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Summarizing recent significant New York appellate cases

When does the six-month time period to recommence a dismissed action under CPLR 205(a) or 205-a begin? The Second Department spent pages and pages and pages to discuss that novel question recently, providing the bar with an important new reading of the fixed date when the six-month recommencement period begins. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

SECOND DEPARTMENT

CIVIL PROCEDURE, RECOMMENCEMENT OF NEW ACTION FOLLOWING DISMISSAL

***HSBC Bank USA, N.A. v Hillaire*, 2026 NY Slip Op 00353 (2d Dept Jan. 28, 2026)**

Issue: When does the six-month grace period under CPLR 205(a) and 205-a begin to run?

Facts: Following the dismissal of a prior mortgage foreclosure action on March 29, 2022, which was not appealed, the plaintiff commenced a new foreclosure action against the defendants on September 9, 2022. Nail and mail service was completed, under CPLR 308(4), on October 20, 2022 (10 days after filing of the affidavits of service). Defendants answered and served counterclaims to, among other things, cancel and discharge of record the mortgage pursuant to RPAPL 1501(4).

Eventually, defendants moved for summary judgment dismissing the complaint and granting their counterclaims, arguing that the new foreclosure "action was time-barred under CPLR 205-a, which had been enacted as part of New York State's broader Foreclosure Abuse Prevention Act. The defendants argued that even with a six-month grace period that was available under CPLR 205-a, the entry of the dismissal order on March 29, 2022, plus six months required this action to have been commenced and service of process to have been completed no later than September 29, 2022, but service was not completed until approximately three weeks later, on October 20, 2022." Plaintiff opposed, arguing that "the provisions of FAPA, including CPLR 205-a, did not apply to this action as FAPA was enacted after this action's commencement and that a retroactive application of CPLR 205-a would be an unconstitutional violation of the Due Process, Takings, and Contract Clauses of the United States Constitution. The plaintiff further argued, among other things, that under the incumbent version of CPLR 205(a), this action needed merely to be "commenced" within six months of the dismissal of the 2013 action. Since the commencement date of this action was September 9, 2022, the plaintiff maintained that this action was timely."

Supreme Court granted defendants' motion, holding that "CPLR 205-a applied to this action and that the six-month grace period under the statute was not satisfied as measured from the termination of the 2013 action. The court further held that since the plaintiff's causes of action were time-barred, the defendants were entitled to judgment as a matter of law on their counterclaim pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage."

Holding: The Appellate Division, Second Department reversed and denied defendants' summary judgment motion. The court began its analysis by explaining that defendant had shown that the second foreclosure action was untimely, having been commenced more than six years after the debt was accelerated in the first foreclosure action, and that the burden then shifted to the plaintiff to show that it had timely recommenced the second action under CPLR 205(a) or 205-a.

The court explained, "CPLR 205(a) provides that where an action is not terminated on certain enumerated disqualifying grounds, the original plaintiff may commence a new action upon the same transaction or occurrence, or series of transactions or occurrences, within six months after the termination, provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within the six-month period . . . The Legislature tightened the requirements for the applicability of the six-month grace period in actions involving mortgage foreclosure. Under FAPA, the savings provision of CPLR 205(a) was replaced with the similarly-denominated CPLR 205-a." Under that provision, "a plaintiff may commence a new action upon the same transaction or occurrence, or series of transactions or occurrences, within the same six-month period contemplated under CPLR 205(a), measured from the termination of the prior action. Both CPLR 205(a) and 205-a measure the six-month grace period from the termination of the prior action."

The court noted, however, that CPLR 205(a) and 205-a diverge in four important respects. "The first divergence is that CPLR 205-a expands the concept of a 'neglect to prosecute' a prior action, which, when applicable, precludes a plaintiff from commencing a new action" to include neglect such as certain discovery abuses, failure to timely apply for default judgment of file note of issue, post-note of issue abandonment, and violations of court orders, among other things. "A second divergence between CPLR 205(a) and 205-a is that section 205-a provides, in subdivision (a)(2), that a plaintiff in a mortgage foreclosure action is entitled to only one qualifying six-month grace period." "The third divergence between CPLR 205(a) and 205-a is that under section CPLR 205-a, a successor in interest or an assignee of the original plaintiff may not commence a new action unless it pleads and proves that such successor or assignee is acting on behalf of the original plaintiff."

And, finally, "[t]he fourth divergence between CPLR 205(a) and 205-a, which is central to this appeal, regards the acts that must be accomplished within each statute's respective six-month grace period. Whereas CPLR 205(a) requires that service of process for a recommenced action merely be 'effected' upon defendants within six months from the termination of the prior action, CPLR 205-a requires that service of process be 'completed' within that same time period. The language of CPLR 205-a places more time pressure upon plaintiffs to successfully recommence actions, as the additional time for completing service of process, rather than merely effecting service of process, upon defendants eats into the operative six-month statutory period. This is particularly true when service of process is made by means of delivery to a person of suitable age and discretion or by nail and mail service, where the delivery of papers to defendants must also include the mailing of copies to defendants and the filing of affidavits of service, and service is not deemed completed for an additional 10-days after such filing. Thus, plaintiffs seeking to recommence mortgage foreclosure actions under CPLR 205-a must necessarily budget more time for both effecting and completing service of process than may be required when CPLR 205(a) is applicable."

Most notably, the open question here was: when is the prior action considered "terminated" such that the 6-month grace period begins to run? On that question, the court explained, "[b]oth CPLR 205-a and 205(a) contain identical language that the respective six-month grace periods applicable thereunder be measured from the termination of the prior action. A central question to this appeal is the meaning of the term 'termination.' Different interpretations affect the calculation of when the six-month grace periods commence and then expire, which, in turn, affects which actions are timely or untimely." Neither the text of the CPLR, nor its legislative history, provided any guidance on when a prior action terminates, however, the court explained.

Interpreting the word termination on its own, the court held that "while CPLR 205-a and 205(a) each provide for a six-month grace period for the recommencement of a new action measured from the termination of a prior action, the statutes do not state that the six-month grace period runs from the prior action's 'dismissal,' or from an order's 'entry,' or from the 'service' of an order of dismissal with notice of entry, or from the entry or service of a 'judgment.' A termination and a dismissal are not necessarily the same thing. Actions may have an order directing dismissal issued or entered, but the action is not terminated at that point as there are further proceedings that may be contemplated by one or more of the parties. Termination of an action in which an order directing dismissal has been issued or entered may be delayed by a timely motion for leave to reargue, a prejudgment motion for leave to renew, an unperfected appeal which is then dismissed, or an appeal that is perfected for an ultimate appellate determination, which may or may not bring the action to repose. In discussing CPLR 205(a), the Court of Appeals held that an action is not terminated until appeals as of right are exhausted."

Noting that some of the Department's prior precedent measured the starting date from different acts, the court clarified that "mere entry of an order of dismissal should not be, in and of itself, sufficient to trigger the six-month grace periods under CPLR 205(a) and 205-a" because under CPLR 2220, the successful party must serve the order on the adverse party in order to give it effect. Indeed, the court noted, service of the order with notice of entry serves two important purposes in litigation: giving certain knowledge to the adverse party that the order has been issued and affects its rights, and providing a fixed date from which appeal and other periods may be measured. Therefore, the court reasoned, "[s]ervice with notice of entry should be required for triggering the rights and time computations that flow from the order itself, including, as in this matter, the computation of the six-month grace periods under CPLR 205(a) and 205-a, notwithstanding those statutes' failures to specifically define the terminating event for measuring the six-month grace periods thereunder for recommencement of an action."

That's not all, however, the court held. "If an order directing dismissal of an action is the subject of a perfected appeal, the termination of the action for CPLR 205(a) purposes, and by extension for CPLR 205-a purposes, is pushed back until the determination of the appeal. If a notice of appeal is filed but the appeal is not perfected, the termination of the action is delayed until the appeal is dismissed for failure to perfect. In both instances, the Court of Appeals has required that the appellate process be 'exhausted' for a CPLR 205(a) termination event to occur."

Distilling all of the scenarios, the Second Department ultimately concluded that "the addition of 30 days from the date of service with notice of entry of the dismissal order is required to recognize any aggrieved party's right to appeal the dismissal order pursuant to CPLR 5513(a) or to move for leave to reargue pursuant to CPLR 2221(d). The term 'termination,' as used in CPLR 205(a) and 205-a, is a word of finality. Termination connotes more finality than a dismissal, as orders of dismissal may be successfully reargued or reversed on appeal by means of recognized statutory rights undertaken within 30 days from the order's service with notice of entry. An action with an order of dismissal, even with notice of entry and without the entry of a judgment, still enjoys statutory oxygen. If 30 days elapse from the service of an order of dismissal with notice of entry without further activity by the aggrieved party, such as the filing of a motion for leave to reargue or a notice of appeal, then at 12:01 a.m. on the 31st day, the action is out of oxygen and has reached, by statutory construction, its full and final termination."

Therefore, "[i]f the aggrieved party undertakes no effort toward taking an appeal of an order of dismissal or moving for leave to reargue, does the date of the terminating event in such instance revert to the date of service of the order of dismissal with notice of entry? The Court of Appeals, by its language, appears to entitle the dismissed party to 30 days to exhaust potential appellate remedies, regardless of whether such remedies are actually pursued . . . An action is not truly terminated until counsel, conscientiously representing the best interests of the client, makes the decision with the client as how best to proceed. For these considerations, the law provides the client and counsel a 30-day window to decide what is best. There is no termination of any action until the client and counsel have had at least that minimal statutory opportunity to weigh the litigation options that might be credibly available." Accordingly, the court held, "the Legislature was looking for a firm date of an action's conclusion, which logically takes into account proceedings that may be undertaken beyond the order of dismissal, its entry, and its service with notice of entry. CPLR 5513(a) and 2221(d) provide 30 additional days from the date of service of an order with notice of entry. Once that further date is reached and no notice of appeal or notice of motion for leave to reargue is filed, the six-month grace period starts running to recommence a qualifying action under CPLR 205-a or CPLR 205(a)."

Since plaintiff recommenced within the 6 months following the expiration of those 30 days after service of the order of dismissal of the first foreclosure action, their second foreclosure action was timely, and should not have been dismissed.

THIRD DEPARTMENT

CIVIL PROCEDURE, EXPERT DISCLOSURE

***Dewan-Zemko v Hunter Mtn. Ski Bowl, Inc.*, 2026 NY Slip Op 00413 (3d Dept Jan. 29, 2026)**

Issue: **What is the scope of a party's duty to disclose a treating physician as an expert witness under CPLR 3101(d)(1)(i)?**

Facts: Following the denial of defendant's summary judgment motion, plaintiffs served an expert witness disclosure notifying of their intent to use plaintiff's treating physician as their medical expert at trial on the issue of causation. Defendant moved to preclude this witness testimony based on plaintiffs' failure to comply with timing requirements for disclosure established by the Third Judicial District's practice rules. Supreme Court granted the motion, and precluded plaintiff's expert witness, holding that plaintiffs had failed to comply with applicable disclosure rules and that their explanations were inadequate, particularly considering the litigation history, which included repeated requests for expert disclosure from defendant, prior court direction to comply with disclosure requirements, and a previous lesser sanction for a prior CPLR 3101(d)(1)(i) violation.

Holding: The Appellate Division, Third Department affirmed, maintaining its prior interpretation of CPLR 3101(d)(1)(i) as requiring formal expert disclosure for all medical professionals, including treating physicians, who will provide expert testimony, and rejected the First, Second, and Fourth Departments' more lenient approaches to such expert disclosure. The court noted that the Second Department has held that "[a] treating physician is permitted to testify at trial regarding causation, notwithstanding the failure to provide notice pursuant to CPLR 3101 (d) (1)"; and the First and Fourth Departments have concluded that "if the failure to comply with the notice requirements of CPLR 3101 (d) (1) relates to 'a treating physician whose records and reports have been fully disclosed,' then that failure 'does not warrant preclusion of that expert's testimony' because 'the defendant has sufficient notice of the proposed testimony to negate any claim of surprise or prejudice.'"

The Third Department rejected the plaintiffs' invitation to join its Sister Departments' interpretations of CPLR 3101(d)(1)(i). Rather, the court reaffirmed its own interpretation that "CPLR 3101 (d) (1) (i) requires disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony. This interpretation is not only consistent with the plain language of the statute but, also, that the burden of providing expert witness disclosure and setting forth the particular details required by the statute lies with the party seeking to utilize the expert. As such, it is not opposing counsel's responsibility to cull through copious medical records to ferret out the qualifications of the subject expert, the facts or opinions that will form the basis for his or her testimony at trial and/or the grounds upon which the resulting opinion will be based. This is especially true here as plaintiffs had provided the necessary authorizations for defendant to access medical records from over 15 separate medical professionals, not including those executed for medical offices and pharmacies. Defendant could not be expected to guess which of those individuals may provide expert testimony at trial."

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