# New York State Law Digest

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

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## CASE LAW DEVELOPMENTS

### Second Department Gives Primer on Varying Standards Under CPLR 4404(a)

**Court Holds That Jury Could Be Instructed to Consider Whether the Accident Actually Happened as Plaintiff Claimed**

In *Krohn v. Schultz Ford Lincoln, Inc.*, 2025 N.Y. Slip Op. 05072 (2d Dep't Sept. 24, 2025), a personal injury action, the jury found that the defendant was negligent, but that such negligence was not a substantial factor in causing plaintiff's injury. The trial court granted the plaintiff's motion to set aside the verdict under CPLR 4404(a) and for judgment on the issue of liability as a matter of law. The Second Department reversed and, in doing so, discussed extensively the implications where the issues of negligence and proximate cause are *not* inextricably intertwined and the applicable distinct standards on a CPLR 4404(a) motion. The court also ruled that "in a personal injury action where there were questions about whether the alleged injury-producing event actually occurred as claimed by the plaintiff here, it was not error for the court to respond to a jury note by instructing that the jury could consider whether the alleged accident occurred." *Id.* at *1.

In February 2014, the plaintiff, a professional musician, brought his newly purchased used van into the defendants to service and repair the vehicle. He "supposedly" complained that the steering and the alignment "felt off." The repairs cost more than $4,000. A few months later the plaintiff was driving the van to a venue at which he was to perform, accompanied by a friend. The plaintiff testified at trial that while exiting the Whitestone Bridge at a speed of approximately 50 mph to merge onto the Van Wyck Expressway, he heard a "metal clank sound," and the van "immediately . . . started veering off to the right, and it wasn't responding to any of my steering efforts." Although he started to apply the brake "there really wasn't any time because the van just went crashing into the [concrete] barrier on the right side of the Van Wyck." He claimed that he "was unable to fully apply the brake before impact," and did not "notice any appreciable decrease in his speed before impact." The car crashed into the concrete barrier multiple times. The plaintiff claimed that the first tow truck driver to arrive stated that he could not tow the van because of damage under the front part of the van. After "a struggle," a second tow truck loaded the van onto a flatbed.

In 2017, the plaintiff brought this action for personal injuries, alleging that the defendants negligently performed the repairs which resulted in the collision and injuries to the plaintiff. At the liability portion of the trial, plaintiff's counsel offered an expert, an engineer and attorney who had worked with plaintiff's counsel in other cases, both as an expert and as co-counsel. He opined that, based on his inspection of the van four months after the accident, "a part of the van's steering mechanism, the pitman arm, became detached from the steering box due to not being attached with the requisite force, causing the van's steering to fail to function"; and "the pitman arm 'was never properly torqued onto the vehicle with the specified 200 foot pounds in the Ford shop manual.'" *Id.* at *2.

In summation, defense counsel referenced evidence that the plaintiff did not present, and raised the issue of whether the accident happened. The verdict sheet presented to the jury asked two questions: (1) "[w]ere the defendants negligent?"; and (2) in the event the jury answered "yes" to the first question, "[w]as that negligence a substantial factor in causing plaintiff's accident?" The sheet did not include a special verdict question about whether the accident occurred.

During deliberations, the jury sent a note to the court reading "[t]he second question presumes there was an accident. Are we to assume that there was an accident, or is that

## IN THIS ISSUE

part of our deliberation?" After speaking with counsel, the court summarized the plaintiff's testimony concerning the incident and instructed the jury, in part, "[i]f you believe that testimony, then you could reasonably conclude that there was an accident. If you don't believe that testimony, you can conclude that there is no accident. That's your determination. So you heard testimony, and you are to consider the weight, if any, to give to that." Shortly thereafter the jury returned a verdict, finding that although the defendants were negligent, their negligence was not a substantial factor in causing the incident.

As discussed above, the plaintiff moved to set aside the verdict and the trial court granted the motion. Initially, the Second Department noted that the trial court and the parties had "confused or used interchangeably" the varied standards under CPLR 4404(a). Justice Dillon then provided his usual comprehensive and instructive analysis. He explained that CPLR 4404(a) provides two distinct alternatives, with significant differences, and courts and parties need to assess whether the relevant CPLR 4404(a) motion involves a law-based or fact-based analysis. The court can determine if a party is entitled to a judgment as a matter of law, in which case the court applies the "insufficiency of evidence" standard. Conversely, the court can order a new trial if the verdict is contrary to the weight of the evidence.

> Insufficiency looks at whether the jury could legally, logically, and objectively reach its verdict based on the evidence presented. Its precise legal standard is whether there is a valid line of reasoning and permissible inferences by which a rational trier of fact could find in favor of the party. Insufficiency is a question of law. When a verdict is set aside for the legal insufficiency of evidence, it is replaced with a judgment of the court in favor of another party to the action, and no new trial is held (citations omitted). . . .
>
> By contrast, weight of the evidence is a more malleable, qualitative, fact-based review of the verdict. The court looks at whether the evidence so preponderates in favor of a party that a contrary verdict could not have been reached on any fair interpretation of the evidence. If a verdict is set aside on the basis of the weight of the evidence, a new trial is held (citations omitted).

*Id.* at *4.

The court then addressed a liability determination in a personal injury action. While negligence and proximate cause are necessary parts to any liability finding, where "there is a line of demarcation between negligence and proximate cause, a jury's verdict finding the first but not the second does not warrant the setting aside of a verdict under CPLR 4404(a). Conversely, where issues of negligence and proximate cause are inextricably intertwined, courts may set aside a verdict where negligence is found but proximate cause is not (citations omitted)." *Id.* at *5.

The appellate court found that here, based on the trial evidence, and "viewing the evidence in the light most favorable to the defendants, as we must in these instances, there was a valid line of reasoning and permissible inferences upon which the jury could parse the alleged negligent repair from the alleged proximate cause and determine that while the defendants were negligent, they were not a proximate cause of the plaintiff's claimed accident (citations omitted)."). *Id.* The court pointed to the following, among other, facts: despite testifying to have "just taken a massive hit" and enduring "a terrifying experience" in an accident in which the van contacted the concrete barrier at least five times, the plaintiff nevertheless made arrangements to get to the event and perform; he did not call the passenger or others to testify at trial about the alleged collision or what followed; he did not notify the police after the accident and thus there was no police report to confirm the details of the accident; he produced no evidence of his towing the van to two locations; and the photographs produced did not reflect the severity of damage consistent with plaintiff's testimony. This "led the jury to consider whether the alleged accident happened at all" and provoked its note to the court and the court's response.

Based on the above, the Second Department concluded that "[u]nder the circumstances of this case, it was not irrational for the jury to conclude that although the defendants negligently performed work on the plaintiff's van, the negligent work was not a substantial factor in causing the alleged accident as claimed by the plaintiff." Thus, the Appellate Division found that the trial court had erred.

But Justice Dillon was not done. He made it clear that the trial court's instruction permitting the jury to consider whether the accident had occurred was justified:

> A trial court must weigh competing principles when considering whether to ask the jury to determine if the alleged injury-producing event occurred as claimed by the plaintiff. On the one hand, there are trials where the question of whether the injury-produzcing event occurred as claimed by the plaintiff presents no factual dispute. There are other cases where the happening of an accident may itself be contested (citations omitted).

*Id.*

Finally, the court held that its conclusion would be no different even under a weight of the evidence analysis.

## Second Department Again Finds Estoppel Not to Apply

### Failure to Update Address with Agency Was Not "Affirmative Conduct"

We previously reported on the Second Department decision in *Citimortgage, Inc. v. Goldstein,* 230 A.D.3d 1219 (2d Dep't 2024). There, a majority of the court held that "the defendant's failure to update his address with the plaintiff, DMV, or USPS, or to update his voting records with a new address, did not constitute 'affirmative conduct,'" which would estop the defendant from contesting service. More recently, in *Sidney v. Genova*, 2025 N.Y. Slip Op. 05006 (2d

Dep't Sept. 17, 2025), the court returned to the issue of estoppel, in the context of defendant's motion to vacate a default judgment pursuant to CPLR 5015(a)(4). In this personal injury action arising out of the plaintiff's electrocution at a residential property owned by the defendant, service was effected pursuant to CPLR 308(2), leave and mail service. The defendant did not answer or otherwise appear. On his motion to vacate, the defendant contested proper service and rebutted the process server's affidavit of service. He denied "ever residing at the address where service allegedly was made and set forth the location of his residence, while also submitting documentary evidence supporting those assertions." *Id.* at *2.

The plaintiff countered that the defendant should be estopped from contesting that the address in the affidavit of service was not the defendant's "dwelling place" or "usual place of abode" at the time service was allegedly effected. The plaintiff pointed to records maintained by the New York City Department of Finance for receipt of tax records listing the address where service was effected as the defendant's address as owner of the property where the underlying accident allegedly occurred. The Second Department concluded, however, that "the defendant's failure to update his address with a city agency did not constitute 'affirmative conduct,' and such failure was insufficient to establish, without a hearing, that the defendant should be estopped from contesting service as a matter of law (citations omitted)." *Id.*

Thus, the court remitted the matter to the trial court "for a hearing to determine whether the defendant was properly served with process and for a new determination thereafter of that branch of the defendant's motion which was pursuant to CPLR 5015(a)(4) to vacate the clerk's judgment." *Id.*

## Defendant Rebuts Process Server Affidavit Using Global Positioning System Records

### Hearing Should Have Been Held

*Bank of N.Y. Mellon v. Simpson*, 2025 N.Y. Slip Op. 04970 (2d Dep't Sept. 17, 2025) dealt with a combined CPLR 5015(a)(4) motion to vacate and a CPLR 3211(a) motion to dismiss based, in part, on improper service grounds. Service had been attempted on the defendant pursuant to CPLR 308(4). To satisfy the due diligence requirement, the process server averred in the affidavit of service that personal service was attempted on four weekdays, at various times, and that inquiries were made with a neighbor as to the borrower's employment, before effecting affix and mail service. While the court found that the affidavit of service constituted prima facie evidence of proper service, it also concluded that

> the defendant sufficiently rebutted the presumption of proper service by submitting, among other things, global positioning system records from the process server that indicated that on one of the dates, the process server attempted service of process at a different address from the address indicated in the affidavit of service. Considering that one of the other dates of attempted service was President's Day, a national holiday, and the limited inquiry made by the process server as to the borrower's employment, the Supreme Court should have held a hearing to determine whether service was properly effected pursuant to CPLR 308(4) (citations omitted).

*Id.* at *2–3.

Thus, the Appellate Division remitted the matter to the trial court for a hearing to determine whether service was proper.

## Seeking Dismissal of Affirmative Defenses Pursuant to CPLR 3211(b)

### Useful Underutilized Tool for Plaintiffs to Remove Threshold Issues

We frequently deal with CPLR 3211(a) motions brought by defendants seeking to dismiss an action. However, another important tool, in this case on behalf of plaintiffs, is CPLR 3211(b) which provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." A plaintiff can employ this mechanism early on in a case to eliminate a defense that he or she believes lacks merit. It is not a secret that there are defendants who "throw in the kitchen sink" when asserting defenses in their answers. In many circumstances, that presents more of an annoyance than a real challenge to the plaintiff.

However, in other circumstances, moving to dismiss a defense can remove a possible impediment expeditiously. For example, in *Bank of Am., N.A. v. Seon Kim*, 2025 N.Y. Slip Op. 05057 (2d Dep't Sept. 24, 2025), a mortgage foreclosure action, the defendant asserted a defense of lack of standing. The plaintiff moved to dismiss the defense and the trial court granted the motion. In affirming the trial court, the Appellate Division found the defense to be without merit as a matter of law:

> The plaintiff established that it was the assignee of the note prior to the commencement of the action by submitting an assignment of mortgage stating, inter alia, that WaMu, the original lender, assigned the subject mortgage to the plaintiff "together with the bond or note or obligation described in said mortgage, and the moneys due and to grow due thereon with interest." The defendants have not raised any doubt as to the unavailability of the defense of lack of standing (citations omitted).

*Id.* at *2.

Other defenses, like personal jurisdiction and statute of limitations, for example, can be addressed at an early stage of the litigation via a CPLR 3211(b) motion, thereby resolving a gateway issue before having to expend extensive amounts of time and money, perhaps in vain. Moreover, if it is determined promptly that there is no personal jurisdiction, the plaintiff may have the opportunity to commence a timely action elsewhere. In addition, in some instances, the

threat of such a motion can induce a defendant voluntarily to dismiss a meritless affirmative defense.

## Some Discovery Orders Do Not Qualify as Conditional Orders of Preclusion

### Order Here Indicated That a Further Determination as to the Imposition of Sanctions Was Required

When there is a discovery dispute in an action that is brought to the court's attention after a good faith effort to resolve it, many times a court upon granting a motion under CPLR 3124 and 3126 will make a conditional order of preclusion. In essence, the order gives the party from whom discovery is sought an opportunity to comply and produce certain discovery by a deadline before a sanction will be enforced. The Court of Appeals has ruled that a failure to comply with a self-executing conditional order renders the order absolute. *Wilson v. Galicia Contr. & Restoration Corp.,* 10 N.Y.3d 827 (2008).

In *Williams v. Staten Is. Univ. Hosp.*, 2025 N.Y. Slip Op. 04814 (2d Dep't August 27, 2025), however, the court held that the subject order was not a conditional order of preclusion, because "it advised that the failure to strictly comply would result in 'preclusion, the striking of a pleading and/or sanctions *as may be appropriate*" (emphasis added), thus indicating that a further determination as to the imposition of any sanctions was required. Since the August 24, 2022 order was not a conditional order of preclusion, the defendants were not required to move to be relieved from it (citation omitted)." *Id.* at *2.

## An Untimely Cross-Motion for Summary Judgment Can Be Considered Even Without an Explanation for the Delay

### Where a Timely Motion Was Made on Nearly Identical Grounds

We have dealt with CPLR 3212, the summary judgment motion deadline and the implications of *Brill v City of New York,* 2 N.Y.3d 648, 651 (2004) on many occasions. In *Brill,* the Court of Appeals stressed that deadlines must be adhered to and, if a litigant fails to move for summary judgment motion within the 30-, 60-, 90-, or 120-day deadline, it will be denied, unless good cause is shown for the delay. A meritorious motion is not an excuse; neither is a lack of prejudice. We have addressed timing issues, the premature filing of notes of issue and confusion as to the applicable period to file the motion.

Here we discuss an untimely cross-motion for summary judgment motion. Ordinarily, the same rules apply as to an original motion: the late cross-motion will be denied unless good cause is shown for the delay. An exception is where there is a timely motion and the cross-motion is made on nearly identical grounds. In *Gomez v. Tilden Estates, LLC*, 2025 N.Y. Slip Op. 04706 (2d Dep't August 20, 2025), the cross-motion was made seven months after the note of issue was filed and the cross-movant-defendants did not offer an explanation for the delay. The main motion, brought by the plaintiff, sought summary judgment on the issue of liability on causes of action alleging violations of Labor Law §§ 240(1) and 241(6).

The Second Department held that, to the extent the defendants' cross-motion sought relief on the same grounds as the plaintiff's motion, it could be considered. However, the portion of the cross-motion not made on nearly identical grounds was untimely:

> Since the plaintiff moved for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240(1) and 241(6), the Supreme Court providently exercised its discretion in considering the merits of those branches of the defendants' cross-motion which were for summary judgment dismissing those causes of action. However, those branches of the defendants' cross-motion which were for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 were not made on nearly identical grounds to the plaintiff's motion for summary judgment. Thus, the court should not have considered those branches of the defendants' cross-motion . . . (citations omitted).

*Id.* at *2.

## Sanctions Award Cannot Be Sought *After* Action Is Discontinued

### Award Requested Was Not in Favor of Party or Attorney in Action Before a Court

In the January, 2024 Digest, we referred to the decision in *13 E. 124 LLC v. J&M Realty Servs. Corp.,* 222 A.D.3d 446 (1st Dep't 2023), where the First Department ruled that the filing of a voluntary discontinuance did not divest the court of jurisdiction to award sanctions for conduct that preceded the discontinuance. There, the trial court had already granted defendants' motion for sanctions *before* the plaintiffs filed a notice of discontinuance.

However, the analysis is different where an action has already been discontinued with prejudice *before* sanctions are sought. In *Baugh v. Seagull 27, LLC*, 241 A.D.3d 623 (2d Dep't 2025), in August, 2022, counsel for the parties executed a stipulation discontinuing the action with prejudice. Three months later, a nonparty Hercules Pharmaceuticals (upon which information subpoenas were previously served in the action) moved for an award of sanctions against the plaintiff, pursuant to 22 N.Y.C.R.R. § 130-1.1. The trial court denied the motion. The Second Department affirmed, noting that 22 N.Y.C.R.R. § 130.1 requires that an award must be in favor of a "party or attorney" in a civil action "before the court." In fact, " '[t]he regulation contemplates an award of costs or the imposition of sanctions for frivolous conduct within the context of the proceeding in which the frivolous conduct is alleged to have occurred.' Here, the motion was untimely, as it was made after the parties executed a stipulation voluntarily discontinuing the action (citations omitted)." *Id.* The court did not directly address the potential standing issue.



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