New York State Law Digest

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No. 785 April 2026

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

CASE LAW DEVELOPMENTS

Majority of Court of Appeals Holds That Recently Amended Workers' Compensation Law § 24 Does Not Authorize Board to Approve Legal Fees on Late Payment Penalties

Dissent Concludes Otherwise Based on the Same Statutory Language

In *Matter of Gonzalez v. Northeast Parent & Child Socy.*, 2026 N.Y. Slip Op. 01443 (March 17, 2026), the issue related to the approval of legal fees in seeking late payment penalties in a Workers' Compensation Law (WCL) proceeding. The majority and dissent in the Court of Appeals came to diametrically opposed conclusions in interpreting the relevant WCL provisions.

The appellant law firm had successfully represented the claimant on his workers' compensation benefits claim arising out of a work-related injury. The WCL Judge awarded claimant's counsel a legal fee of $2,189.93 as a lien on claimant's $13,724.13 compensation award pending receipt of a counsel fee application. Claimant's counsel then requested a hearing to address a late payment penalty, based on the insurer's failure to pay the compensation award and the counsel fee in a timely fashion under WCL § 25. The insurer conceded the late payment. The WCL Judge assessed a late payment penalty but denied counsel's request for legal fees in seeking the penalty, pursuant to WCL § 24. The Board administratively affirmed the denial and the Appellate Division affirmed.

The issue was whether claimant's counsel was entitled to the additional legal fee on the late payment assessment under WCL § 24. What complicated the analysis by the Court of Appeals was that the provision was recently amended, effective January 1, 2023. It now provides, in relevant part, that "[c]laims of attorneys and counselors-at-law for legal services . . . shall not be enforceable unless approved by the board," and "[t]he board shall approve such written and submitted fee application[s] in an amount commensurate with the services rendered and the amount of compensation awarded, having due regard for the financial state of the claimant in accordance with each applicable provision of the . . . schedule" set forth therein (WCL § 24(2)). Significantly, there is nothing in WCL § 24 expressly allowing for the award of counsel fees payable from a penalty imposed, whether made pursuant to WCL § 25 or otherwise.

Under the prior version of WCL § 24, fee awards on late payment penalties under WCL § 25 were "recognized" and permitted by the Board. A majority of the Court of Appeals concluded that under the amended statute, the Board does not have such authority "because the text of WCL 24 (2) establishes a mandatory fee schedule that does not provide for such fees." The Court noted that "[t]he legislature retained some of the section's original language—including the requirement of Board approval and setting the fee as a lien upon a claimant's compensation award—but it adopted a mandatory legal fee schedule, eliminating the Board's broad discretion to determine whether to approve such fees." *Id.* at *2. The fee schedule sets forth a detailed list of six categories of workers' compensation awards and their corresponding legal fee calculation, without providing a "reference to or method for calculating legal fees based on charges against a carrier or employer payable to the claimant under WCL 25. Awarding such fees would be wholly at odds with WCL 24 (2)'s detailed fee schedule, and would contravene the plain meaning of the statute. Thus, WCL 24 (2) limits the Board's authority to approve only legal fees for categories of awards specifically listed therein, and in accordance with the fee schedule." *Id.* at *3.

In addition, the language in WCL §§ 24(2) and 25 narrow the definition of "compensation" in determining the amount of legal fees available under WCL § 24(2), and do not include late payment penalties in that definition:

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> The legislature's choice of language in WCL 24 (2) cabins the meaning of "compensation" as defined in WCL 2 (6) for purposes of calculating legal fees, treating "compensation" solely as "the money allowance payable to an employee or their dependents" as a recompense for the employee's injury or death (WCL 2 [6]). As such, WCL 24 (2)'s use of "compensation" does not encompass "the money allowance" (or "penalty") that is "payable to an employee or their dependents" due to an employer's or carrier's violation of the WCL timely payment requirements (id.).

Id. at *3–4.

Furthermore, "WCL 24 and 25 (2) treat 'compensation,' 'penalties,' and 'attorney's fees' each as distinct, mutually exclusive concepts." The Board cannot approve a legal fee until it sets the compensation amount. Under WCL § 24(2), "compensation" for the purposes of a fee calculation does not include a WCL § 25 charge or penalty, Thus, the Board lacks authority to approve an attorney fee based on WCL § 25 claimant awards.

The majority insisted that even if the statutory text were deemed ambiguous, its conclusion would be the same based upon the "established canon of statutory construction, *expressio unius est exclusio alterius*," which provides that " '[w]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' " (citations omitted). *Id.* at *4. Because the Court must assume that the Legislature was aware of the former version of the statute under which the Board approved legal fees under the circumstances relevant here (i.e., based on late payments under WCL § 25), its failure expressly to list a claimant's award for late payment charges as a basis for legal fees in its detailed list must be deemed to be intentional. Simply stated, if the Legislature intended to impose additional liability in its otherwise detailed amended statute, it would have done so.

The dissent countered that, for over 100 years, the Board had discretion under WCL § 24 to award counsel fees to attorneys for their work in securing late-payment penalties. Nothing in the 2023 amendment removed that discretion. In fact, the amendment was intended to expand an injured employee's access to legal representation. Thus, it increased the baseline level of fee awards by establishing a fixed fee schedule to be used when determining the total fee award.

The dissent disputed the majority's contention that WCL § 24 (2) provides no direction on how to calculate an attorney fee award when securing a late payment penalty. Instead, that "subparagraph calculates attorney's fees as a specified fraction of 'compensation.' No calculation more complicated than calculating a percentage is required." *Id.* at *6. It rejected the majority's argument that the word "compensation" was limited to an "award" and did not include a late fee penalty.

> Indeed, if the Legislature had intended the majority's result, it could have used the word "award" and defined it as the majority does in WCL 2 (6) (where definitions of other terms in the WCL are set forth), restricting it to monies payable as recompense for injury or death, or some other narrow formulation. But that is not what the Legislature did, and not how we have previously construed the Legislature's intent in defining "compensation" broadly.

Id. at *7.

Majority of Court of Appeals Affirms Grant of Summary Judgment in Personal Injury Action Arising Out of Car Accident With a Police Emergency Vehicle

Finds Plaintiffs Did Not Create Material Issues of Fact That Deputy Acted Recklessly

Granath v. Monroe County, 2026 N.Y. Slip Op. 01586 (March 19, 2026), was a personal injury action arising out of a motor vehicle accident at an intersection in which the car the plaintiffs were in (traveling southbound) was struck by a police emergency vehicle driven by Deputy Fong (traveling westbound). She was engaged in an emergency operation, responding to a call for an unrelated motor vehicle accident with heavy damage and unknown injuries. It was undisputed that Fong proceeded through a red light at the intersection. The defendants moved for summary judgment, asserting that Fong was not reckless under Vehicle and Traffic Law (VTL) § 1104. The trial court granted the motion and a split Appellate Division affirmed.

In a 6–1 decision, the Court of Appeals affirmed. Vehicle and Traffic Law § 1104

> grants "the driver of an authorized emergency vehicle when involved in an emergency operation" a certain set of "special driving privileges." "Those privileges include passing through red lights and stop signs, exceeding the speed limit and disregarding regulations governing the direction of movement or turning in specified directions" (citations omitted).

Id. at *3.

In addition, the driver of the police vehicle does not have to activate their lights and sirens during an emergency operation. However, the driver is not protected from the results of "reckless disregard for the safety of others." As a result,

> "for liability to be predicated upon a violation of Vehicle and Traffic Law § 1104, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." A " 'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach." (citations omitted).

Id.

There was no dispute that Fong was engaged in an "emergency operation" when the accident occurred; that she slowed down coming to a complete stop at least once before

proceeding through the intersection; and that she "observed northbound traffic, waited for that traffic to yield to her, and turned on her overheard [*sic*] lights."

The plaintiffs contended, however, that a jury could find that Deputy Fong acted recklessly by failing to activate her air horn or siren; refusing to call in a "Code 77" as required by Monroe County Sheriff's Department (MCSD) policy; and driving into the intersection despite her obstructed view of southbound traffic.

Nevertheless, the Court held that the plaintiffs failed to raise an issue of fact:

> Even assuming Deputy Fong failed to activate her air horn or siren, call in a "Code 77," or observe southbound traffic—either because her view was obstructed or she neglected to look to her right—taken together with the actions she undisputably did take—slowing down, stopping, activating her emergency lights and proceeding only once she observed northbound traffic yield to her—we cannot conclude that Deputy Fong, with "conscious indifference to the outcome," "reckless[ly] disregard[ed] . . . a highly probable risk of harm" (citations omitted).

Id. at *4.

In addition, while VTL § 1104 requires *most* emergency vehicles to use "audible signals" and to display "at least one red light," it explicitly exempts police vehicles from that requirement. Any internal MCSD policy to the contrary cannot form the basis for imposing liability.

The sole dissent by Judge Rivera maintained that there were "disputed issues of material fact and credibility as to whether the emergency vehicle driver activated warning signals before entering the intersection, and whether they checked for and could see oncoming traffic." A jury could conclude that these failures amounted to reckless behavior, and Judge Rivera would reverse for the reasons set forth in the Appellate Division dissent. She concluded that the majority misapplied the summary judgment standard, ignoring those disputed material facts and questions of credibility:

> The majority's conclusion is even more perplexing given that it assumed that the driver "failed to activate her air horn or siren, call in a 'Code 77,' or observe southbound traffic—either because her view was obstructed or she neglected to look to her right" (majority op at 7). If the driver entered the intersection immediately after activating the warning signals, without giving oncoming traffic sufficient time to see or hear those warnings, and the driver's view of the intersection was obstructed as the record describes, a jury could conclude that the driver's behavior was reckless.

Id. at *7.

CPLR 3217(e) Does Not Abridge Right of Parties To Agree To Extend Limitation Period in Foreclosure Action

Finds Stipulation Language To Be Enforceable

In last month's edition of the *Law Digest*, we discussed the impact of the Foreclosure Abuse Prevention Act (FAPA) in the context of CPLR 205-a, permitting the commencement of a second action, including completing service, within six months after the termination of the prior action.

Today we address another provision, CPLR 3217(e), which was added as part of the same amendment. As the sponsor's memorandum noted, the legislation was intended to deal with "an ongoing problem with abuses of the judicial foreclosure process and lenders' attempts to manipulate statutes of limitations." Prior to the enactment of FAPA, a loan that was previously accelerated could be de-accelerated by the plaintiff by filing a voluntary discontinuance. CPLR 3217(e) provides that the voluntary discontinuance of an action based on a CPLR 213(4) instrument (bond, note or mortgage), "whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute."

In *HSBC Bank USA, N.A. v. Nicholas*, 2026 N.Y. Slip Op. 01461 (1st Dep't March 17, 2026), the plaintiff commenced this foreclosure action more than six years after it had voluntarily discontinued a previous foreclosure action against the defendant. As noted above, the voluntary discontinuance would not reset the statute of limitations under FAPA. However, here, when the parties agreed to discontinue the prior 2008 foreclosure action without prejudice in 2011, the written stipulation executed by counsel and filed with the court stated that that "the statute of limitations for any claims of plaintiff or defendant against the other is hereby tolled from July 22, 2008 . . . until June 1, 2013." Plaintiff then brought this foreclosure action in 2018 and moved for summary judgment. The defendant cross-moved to dismiss the complaint, arguing that the action was time-barred under FAPA.

Initially, the First Department confirmed that FAPA applies retroactively, citing to its own decision in *Genovese v. Nationstar Mtge. LLC*, 223 A.D.3d 37 (1st Dep't 2023) and the Court of Appeals' decisions in *Van Dyke v. US Bank, N.A.*, 2025 N.Y. Slip Op. 06537 (Nov. 25, 2025) and *Article 13 LLC v. Ponce De Leon Fed. Bank*, 2025 N.Y. Slip Op. 06536 (Nov. 25, 2025), rejecting constitutional challenges.

The court then held that there was nothing in CPLR 3217(e) or otherwise prohibiting parties from executing a stipulation, as was done here, to toll the limitation period. First, it rejected the argument that under General Obligations Law § 17-105(1), the stipulation had to be signed by the parties themselves to be enforceable:

> General Obligations Law § 17-105(5)(b), as amended by FAPA, expressly provides that "[t]his section does not change the requirements or the effect with respect to the accrual of a cause of action, nor the time limited for commencement of an action based upon . . .

> a stipulation made in an action or proceeding." The 2011 stipulation was clearly a "stipulation made in an action or proceeding" and is therefore excluded from the requirements of General Obligations Law § 17-105(1).

HSBC Bank USA, N.A. v. Nicholas at *1.

In addition, the First Department maintained that the legislative history of FAPA confirmed that parties can agree to extend the limitation period for a foreclosure action *exclusively* through General Obligations Law § 17-105, even where that stipulation also discontinued the action:

> [T]he Senate Sponsor's Memorandum in Support clarifies that FAPA does not prevent parties from agreeing to extend the limitations period for a foreclosure action; rather, it identifies General Obligations Law § 17-105 as "the exclusive means" to do so. The Sponsor's Memo repeatedly warned of lenders' "unilateral" acts, including lenders' "unilateral ability to toll or extend the time prescribed by law to commence an action"; their ability to "unilaterally manipulate" the limitation period; and their ability to effect a "unilateral 'de-acceleration.'" And it explained that a "bare stipulation of discontinuance or a lender's unilateral decision to revoke its demand for full payment is not a method prescribed by the Legislature for waiving, extending, or modifying the statute of limitations." This language suggests that the Legislature did not intend to abrogate the ability of parties to extend the statute of limitations by explicit agreement, even if the stipulation also voluntarily discontinued the action (citations omitted).

Id.

Plaintiff's Attempts To Circumvent CPLR 3217(b) Consequences Rejected

Characterizing Its Motion as One To Dismiss Complaint Was Unsuccessful

In *Deutsche Bank Natl. Trust Co. v. Starr,* 245 A.D.3d 888 (2d Dep't 2026), the plaintiff brought a mortgage foreclosure action in August, 2009. The trial court granted the plaintiff's motion to discontinue in 2010. In November, 2012, plaintiff brought this mortgage foreclosure action. In October, 2016, the trial court granted plaintiff's motion for summary judgment motion, to strike defendant's answer and for an order of reference and denied defendant's cross-motion to dismiss. In June, 2019, the Appellate Division modified the order as to deny plaintiff's motion.

In March 2022, the plaintiff moved to dismiss the complaint without prejudice predicated on its "inability to show compliance with RPAPL 1306 and/or on equitable grounds." The defendants cross-moved under CPLR 3217(b) to discontinue the action with prejudice. The trial court denied plaintiff's motion, granted the defendant's cross-motion and dismissed the action with prejudice, finding that the plaintiff's "excessive delay in taking measures to correct [its] own errors and defects [rose] to the level of laches."

The Appellate Division affirmed, insofar as finding that plaintiff's motion to dismiss, made after the expiration on the underlying limitation period, was instead one to discontinue under CPLR 3217(b) without prejudice. "Here, the plaintiff attempted to avoid the undesired consequences of a voluntary discontinuance by denominating its motion as one seeking dismissal of the complaint, but, as the plaintiff was moving to dismiss its own action, its motion was, in actuality, one to voluntarily discontinue the action pursuant to CPLR 3217(b) (citations omitted)." *Id.* at *5.

The Second Department did agree that the trial court erred in discontinuing the action with prejudice on laches grounds, since the doctrine of laches was never raised by the parties. Nevertheless, the Appellate Division held that the discontinuance with prejudice was justified on another basis. Although generally a voluntary discontinuance via court order pursuant to CPLR 3217(b) should be without prejudice, here there were special circumstances, that is, prejudice to the defendant if the action was discontinued without prejudice. "The defendant demonstrated, prima facie, that a future action would be time-barred and that the plaintiff would not be entitled to the benefit of the savings provision of CPLR 205-a(a) in commencing a future action to foreclose the mortgage because the six-month savings provision under that statute is not available where an action has been voluntarily discontinued (citations omitted)." *Id.* at *6.

Verified Pleading Can Be Used in Place of an Affidavit Where Verifying Person Has Personal Knowledge of Relevant Facts

Keep That in Mind When Considering Who Should Verify a Pleading

Frequently, when we talk about the utility of using a verified pleading, we contrast a verification executed by a party with one executed by counsel. Thus, for example, on a CPLR 3215 motion for entry of a default judgment, a complaint verified by a party that has been served may be used as an affidavit of facts constituting the claim and the amount due. A complaint verified by counsel generally cannot.

However, even in the instance where a pleading has been verified by a party, it is important that the person verifying has personal knowledge of the relevant facts. In *Toorak Capital Partners, LLC v. 15 Dewey Place Corp.*, 244 A.D.3d 778 (2d Dep't 2025), a mortgage foreclosure action, the Appellate Division ruled that the plaintiff did not satisfy its burden on its summary judgment motion by attaching various loan documents to the verified complaint.

> "Although a '"verified pleading" may be utilized as an affidavit whenever the latter is required,' the verified pleading has evidentiary value only if the verifier has personal knowledge of the facts." In this action, the complaint was verified by Christopher Redburn, an asset manager for Cohen Financial, the plaintiff's "special servicer and authorized agent." However, Redburn did not lay any foundation for his basis of knowledge or for the admission of the business records annexed to the complaint (citations omitted).

Id. at 780.

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