New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

No. 778 September 2025

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

NYSBA

CASE LAW DEVELOPMENTS

Court Holds There to Be No General Jurisdiction Over Defendant

Maintaining Rental Locations in New York . . . and 49 Other States Not Enough to Get Further Discovery

In *Manning v. Budget Rent A Car*, 2025 N.Y. Slip Op. 04644 (2d Dep't August 13, 2025), the plaintiffs brought this action against Budget Rent A Car and Gerard Long, arising out of personal injuries sustained in a car accident that occurred in Clarendon, Jamaica, West Indies. They alleged that the vehicle driven by Long, and in which they were passengers, developed mechanical difficulties, causing Long to lose control of the car, owned by Tropic. Years earlier, Tropic and Budget had entered into an International Unit Franchise Agreement.

Prior to discovery, Budget moved for summary judgment on the ground, among others, that it could not be held vicariously liable as Tropic's franchisor and for dismissal under CPLR 3211(a)(8) for lack of personal jurisdiction. The trial court denied the motion.

Here we deal only with the jurisdictional challenge and only to the extent it implicates general jurisdiction. The appellate court reviewed the current state of the law, that is (i) "[a] court is authorized to exercise general jurisdiction over a foreign corporation when the corporation's affiliations with the state ' "are so continuous and systematic as to render them essentially at home in the forum State" ' "; (ii) " '[S]tanding alone, mere in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum State]' "; and (iii) " '[t]o determine whether a foreign corporate defendant's affiliations with the state are so continuous and systematic as to render it essentially at home . . . "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide" ' (citations omitted)." *Id.* at *2.

In this action, Budget's submissions established that Budget is a Delaware corporation with its principal place of business in New Jersey; it is registered to do business in New York; and it "maintains rental locations in the State of New York, rental locations in the other 49 states where it is registered to do business, and has international franchises countrywide and worldwide." In finding a lack of general jurisdiction, the Second Department concluded that "the plaintiffs' mere assertion in opposition that Budget maintains rental locations in New York, standing alone, failed to indicate how further discovery might lead to evidence showing that general personal jurisdiction in New York exists over Budget (citation omitted)." *Id.*

It is important to remember that in describing the "at home" standard applicable in assessing whether an entity is subject to general jurisdiction, the United States Supreme Court stressed the reluctance of the Court to find general jurisdiction where the defendant was conducting "sizable" business in multiple states: "If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit (citation omitted).' " *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

IN THIS ISSUE

Court Holds There to Be No General Jurisdiction Over Defendant

Yet Another, But Different, Consent to Jurisdiction Amendment Passed By New York Legislature

Courts ***Can*** Ignore Experts' Affidavits, Submitted in Opposition to Summary Judgment Motions, Who Were Not Previously Timely Disclosed

Third Department Reverses Course, Joining First Department, in Holding That Catalyst Theory Applies in CPLR Article 86 Cases

New York Court Need Not Have Personal Jurisdiction over the Defendant Where Plaintiff Is Seeking to Enforce a Foreign Judgment in New York

CPLR 2001 Cannot Be Used to Excuse or Disregard Jurisdictional Defects

Court Affirms Denial of Defendant's Motion to Change Venue from Suffolk County to New York County, Finding Plaintiff Had Demonstrated That He Had ***Second*** Residence There

Yet Another, But Different, Consent to Jurisdiction Amendment Passed By New York Legislature

This One Limits Class of Plaintiffs Who Can Sue an Authorized Foreign Corporation

As we have noted in the past, on two separate occasions, the New York State Legislature passed an amendment conditioning a foreign corporation's filing for authority to do business in New York on consent to general jurisdiction here, but the governor vetoed them both. Yet, a third attempt has been made, and the Legislature again recently passed a similar amendment, but with a significant difference.

The newest proposed amendment, aimed at meeting the concerns expressed in the Governor's prior veto memos, provides that registration constitutes consent to the general jurisdiction of the New York State courts over such authorized foreign corporation, but ONLY where an action is brought by a limited class of potential plaintiffs, that is, New York residents or New York licensed businesses. Specifically, the amendment limits the plaintiffs to: a New York State resident; a domestic corporation, unincorporated association, partnership, individually owned business, limited liability company, limited partnership or limited liability partnership; or a foreign corporation, limited liability company, limited partnership or limited liability partnership authorized to do business in the state.

As of this writing, the amendment has not been sent to the Governor.

Courts *Can* Ignore Experts' Affidavits, Submitted in Opposition to Summary Judgment Motions, Who Were Not Previously Timely Disclosed

Parties Cannot Ignore Discovery Deadline Orders

Years ago, there was a line of cases out of the Second Department barring the use of expert affidavits served in opposition to summary judgment motions where the expert was not exchanged before the note of issue was filed. In response, CPLR 3212(b) was amended in 2015 to provide that a court cannot refuse to consider an affidavit submitted in connection with a summary judgment motion because a CPLR 3101(d)(1)(i) expert exchange had not been made prior to the submission of the affidavit. However, the amendment did not impact a trial court's discretion to supervise disclosure, to set deadlines, and to impose penalties arising out of a party's failure to comply with expert disclosure. *See Weinstein, Korn & Miller, New York Civil Practice,* CPLR ¶ 3101.52d (David L. Ferstendig, ed. 2025) ("Note that this amendment should not impact a court, district or judge's rule or order or the Commercial Division Rules requiring expert disclosure by a date certain prior to the filing of the note of issue (see 22 NYCRR §202.70, Rule 13). In addition, the legislation should not protect a party who willfully fails and refuses to provide requested discovery under CPLR 3126.").

In *Kornreich v Honeyman*, 2025 N.Y. Slip Op. 04639 (2d Dep't August 13, 2025), the Appellate Division noted that the plaintiff did not serve an expert witness disclosure prior to the discovery deadline set forth in an August, 2018 trial court order mandating that: "ALL outstanding discovery, to the extent not already provided or completed, including depositions are to be exchanged and/or completed on or before October 5, 2018." In fact, plaintiff submitted the expert evidence four years after the court-ordered deadline and after she filed an amended note of issue certifying that discovery was complete except for a nonparty deposition. The trial court granted the defendants' summary judgment motions and expressly stated that it would not consider the plaintiff's expert affidavit, which was dated April 21, 2016.

In affirming the trial court's grant of the motions, the Second Department stated:

> The plaintiff failed to demonstrate a reasonable excuse for her failure to comply with the Supreme Court's order dated August 22, 2018, directing disclosure of all outstanding discovery by October 5, 2018. Moreover, the plaintiff failed to establish good cause for not disclosing the expert's affidavit before filing the amended note of issue. Thus, under the circumstances of this case, the court providently exercised its discretion in declining to consider the plaintiff's expert affidavit (citations omitted).

Id. at *1.

The lessons: Notwithstanding the 2015 amendment to CPLR 3212(b), an affidavit submitted by an expert in opposition to a summary judgment motion not previously identified *can be* ignored by the court. Furthermore, while expert disclosure has been permitted after the filing of the note of issue, counsel cannot ignore a court order directing *all* disclosure by a certain date, to the extent of failing to provide expert disclosure, or willfully withhold disclosure.

Third Department Reverses Course, Joining First Department, in Holding That Catalyst Theory Applies in CPLR Article 86 Cases

Now Putting Those Departments in Conflict with the Second and Fourth Departments

CPLR Article 86, the New York State Equal Access to Justice Act (EAJA), is based on, but not identical to, its federal counterpart, the federal Equal Access to Justice Act, 28 U.S.C. § 2412(d). CPLR 8601 provides that a "prevailing" party in an action against the State can recover attorneys' fees and other expenses "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." The "catalyst theory" provides that even where the government moots an action voluntarily by granting the relief sought, the plaintiff can nevertheless recover attorneys' fees because the claim asserted was a catalyst for favorable governmental action.

We previously reported that the Second, Third, and Fourth Departments had rejected the catalyst theory. We

also noted that in *Solla v. Berlin*, 106 A.D.3d 80 (1st Dep't 2013), *reversed on other grounds,* 24 N.Y.3d 1192 (2015), the First Department had formally recognized the theory. The First Department has subsequently reaffirmed its holding in *Solla.*

Recently in *Markey v. Tietz*, 2025 N.Y. Slip Op. 04689 (3d Dep't August 14, 2025), the Third Department reversed its precedent in *Matter of Clarke v. Annucci*, 190 A.D.3d 1245 (3d Dept 2021), now holding that the catalyst theory applies in CPLR Article 86 cases. Previously, the Third Department had insisted that it was controlled by the U.S. Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Home Resources,* 532 U.S. 598 (2001), which held that the catalyst theory no longer applied to federal statutes that awarded attorneys' fees to the prevailing party. Here, in *Markey*, the court held that "[u]pon reflection, a strict application of *Buckhannon* is incompatible with the state EAJA's text." Significantly, when discussing a party's application for attorneys' fees, the state EAJA differs from its federal counterpart in that the former includes a "settlement," as opposed to "an order of settlement" under the federal EAJA. Thus,

> [a] settlement agreement reduced to a writing subscribed by the parties to be bound is enforceable even without judicial imprimatur. The fact that the federal EAJA provides the model for the state EAJA supports a presumption that the Legislature made a conscious choice to change "order of settlement" (28 USC § 2412 [d] [2] [G]) to "settlement" (citations omitted).

Id. at *3–4.

The court then addressed the language of the relevant state statute. It noted that "to prevail means to win" and "the statute uses the term 'prevail' to define two types of prevailing parties: (1) the party who '[wins] in whole' and (2) the party who wins 'in substantial part where such party and the [S]tate [win on] separate issues' (CPLR 8602 [f])." *Id.* at *1. The Court found the language to be ambiguous, since "a party 'who prevails in whole' must be a party who obtains all of the relief requested, but it is unclear whether the prerequisite to win on 'issues' applies to a wholly prevailing party (CPLR 8602 [f], citation omitted)." *Id.* at *5.

In resolving the ambiguity, the Third Department stressed that although fee-shifting statutes are generally to be construed narrowly, because the state EAJA is a remedial statute, it can be interpreted broadly. The court reasoned that

> [t]here is no clearly expressed requirement in the state EAJA that a party "prevails in whole" only if the party obtains complete relief on the merits of the dispositive issues asserted in the litigation (CPLR 8602 [f]) . . . The text of the state EAJA, the legislative record, our collective judicial experience and common sense all lead us to conclude that the Legislature could have rationally determined that parties who receive complete relief from the State after the commencement of litigation have prevailed "in whole" even if the State folds and gives it to them.

Id. at *6.

Moreover, when the state EAJA was enacted, a decade before the *Buckhannon* decision, the Legislature stated "that it looked to the federal EAJA's interpretive federal case law 'that has evolved' " as evidenced by the language in CPLR 8600. At that time, " 'the catalyst theory was a standard generally accepted by United States [Circuit] Courts . . . in evaluating whether to award counsel fees under the federal EAJA.' " *Id.* at *7.

The court concluded that "to 'prevail[ ] in whole' under our application of the catalyst theory to the state EAJA, the party must only show that it received from the State all of the relief requested that could have been awarded in a final judgment on the merits or settlement in the party's favor (citation omitted)." *Id.* at *8. The plaintiff or petitioner need not establish that "the civil action, in fact, catalyzed the State's complete reversal to be a prevailing party."

New York Court Need Not Have Personal Jurisdiction over the Defendant Where Plaintiff Is Seeking to Enforce a Foreign Judgment in New York

New York Court's Enforcement of Foreign Judgment Does Not Offend Due Process

In *Cadlerock Joint Venture, L.P. v Simms*, 2025 N.Y. Slip Op. 04541 (2d Dep't August 6, 2025), the plaintiff, as assignee of a default judgment obtained (and renewed) in North Carolina, brought this action via a CPLR 3213 summary judgment motion in lieu of complaint to enforce the North Carolina renewal judgment. The defendant did not attack the North Carolina judgment. Instead, he argued that the New York court lacked jurisdiction over him, because he was a North Carolina resident and had no assets in or connection to New York. The trial court ruled that the court lacked jurisdiction over the defendant, denied plaintiff's motion and granted defendant's cross-motion to dismiss.

The Appellate Division reversed and held that a New York court need not have personal jurisdiction over the defendant "in order for the plaintiff to obtain such recognition and potential enforcement of the judgment in New York." The court pointed out that while a New York court would lack jurisdiction to determine the merits of the underlying controversy, here the plaintiff was only seeking to enforce the North Carolina judgment in a New York court. The North Carolina judgment is entitled to full faith and credit and "can only be challenged in another forum upon the ground that the court that rendered the judgment lacked the jurisdiction to do so (citations omitted)." *Id.* at *2. The plaintiff is merely asking " 'the court to perform its ministerial function of recognizing the [out-of-state] money judgment and converting it into a New York judgment' (cita-

tions omitted)." *Id*. The defendant was not contesting the North Carolina court's jurisdiction or contending that he was denied due process there.

The court concluded that permitting a North Carolina judgment to be recognized and enforced in New York did not offend due process because

> [t]he judgment debtor's liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment is satisfied by the debtor's relationship to the state that rendered the judgment in the first instance and the opportunity to litigate the merits there. . . "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter" (citations omitted).

Id.

CPLR 2001 Cannot Be Used to Excuse or Disregard Jurisdictional Defects

Pro Se Incarcerated Person's Failure Strictly to Comply with Service Statutes Results in Dismissal

We have addressed CPLR 2001 in the past, both as to where it applies and does not. Simply stated, it provides that the court may permit the correction of or disregard or excuse procedural mistakes, omissions, defects or irregularities, and "if a substantial right of a party is not prejudiced," the error "shall" be disregarded. *See Weinstein, Korn & Miller, New York Civil Practice,* CPLR ¶ 2001.03 (David L. Ferstendig, ed. 2025), for an exhaustive list of mistakes, omissions, defects, and irregularities that can be corrected, disregarded or excused under CPLR 2001. However, CPLR 2001 cannot be used to excuse or disregard "jurisdictional" or "substantive" errors. Sometimes that is in the context of a failure properly to commence an action. Here we deal with the failure to effect proper service.

In *Baptiste v. County of Suffolk*, 2025 N.Y. Slip Op. 04618 (2d Dep't August 13, 2025), the plaintiff pro-se incarcerated person commenced an action against the defendants, County of Suffolk, Suffolk County Police Department, Geraldine Hart, and Janine Keleghan. The plaintiff attempted service on multiple occasions both of the summons and complaint and an amended summons and complaint. The trial court found that the plaintiff did not effect proper service, but denied the defendants' motion to dismiss and granted the plaintiff a 30-day extension of time to effect service upon the defendants in the interests of justice and for good cause shown. The plaintiff subsequently filed a single affidavit of service attesting that that he mailed a copy of the amended summons to the Suffolk County Police Department within the 30-day period. The trial court again denied the defendants' motion to dismiss, this time citing to CPLR 2001.

The Appellate Division reversed. It noted that the plaintiff failed to establish that he properly effected service upon the defendants under CPLR 308 or 311. The Second Department rejected the trial court's application of CPLR 2001 to the defect in this case. It held that the plaintiff's failure strictly to comply with the service statutes was a jurisdictional defect the trial court could not disregard. Plaintiff's incarcerated pro se status did not impact that analysis.

> " 'The court's ability to apply CPLR 2001 . . . presupposes that the court has acquired jurisdiction.' " Thus, "CPLR 2001 may be used to cure only a 'technical infirmity' " in effecting service. " 'In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " "Defendant's actual receipt of the summons and complaint is not dispositive of the efficacy of service" (citations omitted).

Id. at *2.

Court Affirms Denial of Defendant's Motion to Change Venue from Suffolk County to New York County, Finding Plaintiff Had Demonstrated That He Had *Second* Residence There

Plaintiff Established that He Had a Bona Fide Intent to Retain Residence in Suffolk County with Some Degree of Permanency

Under CPLR 503(a), venue can be placed in the county in which one of the parties resided when the action was commenced *or* in the county in which a substantial part of the events or omissions giving rise to the claim occurred. In *Paulson v. Paulson*, 2025 N.Y. Slip Op. 04259 (2d Dep't July 23, 2025), a Suffolk County divorce action, the defendant moved to change venue to New York County, submitting evidence that the parties resided there when the action was commenced.

In opposition, however, the plaintiff established that he had a second residence in Suffolk County at the time the action was commenced. The plaintiff pointed to the substantial time he spent in Southampton over a 28-year period, the deeds to his Southampton property, receipts for property taxes, vehicle and voting registrations noting the Southampton address, a five-year lease agreement starting in 2019 for his Southampton office, and the parties' 2020 tax return listing his Southampton residence as the home address.

In affirming the trial court's denial of the motion, the court found that the "evidence was sufficient to establish that, at the time of the commencement of the action, the plaintiff had a bona fide intent to retain a residence in Suffolk County with some degree of permanency." *Id*. at *1.

ISSN 0028-7636 (print) ISSN 2379-1225 (online)