Essential to Commencement and is Jurisdictional in Nature

Thus, CPLR 205(a) Was Unavailable and CPLR 306-b Inapplicable

Prior to the adoption of commencement by filing, an action was commenced by serving the defendant. When commencement by filing came into effect, filing and service became two separate and distinct acts. CPLR 304 provides that an action is commenced by filing. Thereafter, service of the initiating pleadings needs to be effected under CPLR 306-b within 120 days of commencement, unless the statute of limitations is four months or less, in which case service must be effected within 15 days after the expiration of the applicable statute of limitations. "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

There can be a situation, however, where service in an inherent part of commencement and the failure to effect service is a nonwaivable jurisdictional defect, not subject to the CPLR 306-b extension. Such an example is contained in Court of Claims Act § 11, which requires that the Attorney General be served.

In *Williams v. State of New York*, 2025 N.Y. Slip Op. 02977 (3d Dep't May 15, 2025), the claimant filed a timely claim in June 2021 against the State of New York in the Court of Claims under the Child Victims Act (CVA). In addition, he served the Attorney General within the time frame provided by the CVA. The Court of Claims dismissed the action in July 2022, however, based on the claimant's failure to comply with the substantive pleading requirements of Court of Claims Act § 11 (b). The Court rejected the claimant's argument that the CVA relaxed the pleading requirements. (In that regard, see the May, 2025 edition of the *Law Digest* discussing the Court of Appeals decision in *Wright v State of New York*, 2025 N.Y. Slip Op. 01564 (March 18, 2025).)

Rather than appeal that order, the claimant filed this action in December 2022, based on the same series of events and pursuant to CPLR 205(a). That section, which we have dealt with extensively in the *Law Digest*, provides that where a prior timely commenced action is terminated (and does not fall within any of the listed exceptions), a new action based on the same transactions and occurrences or series of transactions or occurrences can be brought within six months after termination of the prior action. Filing and service must be effected within those six months.

There was no dispute that the June 2021 claim was timely commenced and that the instant claim was timely filed in December 2022. However, the claimant conceded that, "due to inadvertent miscommunication and law office failure, service of process [upon the Attorney General] was not completed until February 13, 2023," a week after the six-month period under CPLR 205(a) expired. The Third Department affirmed the Court of Claims order, holding that "[s]ince claimant was required to file the instant claim with the court and serve it upon the Attorney General by February 6, 2023, and failed to do the latter, he did not properly commence the instant claim within the six-month timeline allotted by CPLR 205 (a) (citations omitted)." *Id.* at 2-3.

The court rejected the claimant's argument that the Court of Claims erred in failing to permit late service on the Attorney General under CPLR 306-b. The Third Department emphasized that to the extent that CPLR 306-b conflicted with the requirements of the Court of Claims Act, it was inapplicable:

> Consistent with the overarching principle that the "statutory requirements . . . upon which defendant's waiver of sovereign immunity is conditioned . . . must be strictly construed," the provisions of the CPLR only apply in the Court of Claims where a procedural gap exists within the Court of Claims Act. . . CPLR 306-b expressly provides a timeline for service "after the commencement" of an action or proceeding. By contrast, commencing litigation before the Court of Claims requires both filing and service. As the application of CPLR 306-b would be in direct conflict with the requirements of Court of Claims Act § 11, we find that the Court of Claims did not err in declining to apply it (citations omitted).

Id. at 2.

Thus, claimant's failure timely to serve the Attorney General was a jurisdictional defect requiring dismissal of the action.

You Might Not Like All of The Uniform Rules

But You Cannot Simply Ignore Them

Prior to bringing a motion relating to a bill of particulars or disclosure, a party is required to make a good faith effort to resolve the dispute. If a motion is then required, that party must include an affirmation attesting to the efforts to confer with opposing counsel in a good faith effort to resolve the issues raised by the motion. For years, that requirement was contained in Uniform Rule § 202.7, which also provides that the affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." § 202.7(c).

In the massive rule dump applicable in the general trial courts effective February 1, 2021, a new rule was enacted, § 202.20-f, entitled "Disclosure Disputes." We discussed this rule in some detail in the March, 2021 edition of the *Law Digest*. Relevant here, § 202.20-f, which overlaps with § 202.7, requires that prior to contacting the court and absent exigent circumstances, counsel are required to consult in good faith, in person or via a phone conference, to resolve discovery disputes. If the discovery dispute cannot be resolved, a discovery motion requires the submission of an affidavit/affirmation of good faith, providing the date and time of the conference, the persons participating, and the conference's duration. Counsel's failure to comply with this rule can result in the discovery motion being denied without prejudice to renewal once compliance is achieved, or the motion can be held in abeyance until the court's informal resolution procedures are conducted.

Lest you do not take these requirements seriously, I submit for your approval the Second Department decision in Steinberg v. Bais Yaakov Council, Inc., 2025 N.Y. Slip Op. 02366 (2d Dep't April 23, 2025). There, the plaintiffs brought a personal injury action arising out of bicycle riding activity at a summer camp. After depositions were conducted, plaintiffs' counsel requested that the defendants produce two additional witnesses: a nurse at the camp and defendant's Chairwoman of the Board of Directors. The defendants' attorney refused. After the plaintiffs moved to compel, the defendants cross-moved for a protective order. The trial court denied the motion and granted the cross-motion.

The Appellate Division held that the trial court properly denied plaintiffs' motion as a result of "plaintiffs' failure to substantively comply with the requirements of 22 NYCRR 202.7 and 202.20-f. In his affirmation, the plaintiffs' attorney failed to attest that he conducted an in-person or telephonic conference to resolve the disputed discovery in compliance with 22 NYCRR 202.20-f(b) (citations omitted)." *Id.* at 3-4. The Second Department did find that the trial court's denial "should have been without prejudice to renewal once the provisions of 22 NYCRR 202.20-f have been complied with (citations omitted)." Id. at 4. However, the damage was done: an unnecessary waste of time and money for failing to comply with the rules.

Beware of Trial Court Orders Directing Compliance with CPLR 3216

While the 2014 Amendment May Have Reduced the Possibility that Conference Orders Will Suffice, Court Directed CPLR 3216 Demands Are Still Available

When a plaintiff does not move a case along, a defendant cannot merely move to dismiss the action. CPLR 3216 is the mechanism relating to a party's neglect to prosecute an action prior to the filing of a note of issue. It provides that either a party or the court can demand that the inactive party resume prosecution of the action and serve and file a note of issue within 90 days of the receipt of the demand. These notices found their way into conference orders, provoking some confusion as to whether they were triggering CPLR 3216.

In connection with a 2014 amendment to CPLR 3216, the Sponsors Memorandum noted that "many courts automatically include a 90-day notice in a generic preliminary conference order the execution of which may result in an administrative dismissal of a civil action with no further notice to the parties. In addition, the practice under rule 3216 is further complicated by the confusion that results from the interplay between a 90-day demand, statutory disclosure requirements and the filing of a note of issue."

That amendment provided that (a) a CPLR 3216 dismissal order from the court can only be made "with notice to the parties"; (b) such a dismissal cannot eventuate until one year after joinder of issue "or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later"; and (c) where the court serves the written demand, it must "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

The latter provision and the requirements imposed upon the courts have provoked at least one commentator to state that "Conference Orders being used as triggers for CPLR 3216 dismissal is a dead letter." *See* David B. Hamm, NY CLS CPLR 3216, Practice Insights, *David B. Hamm, CPLR 3216 Conference Orders No Longer Constitute 3216 Notice.* While Mr. Hamm may be correct, it does not mean that a court has lost its ability to provide an effective 90-day notice/demand.

In *Wells Fargo Bank, N.A. v. Etienne*, 2025 N.Y. Slip Op. 02811 (2d Dep't May 7, 2025), for example, a mortgage foreclosure action, the trial court, in an order, stated that based on updates it received at a status conference one day earlier "more than one year has passed since the joinder of issue and [the p]laintiff has unreasonably neglected to prosecute this action." The court directed the plaintiff to "resume prosecution of the action by [either moving] for entry of judgment or [filing] a note of issue within [90] days after receipt of this order." The order warned that, if the plaintiff "fails to do so within the specified time period, this Court will issue a subsequent order dismissing this case pursuant to CPLR 3216 without notice to the parties." The order was properly served by the trial court. When the plaintiff failed to comply with the order, the trial court dismissed the action pursuant to CPLR 3216. A subsequent motion to vacate was also denied.

The Appellate Division affirmed, finding that the relevant order

> clearly advised the plaintiff that its failure to comply with the demand to resume prosecution would serve as a basis for dismissal of the action for failure to prosecute. Contrary to the plaintiff's further contention, the Supreme Court properly determined that, under the circumstances, the court provided sufficiently detailed notice of the specific conduct constituting the plaintiff's neglect (citation omitted).

Id. at 4.

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