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Reporting on
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CASE LAW DEVELOPMENTS

Second Department Rules That Expenses Associated With Preparing *Digital* Record and Briefs Are Recoverable Under CPLR 8301(a)(6) Appellate Division Practice Rules and Court's Local Rules of Practice Support Such a Conclusion

CPLR 8301(a) (6) provides in pertinent part that: “(a) A party to whom costs are awarded in an action or on appeal is entitled to tax his necessary disbursements for . . . 6. the reasonable expenses of printing the papers for a hearing, when required.”

The issue we deal with here in *Underhill Venture, LLC v. Sarang*, 2026 N.Y. Slip Op. 04976 (2d Dep’t August 12, 2026), a matter of first impression for the court, is whether such a party, awarded costs on appeal, “is entitled to tax, as a necessary disbursement, the reasonable expenses incurred by that party in connection with the assembly and submission of a *digital* record and briefs on the appeal (emphasis added).” The Second Department concluded that they were recoverable.

The court noted that the recovery of costs and disbursements in this situation depended on the statutory authorization in CPLR 8301(a). As set forth above, CPLR 8301(a) provides for the taxing (as a disbursement) of printing fees. Nevertheless, the Second Department had not previously addressed whether the reasonable expenses associated with the preparation and filing of digital copies constituted a “printing” expense under CPLR 8301(a)(6).

The Second Department referenced the Practice Rules of the Appellate Division, which require that an appellant who perfects an appeal using the full record method file one digital copy of the record and briefs. 22 N.Y.C.R.R. § 1250.9(a)(1), (c)(1), (d). It was conceded that the plaintiff used the full record method and filed only a digital copy of its record and briefs. The court did not require the filing of hard copies.

Furthermore, the court’s Local Rules of Practice state the requirements necessary to file digital copies. They include provisions that they “comply with the technical requirements and guideline for electronically filed documents (22 NYCRR Part 1245, Appendix A), and shall be filed by uploading through a digital portal (22 NYCRR 670.9[a]),” “comply with text searchable PDF archival format,” “contain bookmarks linking the tables of contents of briefs and records to the corresponding page of the document,” and “be scanned at a resolution sufficient to ensure legibility.”

As a result, the Second Department held that “the plaintiff’s use of an appellate printer to prepare ‘electronic bookmarks,’ ‘electronic links,’ ‘digital file conversion(s),’ and ‘uploads’ for its prior appeal constituted ‘reasonable expenses of printing the papers for a hearing, when required,’ within the meaning of CPLR 8301(a)(6) and was ‘reasonable and necessary within the context of the litigation (citations omitted).’” *Id.* at *3.

Once Parties Executed Unconditional Stipulation of Discontinuance, Trial Court Could Not Entertain Plaintiff’s Subsequent Motion Stipulation Was Silent on Whether Court Retained Jurisdiction

HSBC Bank USA, N.A. v. Rini, 2026 N.Y. Slip Op. 04845 (2d Dep’t August 5, 2026) was a 2018 mortgage foreclosure action in which the defendant Rini moved, inter alia, to dismiss the complaint for lack of personal jurisdiction. In September 2020, the trial court denied the motion. Nearly three years later, however, in July 2023 the Second Department reversed and remitted the matter to the trial court for a hearing to determine whether the defendant was properly served and then a new determination on the motion to dismiss.

Prior to the hearing scheduled by the trial court, the plaintiff and the defendant entered into a conditional agreement to settle the action, including a term for a loan modification for the defendant. The court placed the conditional agreement on the record and stated that it would retain jurisdiction over

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the action. The parties subsequently executed a stipulation of discontinuance in February 2024 and filed it with the court. The stipulation provided that the plaintiff withdrew the complaint and discontinued the action, the defendant withdrew her answer and counterclaims, and all claims interposed in the action were discontinued. Significantly, the stipulation failed to state whether the court retained jurisdiction for any purpose.

In November 2024, the plaintiff moved to vacate the stipulation and to restore the action to the active calendar, asserting that the defendant had not completed the paperwork for the loan modification, which was part of the earlier conditional agreement. The trial court granted the motion, insofar as directing a hearing to determine whether the defendant breached the conditional agreement to settle the action.

On appeal, the Second Department did not get to the merits of the dispute, instead concluding that the trial court lacked jurisdiction to hear the motion. It stressed that a motion can be addressed only in a pending action. Thus, once an action has been “unequivocally terminated by the execution of an express, unconditional stipulation of discontinuance,” a court lacks jurisdiction to entertain a subsequent motion. That, in fact, was the case here, and the only avenue available to the plaintiff to proceed was via a plenary action:

The action was unconditionally discontinued by the stipulation of discontinuance executed by the plaintiff and the defendant and filed with the court, in which the plaintiff withdrew the complaint and discontinued all claims interposed in the action, and the stipulation was silent as to the court’s retention of jurisdiction for any purpose. Accordingly, under the circumstances, the plaintiff’s requested relief was not available by way of a motion and could only be obtained by commencing a plenary action (citations omitted).

Id. at *2.

The lesson to be learned here is that when parties are entering into a stipulation of discontinuance, in which future obligations are anticipated, they should include a provision that the court retains jurisdiction, and have the stipulation “so ordered” by the court.

Failure to Create a Record in the First Place Is Not Analogous to Spoliation

Thus, CPLR 3126 Spoliation Sanctions Are Unavailable

In prior editions of the *Law Digest*, we have dealt with the common law doctrine of spoliation and possible sanctions where a party negligently loses or intentionally destroys key evidence. In the seminal decision in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015), the Court of Appeals set forth the standard, in part:

A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party’s claim or defense such that the

trier of fact could find that the evidence would support that claim or defense.

In *Osborne v. Merchant Sq. Dental, PLLC*, 2026 N.Y. Slip Op. 04869 (2d Dep’t August 5, 2026), the plaintiff, employed by MSD, alleged that on October 23, 2018 she sustained injuries when the defendant Lee extracted her wisdom teeth at MSD’s office. The plaintiff commenced this dental malpractice action against MSD, Lee, and the defendant Masihuddin, MSD’s principal.

During discovery, the defendants produced a one-page “Patient Progress Note” and a copy of a May 2018 X-ray, which the plaintiff testified was taken to test the X-ray machine. Prescription records for the plaintiff dated October 24, 2018 (the day after the extraction procedure) were produced by nonparty CVS Pharmacy. It was undisputed, however, that Lee never made a record of the procedure or any care provided before or after the procedure.

Relevant to our discussion, the plaintiff moved to strike the defendants’ answers for spoliation of evidence under CPLR 3126, which motion the trial court denied. The Second Department affirmed. It stressed the difference between spoliation and the plaintiff’s claim here, that is, that the defendants failed their alleged statutory duty to *create* records in the first instance, which did not constitute spoliation. “Contrary to the plaintiff’s contention, failing to create records in the first instance is not sufficiently analogous to destroying or failing to preserve evidence that was already in existence (citations omitted).” *Id.* at *2.

Six-Month Period Under CPLR 205(a) and CPLR 205-a Does Not Begin to Run Until 30 Days After Service of Order Denying Motion to Vacate Prior Order on Default, With Notice of Entry

Appeal Unavailable from Order Granted Upon Default

In the March 2026 edition of the *Law Digest*, we discussed the decision in *HSBC Bank USA, N.A. v. Hillaire*, 251 N.Y.S.3d 198 (2d Dep’t 2026), in which the Second Department attempted to provide clarity as to when an action is “terminated” for the purpose of CPLR 205 and CPLR 205-a and the commencement of the six-month period, where no appeal is taken. Specifically, it concluded that the termination occurs 30 days after service of the order of dismissal with notice of entry:

The term “termination,” as used in CPLR 205(a) and 205-a, is a word of finality . . . 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.

Id. at 213.

More recently, in *Federal Natl. Mtge. Assn. v. Brigandi*, 2026 N.Y. Slip Op. 04841 (2d Dep’t August 5, 2026), the plaintiff

had earlier commenced a mortgage foreclosure action in 2015. That action was dismissed by a December 7, 2018 order, inter alia, granting defendant's cross-motion for summary judgment—which the plaintiff apparently did not oppose—on the ground that the plaintiff had failed to comply with the RPAPL 1304 mailing requirements. The plaintiff moved to vacate that portion of the December 2018 order, and on May 10, 2022, the trial court denied the motion on the ground that the plaintiff had failed to comply with RPAPL 1304. Twelve days later, on May 22, 2022, the plaintiff was served with the order with notice of entry. The plaintiff subsequently filed an untimely notice of appeal, and on December 22, 2022 the appeal was deemed dismissed for failure to perfect.

Prior to the dismissal of the appeal, the plaintiff commenced this foreclosure action on November 10, 2022. By order dated May 16, 2024, the trial court denied defendant's summary judgment motion, rejecting the defendant's argument, among others, that this second action was untimely.

On appeal, the Second Department held that the action was timely under both CPLR 205 and 205-a. The court found that the failure to comply with RPAPL 1304, a condition precedent, was *not* a dismissal on the merits. The defendant asserted that the termination of the prior 2015 action for purposes of CPLR 205(a) and CPLR 205-a occurred with the December 2018 order granting summary judgment in the 2015 action. The Second Department disagreed, concluding instead that the termination of the prior action did not happen, at the earliest, until 30 days after service of the May 2022 order (denying plaintiff's motion to vacate the prior order) with notice of entry (June 21, 2022). Thus, this action, commenced in November 2022, was timely. It based its conclusion on the fact that “no appeal lies from an order granted upon the default of the appealing party. The proper procedure for obtaining review of an order granted upon a party's default in opposing a motion is to move to vacate the default, and, if necessary, appeal from the order deciding that motion, which the plaintiff did.” *Id.* at *2.

Amendments and Relation-Back Doctrine **Relation-Back to Add Claims, as Opposed to Parties, is** **Governed by Different Standard**

The decision in *217 Trust v. VIR Constr., Inc.*, 2026 N.Y. Slip Op. 04824 (1st Dep't July 30, 2026) discusses the two primary categories of the relation-back doctrine. This gives us an opportunity to review the doctrine and the concept of amendments in general.

CPLR 3025 sets forth various provisions impacting amendments of pleadings with respect to the assertion of claims. CPLR 3025(a) provides the bases to amend as of right, that is, without requiring a court order, or the stipulation of the parties. It states that a party can amend their pleading *once* as of right within 20 days after service; at any time before the period for responding to it expires; or within 20 days after service of a pleading responding to it.

If a pleading has been amended once as of right or if the time for amending as of right has expired, CPLR 3025(b) permits amendments by stipulation of all the parties or leave of court. The statute provides that “[l]eave [of court] shall be free-

ly given upon such terms as may be just including the granting of costs and continuances.” As we have previously discussed in the *Law Digest*, case law has supplemented this analysis and, for the most part, holds that an affidavit of merit is unnecessary. Thus, the standard is that absent “prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dep't 2008).

Years ago, a court order was necessary to add a party, as opposed to a claim. Fortunately, CPLR 1003 was amended to provide a similar timeline (to CPLR 3025(a)) to add parties once without leave of court, that is, within 20 days after service of the original summons; any time before the period for responding to it expires; or within 20 days after service of a pleading responding to it.

CPLR 203(f) states that a claim in an amended pleading “is deemed to be interposed at the time the claims in the original pleading were interposed,” so long as the original pleading gave notice of the transactions or occurrences to be proved in the amended pleading. Thus, a linchpin of the relation-back doctrine with respect to the adding of claims is that proper notice be given.

Another form of the relation-back doctrine involves parties “united in interest.” A claim asserted against a new defendant in an amended pleading will relate back to claims previously asserted against an original defendant if all three of the following conditions are met:

1. Both of the claims must arise out of the same conduct, transaction, or occurrence;
2. Both parties must be united in interest such that the new defendant can be charged with notice of the institution of the action and will not be prejudiced thereby; and
3. The new defendant must have known, or should have known, that but for plaintiff's mistake, the new defendant would have been included in the original pleadings.

CPLR 203(b), (c). See *Buran v. Coupal*, 87 N.Y.2d 173 (1995).

217 Trust deals with the relation-back doctrine as it applies to claims. Specifically, the First Department was asked whether the trial court's order granting plaintiffs' motion to amend their complaint against their renovation contractors was proper. The motion sought to “add a claim by plaintiffs' first-party insurer [Great Northern], as subrogee, to recover the portion of plaintiffs' damages for which the insurer had reimbursed them.” An independent action on the subrogation claim was assumed to be time-barred. Ultimately, the appellate court held that the amendment was permitted under the relation-back doctrine because the original complaint gave defendants “notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to [the subrogation claim asserted in] the amended pleading.”

The First Department rejected the defendants' argument

that the trial court improperly applied CPLR 203(f) “sua sponte,” because plaintiffs’ submissions never cited to CPLR 203(f) or expressly referred to the relation-back doctrine:

Plaintiffs stated in their moving papers that the proposed subrogation claim “arise[s] from the same renovation work that gave rise to the [217 plaintiffs’] existing claims,” that “the subrogation claim is based on the same facts and theory of liability as the primary action [by the 217 plaintiffs],” and that granting the amendment would not prejudice defendants. In addition, plaintiffs stated in their moving papers that Great Northern could recover on its subrogation claim only if permitted to assert the claim in this action because a “separate action” on the subrogation claim would be time-barred (even if they were mistaken as to the date on which the claim became time-barred). In view of these statements, it was implicit in plaintiffs’ moving papers, even without a citation of CPLR 203(f) or the use of the phrase “relation-back,” that plaintiffs were relying on the relation-back theory codified in CPLR 203(f), and defendants could have, and should have addressed that provision in their opposition. Accordingly, the court properly considered CPLR 203(f) in deciding the cross-motion.

Id. at *4.

The next question was whether CPLR 203(f) applied. The court noted, as referenced above, that a linchpin of the relation-back doctrine is that proper notice be given to the defendant within the applicable limitation period. It found that such notice was given here:

Under this standard, Great Northern’s subrogation claim, on its face, should be deemed to relate back to the filing of the earlier complaints. The proposed FAC alleges that Great Northern, pursuant to its policy covering the building, made a payment to the 217 plaintiffs for a portion of the property damage allegedly caused by defendants’ negligence in managing the renovation project. The earlier complaints all contain substantially the same allegations of defendants’ mismanagement of the project as does the proposed FAC. Indeed, had Great Northern not reimbursed the 217 plaintiffs for the damage from the leak that occurred on January 31, 2019, the damage from that leak would have been at issue as a claim of the 217 plaintiffs themselves, inasmuch as the 217 plaintiffs allege that the leak was a result of defendants’ mismanagement of the project . . . As plaintiffs point out, the only effect of the assertion of the subrogation claim is to shift the claim for a portion of the damages allegedly caused by defendants’ alleged wrongdoing from the 217 plaintiffs to Great Northern, their insurer.

Id. at *6.

The court rejected defendants’ position that the earlier complaints did not give notice of at least one essential element of the subrogation claim because it has previously held that “[d]efendants need not have been put on notice of every

factual allegation on which the subsequent claims depend . . . [where] the original complaint put them on notice of the occurrences that underlie those claims (citation omitted).” *Id.* at *9.

The court similarly dispensed with the defendants’ assertion that the failure to add the subrogation claim before the limitations period expired was not inadvertent or a mistake, but was instead a deliberate choice. Here, plaintiff’s motion was seeking to add a claim, not a party. Thus, the issue of a “mistake,” as noted above one prong of the three-part test for adding a new defendant, simply did not apply:

“[W]here, as here, a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation-back are permitted” (citation omitted).

Id. at *10.

The court added that even if the mistake element applied, it could not “say that the delay in asserting the subrogation claim was not based on oversight or mistake of law.”

Finally, the court refused to find that the amendment to assert the subrogation claim would unfairly prejudice the defendants, by subjecting them potentially to greater liability.

Initially, as defendants concede, this Court has never treated the potential for additional liability as conclusively demonstrating undue prejudice for relation-back purposes. That this Court has permitted an amendment to assert an otherwise untimely derivative claim also shows that an increase in exposure to potential liability does not constitute undue prejudice for these purposes. As we said in *Giambrone*, to find prejudice, “there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” . . . As with their notice argument, defendants’ prejudice argument collapses when one considers that the claim for damages based on the January 31, 2019 radiator leak would plainly be part of the case if it were not covered by insurance and were being asserted by the 217 plaintiffs themselves, rather than by their insurer. That the insurer has paid the claim and now asserts the claim as the subrogee of the 217 plaintiffs should not lead to a different result (citations omitted).

Id. at *11.

**Hope that your summer was enjoyable, restful and peaceful.
David**