New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

No. 792 November 2026

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

NYSBA

CASE LAW DEVELOPMENTS

Majority of Court of Appeals Affirms Grant of Summary Judgment on Plaintiff's Adverse Possession Claim

Dissent Finds Material Issues of Fact on Hostility and Exclusivity Requirements

Genesee County Fish & Game Protective Assn., Inc. v. Sullivan, 2026 N.Y. Slip Op. 06168 (Oct. 22, 2026) addresses whether the plaintiff was entitled to summary judgment on its adverse possession claim. A split Court of Appeals affirmed the lower courts' grant of the motion.

The plaintiff is a private conservation association incorporated in 1909 as a not-for-profit that owns a 200-acre parcel of land in Genesee County. In addition to the conservation activities, the plaintiff provides its approximately 1,500 members with recreational opportunities, with 21 of those members residing year-round on the property. The defendants, a married couple (the Dixes), used a 45-acre property east of the plaintiff's land for recreation. Capri Dix, a former member of the association (as were other predecessors in interest), was the owner of the property, having been granted a remainder interest from her grandmother. The plaintiff's and defendants' properties are divided by Godfrey's Pond Road: the plaintiff has owned the western half of the road since 1932, and defendants and their predecessors in interest obtained title to their eastern half of the road at least as early as 1949. Godfrey's Pond Road provides "the only access to the property for plaintiff's members, emergency services vehicles, and delivery services."

In 2021, there was a dispute between the defendants and the plaintiff regarding the use and ownership of the road. There were "several provocative actions primarily taken by defendants and members of their family, including blocking the eastern half of the road with tree trunks," and an encounter between association members and defendants resulting in police intervention. Plaintiff then brought this action asserting, as relevant here, a cause of action for title by adverse possession and a judicial declaration that plaintiff was the rightful and legal owner of the eastern portion of the road. The trial court granted plaintiff's summary judgment motion and a closely divided Appellate Division (3-2) affirmed.

A majority of the Court of Appeals (5-2) affirmed in a brief memorandum opinion. The dissent, written by Judge Rivera and joined by Chief Judge Wilson, was a lengthier one, which sets forth the underlying facts in more detail.

Before we get to those opinions, we need to review the underlying law. First, on a summary judgment motion, referred to as a "drastic remedy," the moving party must make out a prima facie showing of entitlement to judgment as a matter of law, offering evidence eliminating any material issues of fact; the court is to view the facts in the light most favorable to the non-moving party; and the court is to draw all reasonable inferences in the non-movant's favor.

Second, as the dissent notes: "Adverse possession serves as a legal doctrinal basis for granting fee simple title to a non-owner who has used and occupied the property in question in a manner adverse to the rights of the owner for the prescribed statutory period. The owner's title is extinguished as a matter of law, and a new, lawful title is declared in the adverse possessor (citations omitted)." *Id.* at *3. In order to establish an adverse possession claim, the property's occupation "must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)." *Estate of Becker v Murtagh,* 19 N.Y.3d 75, 81 (2012). Adverse possession is "not a favored method of procuring title." *Belotti v Bickhardt*, 228 N.Y. 296, 308 (1920). Nevertheless, "adverse possession is 'a necessary means of clearing disputed titles' and ensuring that title is not permanently encumbered (citations omitted)." *Golobe v Mielnicki*, 44 N.Y.3d 86, 98 (2025).

IN THIS ISSUE

Majority of Court of Appeals Affirms Grant of Summary Judgment on Plaintiff's Adverse Possession Claim

Doctor Covered Under Self-Insurance Plan Pursuant to On-Call, Per Diem Doctor Employment Agreement

Request for CPLR 306-b Extension Fails Under Interest of Justice Standard

Resort to CPLR 317 as an Alternative to CPLR 5015(a) in Vacating a Default

Noting that adverse possession supports an "important policy of repose," the majority in *Genesee County* held that the "unique facts" in this case supported the grant of plaintiff's summary judgment motion:

> Plaintiff's proof on each of the required elements was sufficient to establish title by adverse possession, and in response defendants raised no triable issue of fact. Among other evidence establishing hostile and exclusive possession of the road, plaintiff's submissions demonstrated that "it was only plaintiff that had plowed, patched, paved, repaired, and otherwise maintained the entire road for decades."

Genesee County at *2.

The dissent, however, found there to be material issues of fact because the plaintiff failed to establish with clear and convincing evidence its hostile, rather than consensual, and exclusive use and possession of the eastern half of the road during the entire statutory period. The dissent focused on "whether defendants' predecessors in interest gave plaintiff express permission to use the disputed portion of the road, or alternatively, whether there was a close, neighborly, and accommodating relationship between plaintiff and defendants' predecessors in interest that implies permissive use of the disputed property by plaintiff and thus defeats the usual presumption of hostility (citations omitted)." *Id.* at *4–5. Significantly, if plaintiff's use of the eastern half of the road was permissive, it could not prove the hostility and exclusivity elements. Moreover, if it were established that entry on the disputed land was initially permitted, then adverse possession will not begin "until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner (citation omitted)." *Id.* at *6.

The dissent found that the record reflected that the plaintiff's use of the eastern portion of the road was permissive, creating material issues of fact, pointing to the following facts:

> Here, the record demonstrates a friendly, neighborly, and cooperative relationship between plaintiff and its associational members and defendants and their predecessors in interest, spanning decades, which implies that plaintiff's use of the disputed eastern portion of the roadway was permissive. Indeed, defendant Capri Dix and many of her predecessors in interest and past and current family members were associational members of plaintiff themselves, and would use the road to access plaintiff's property, coming and going as they pleased. Capri Dix's grandmother, great aunt, and great-grandmother would regularly ride horses on the road and on trails within plaintiff's property, and Capri's great-grandfather, Vincent Frens, was described by plaintiff as an extremely close friend of many of plaintiff's members before his passing. Additionally, prior to the instant dispute, Capri often used the entire road to access her approximately 45-acre parcel to the east of the property line, which she and her family members now primarily use for recreation.

Id.

Moreover, evidence was adduced that Capri's great-grandfather had permitted plaintiff's members to use the disputed portion of the road,

> although several of plaintiff's long-time members deny being aware that plaintiff did not own the entire road until this dispute arose. The veracity of these assertions goes directly to whether plaintiff's actions were hostile to title of defendants and their predecessors in interest. The record further reveals that Frens [the great-grandfather] allowed plaintiff to take gravel from a pit on his property to pave and patch the road, which, as noted, was mutually used by plaintiff's members and defendants and their predecessors in interest. Frens also permitted plaintiff's members to hunt on his property, indicative of their close, neighborly ties during his lifetime.

Id.

The dissent also ruled that the plaintiff had failed to establish as a matter of law its exclusive use of the property:

> "When the party claiming adverse possession permits others to use the property, exclusivity exists where the claimant's use of the property is 'separate and exclusive from the general use.'" "Thus, allowing others to use the property does not necessarily negate 'exclusivity.'" However, the element of exclusivity "is not established 'where [a claimant's] use is in connection with the use of the owner and the general public." Thus, exclusivity is negated if the record demonstrates that the claimant's use "was with [the owner's] permission rather than being hostile" (citations omitted).

Id. at *6–7.

The dissent conceded that the evidence indicated that the plaintiff's use of the disputed portion of the road exceeded that of the defendants and that the plaintiff did plow, patch, pave, repair and maintain the road. However, it maintained that those facts did not eliminate material issues of fact with respect to the plaintiff's exclusive use for the entire statutory period, in the face of other facts showing the defendants' (and their predecessors') extensive use of the entire road and consent to the plaintiff's member use.

While agreeing with the majority that "repose is a worthy goal," the dissent insisted that that did not justify a finding of adverse possession based on the facts here:

> [R]epose is not an appropriate justification to excuse plaintiff's failure to establish by clear and convincing evidence—leaving no material triable question of fact unresolved—its claim to title by adverse possession based on a summary judgment record of mutual use and enjoyment of the property by these neighbors and their predecessors. It would be a different case without this close, cooperative, and long-standing associational relationship between the parties and their predecessors in interest, but those ties cannot be disentangled on a summary judgment motion.

Id. at *7.

Doctor Covered Under Self-Insurance Plan Pursuant to On-Call, Per Diem Doctor Employment Agreement

Court Also Deals with "Other Insurance" and Priority of Coverage Issues

In *Kolli v. Kaleida Health*, 2026 N.Y. Slip Op. 06167 (Oct. 22, 2026), the decedent Dr. Kolli treated a patient while working as an on-call, per diem doctor under an employment agreement with the defendant Kaleida Health. The patient brought a medical malpractice action against Dr. Kolli and Kaleida. Dr. Kolli filed an insurance claim with his primary medical malpractice (MLMIC) and excess (HPIC) insurers. After Dr. Kolli died, the underlying medical malpractice action was settled, with the insurers and Kaleida agreeing to fund the settlement one-third each with a reservation of rights as to the insurance coverage and its priority. This declaratory judgment action resulted, with the parties agreeing to reimburse each other as per the court's ultimate determination.

The first issue was whether Dr. Kolli was covered by Kaleida's self-insurance plan (SIP). The Court of Appeals found there to be coverage, highlighting "the unambiguous terms" of the SIP and the employment agreement:

> Kaleida's SIP expressly stated that physicians employed by Kaleida for the purpose of providing patient care are "covered persons" while "acting on behalf of, or at the direction of" Kaleida. And section 6 (a) of Dr. Kolli's employment agreement with Kaleida unambiguously provided that he would be covered by Kaleida's SIP when acting pursuant to the employment agreement, as he was when he treated the patient at a Kaleida facility pursuant to his duties as a Kaleida on-call physician. We agree with the lower courts that Kaleida's proposed reading of section 6 (b) (ii) of the employment agreement is not reasonable because it would render other provisions of the employment agreement a nullity. Specifically, Kaleida's proposed interpretation would mean that Dr. Kolli was never covered under the SIP, despite the unambiguous terms to the contrary in section 6 (a) of the employment agreement. Instead, we agree with the Appellate Division that the only reasonable interpretation of section 6 (b) (ii) is that it applied when Dr. Kolli treated his private practice patients at a Kaleida facility, as opposed to patients he treated for the first time while performing his on-call duties for Kaleida.

Id. at *1–2.

The next issue related to the priority of coverage. Initially, the Court rejected Kaleida's argument that its SIP did not constitute "other insurance" pursuant to the MLMIC and HPIC policy provisions. To the contrary,

> Kaleida's SIP was an insurance policy: it protected physicians such as Dr. Kolli and others against risk, required reporting of claims, and contained terms regarding priority of coverage and coverage exclusions. It was not merely a "self-insurance mechanism" for Kaleida to pay its own judgments. Moreover, the "other insurance" clauses contained within the MLMIC and HPIC policies expressly encompassed "insurance equivalent[s]" or "equivalent coverage." Even if the SIP was not "insurance," it was at a minimum an "equivalent" thereto (citation omitted).

Id. at *2.

The Court also agreed, for the reasons set forth by the Appellate Division, that (a) the HPIC policy specifically stated that its coverage was in excess of MLMIC's coverage, (b) Kaleida's coverage was also excess to MLMIC's coverage, and (c) Kaleida and HPIC were responsible for such excess coverage on a pro rata basis. The Fourth Department had reasoned that

> Kaleida's self-insurance plan provides that physicians "shall be assumed to be maintaining primary medical practice insurance" with coverage limits of at least $1 million per claim and $3 million aggregate. MLMIC, as the primary insurer, had policies of $1.3 million "Each Person Limit" and a $3.9 million "Total Limit." Under the circumstances of this case, MLMIC's "Each Person Limit" applies, and Kaleida and HPIC are responsible as excess insurers for the remaining portion of the settlement, with Kaleida responsible for 91.67% and HPIC responsible for 8.33% (citations omitted).

Kolli v. Kaleida Health, 229 A.D.3d 1303, 1306–07 (4th Dep't 2024).

Request for CPLR 306-b Extension Fails Under Interest of Justice Standard

Running of Statute of Limitations Not Enough Because of Plaintiff's Extreme Lack of Diligence

In the October 2026 edition of the *Law Digest,* we discussed the decision in *M&T Bank v. Global Sign Cleaning & Maintenance, Inc.,* 2026 N.Y. Slip Op. 05092 (2d Dep't August 26, 2026), in which the Second Department addressed the good cause standard, requiring a showing of due diligence to obtain an extension under CPLR 306-b. As noted there, however, the interest of justice standard does not require the showing of such diligence as a prerequisite to its application, but is considered one of the factors, among others. They include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of the plaintiff's request for the extension, and prejudice to the defendant. *Leader v. Maroney, Ponzini and Spencer*, 97 N.Y.2d 95, 105–06 (2001).

It is important to note, however, that a showing of "extreme lack of diligence" can result in the denial of a CPLR 306-b motion even under the interest of justice standard.

In *Gonzalez v. Country Manor Apts.,* 2026 N.Y. Slip Op. 06002 (1st Dep't Oct. 15, 2026), the trial court denied plaintiff's CPLR 306-b cross-motion to extend plaintiff's time to serve the amended complaint. The First Department affirmed, first finding that the plaintiff had not established good cause. The court relied on the plaintiff's failure to use "reasonably diligent efforts" to serve the defendants-owners of the property where the accident occurred, or to ascertain which entity or entities owned the property when the accident happened.

Moreover, the plaintiff failed to establish that his failure to timely serve resulted from circumstances beyond his control, in view of the denial of plaintiff's motion for a default judgment against the defendant CMA in June 2023

> based on his apparent lack of knowledge of the entity that owned the premises where he was injured, and his ensuing 13-month delay in seeking to identify the entities that actually owned the property from the Department of State. Indeed, information available online indicates that process could have been served on the Secretary of State and that the owners changed their address for receiving notice of such service in March 2022, before plaintiff purported to serve CMA in April 2022. Plaintiff's "continued mistaken belief" that CMA simply defaulted even after his default judgment motion was denied is akin to law office failure, which cannot support a finding of good cause (citations omitted).

Id. at *2.

The court also held that an extension in the interest of justice was not merited. Significantly, as noted above, one of the factors to be considered is whether the statute of limitations has run, thereby resulting in the loss of a potentially meritorious claim, which apparently was relevant here. However, the Appellate Division agreed with the trial court that the plaintiff's "extreme lack of diligence" was dispositive:

> The default judgment motion was denied, at the latest, almost five months before the limitations period expired. Additionally, service was delayed for three years, as this action was commenced in March 2022, plaintiff sought leave to amend in September 2024, and the owners were only served in March 2025. Further, plaintiff did not promptly request an extension of time to serve in June 2023, when he should have discovered service was possibly defective, instead cross-moving two years later in response to the owners' motion to dismiss. Plaintiff did not explain why he delayed in ascertaining the owners' identities or moving to extend time for service (citation omitted).

Id.

The First Department stressed that the applicable statute of limitations was three years and " 'defendants had no notice of plaintiff['s] claims for nearly [four and a half] years after their accrual, leading to an inference of substantial prejudice.' 'Because some factors weigh in favor of granting an interest of justice extension and some do not,' we decline to 'disturb Supreme Court's discretion-laden determination (citations omitted).' " *Id.* at *3.

Resort to CPLR 317 as an Alternative to CPLR 5015(a) in Vacating a Default

Failure to Update Address With Secretary of State Not Barrier to Vacating Default Under CPLR 317

When seeking to vacate a default, practitioners are generally familiar with CPLR 5015. Specifically, CPLR 5015(a) provides that the court that issued the order or judgment can "relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct" on several grounds, including—relevant here—excusable default. Thus, to have the order or judgment vacated (set aside), the party must show that the default was excusable and that there is a meritorious claim or defense. Law office failure can be considered. *See* CPLR 2005. The motion must be made within one year after service on the moving party of the order or judgment with notice of entry, or within one year after the date of entry if the moving party entered the order or judgment.

Some practitioners may not be as readily aware of CPLR 317, which can apply in the case of a default. It provides that in actions, other than for divorce, annulment, or partition, a person *not* served by personal delivery, or through an agent (CPLR 318), who does not appear, "may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry." CPLR 317. Significantly, while the person must demonstrate that they have a meritorious defense under CPLR 317, unlike CPLR 5015(a)(1) they are not required to provide an excuse for the failure to appear, other than establishing that they "did not personally receive notice of the summons in time to defend." CPLR 317. Nevertheless, it is good practice to set forth an excuse, if available, since many motions to vacate can be brought pursuant to both sections.

Sherpa v. SRF Partnership, L.P., 2026 N.Y. Slip Op. 06340 (2d Dep't Oct. 28, 2026) highlights another benefit of CPLR 317. Service of the summons and complaint on the corporation via the Secretary of State—the service used here—is *not* considered personal delivery to the corporation, making CPLR 317 available. Generally, when applying to vacate under CPLR 5015, a defendant's failure to update its address with the Secretary of State is not a reasonable excuse for a default. *See San-Dar Assoc. v. Corporate Habitat NY, LLC*, 226 A.D.3d 525 (1st Dep't 2024). However, since there is no need under CPLR 317 to show an excuse for failing to appear, as noted in *Sherpa*,

> the defendant established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time that the summons and complaint were served was incorrect and, consequently, that it did not receive actual notice of the action in time to defend itself. Further, there is no basis in the record to conclude that the defendant's failure to update its address with the Secretary of State constituted a deliberate attempt to avoid service of process (citations omitted).

Id. at *1.

The court added that the defendant demonstrated that it had a potentially meritorious defense.

© 2026 by the New York State Bar Association
ISSN 0028-7636 (print) ISSN 2379-1225 (online)