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AMEND COMPLAINT, MOTION TO DISMISS.

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The First Department, in a full-fledged opinion by Justice Richter, over a partial dissent, determined plaintiff's (the Trustee's) motion to amend its complaints in these residential mortgage backed securities actions should have been granted. The amendment sought to allege defendant breached the underlying contract by failing to notify the trustee of loan breaches. The majority found that the contract provision requiring notice was ambiguous. The dissent argued the contract was not ambiguous and did not require notification:

It is well settled that "[a] request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" … . "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" … .

Judged by these standards, the motion court should have granted the Trustee's motions for leave to file the amended complaints with respect to the express breach of contract claims based on DBSP's (defendant's) failure to notify the Trustee of the loan breaches … . It cannot be said, at this early stage of the proceedings, that these claims are "palpably improper or insufficient as a matter of law" … . Nor has DBSP asserted, let alone shown, that it would suffer any prejudice or surprise directly resulting from the delay. * * *

… [B]because the disputed provision is reasonably susceptible to more than one interpretation, "it cannot be construed as a matter of law, and dismissal . . . is not appropriate" … . LDIR, LLC v DB Structured Prods., Inc., 2019 NY Slip Op 03154, First Dept 4-25-19

BUSINESS RECORDS EXCEPTION, NEW THEORY RAISED IN OPPOSITION.

REPORT OF FIRE MARSHAL, WHO HAD NO INDEPENDENT RECOLLECTION OF HIS INVESTIGATION INTO THE CAUSE OF THE FIRE, WAS ADMISSIBLE PURSUANT TO THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE, COURT SHOULD NOT HAVE CONSIDERED A NEW THEORY OF LIABILITY RAISED FOR THE FIRST TIME IN PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff could not defeat a summary judgment motion by raising a new theory of liability in the opposing papers:

The report established that the fire marshal conducted an investigation at the subject premises and concluded that the fire in defendants' building was caused by combustible clothing left in a dryer for too long, rather than any defect in the premises or dryer … . Although the fire marshal did not have an independent recollection of his investigation, his report was admissible under the business record exception to the hearsay rule, and was sufficient to satisfy defendants' prima facie burden, since it noted that he independently inspected the premises and concluded that the accident was not due to defendants' negligence … .

In opposition, plaintiff failed to raise a triable issue of fact. Her expert failed to address the theories of liability raised in the complaint and bill of particulars and failed to rebut defendants' showing. Instead, plaintiff's expert raised a new theory, namely that plaintiff's injuries from smoke inhalation were caused by the absence of a self-closing door in the laundry room where the fire occurred, which caused smoke to permeate into plaintiff's apartment. A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers … . Mirdita v Musovic Realty Corp., 2019 NY Slip Op 03284, First Dept 4-30-19

DEPOSITIONS, REPLY PAPERS.

UNSIGNED DEPOSITIONS WERE ADMISSIBLE AND EVIDENCE SUBMITTED IN REPLY SHOULD HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department, although affirming the denial of defendants' motion for summary judgment in this slip and fall case on other grounds, noted that the depositions were admissible and evidence submitted in reply should have been considered:

Although the plaintiff's deposition transcript, which the defendants submitted in support of their motion, was unsigned, it was nonetheless admissible as the plaintiff raised no objection to its submission or accuracy and, in fact, requested that the Supreme Court "incorporate" his transcript into his opposition … . Regarding the deposition transcript of the decedent's niece, which the defendants also submitted in support of their motion, the defendants demonstrated that they had submitted the unsigned transcript to the decedent's niece for review, but that she failed to sign and return it within 60 days. Thus, the niece's deposition transcript could have been used by the defendants as fully as though signed (see CPLR 3116[a] …). Furthermore, even though the evidence demonstrating the defendants' compliance with CPLR 3116(a) was submitted by the defendants in reply, the court should have considered it, because it was in direct response to allegations raised for the first time in the plaintiff's opposition papers … . The unsigned deposition transcript of the defendants' property manager was admissible under CPLR 3116(a) since it was submitted by the defendants themselves and thus adopted as accurate … . Baptiste v Ditmas Park, LLC, 2019 NY Slip Op 02844, Second Dept 4-17-19

DISCOVERY, MEDICAL RECORDS.

DEFENDANT'S HEALTH AT THE TIME OF THE TRAFFIC ACCIDENT WAS NEVER PLACED IN CONTROVERSY AND THE PHYSICIAN-PATIENT PRIVILEGE WAS NOT WAIVED BY A LETTER TO PLAINTIFF'S ATTORNEY INDICATING DEFENDANT SUFFERED FROM DEMENTIA, ANXIETY AND DEPRESSION (SECOND DEPT).

The Second Department, over a two-justice dissent, determined that defendant driver's (Rozansky's) medical condition at the time of this 2004 traffic accident was not "in controversy" and therefore the driver's medical records were not discoverable. Rozansky, who subsequently died, had, in 2006, submitted a letter from his social

worker to plaintiff's attorney claiming he suffered from dementia, anxiety and depression, allegedly to be excused from a deposition, but otherwise the issue of the Rozansky's health was not raised:

… [T]he plaintiffs failed to sustain their initial burden of demonstrating that Rozansky's condition at the time of the accident was "in controversy" within the meaning of CPLR 3121(a) … . Furthermore, even if the plaintiffs had met that burden, neither Rozansky nor his estate waived the privilege attached to the medical records, as the defendant has not asserted a counterclaim or sought to excuse Rozansky's conduct at the time of the accident on the basis of some condition … . Contrary to the conclusion of our dissenting colleagues, Rozansky did not place his mental condition at the time of the accident "in controversy" or waive the privilege attached to his medical records by allegedly declining to be deposed … . Neither Rozansky nor his estate have sought to excuse his conduct at the time of the accident … , due to any condition. At best, Rozansky placed his mental condition in September 2006 at issue by allegedly refusing to appear for a deposition … . The plaintiffs could have moved at that time to compel the deposition and challenged the social worker's diagnosis. Instead, nine years after the social worker's letter, and six years after Rozansky's death, and after filing three notes of issue over the course of some seven years, indicating that discovery was complete and the case was ready for trial, the plaintiffs purported to use the mechanism of a trial subpoena to compel production of Rozansky's medical records from October 22, 1999, to the present. We disagree with our dissenting colleagues that Rozansky's alleged invocation of dementia in September 2006, by submission of a letter from his social worker, established a waiver of the privilege attached to his medical records from October 22, 1999. Peterson v Estate of John Rozansky, 2019 NY Slip Op 02568, Second Department, 4-3-19

DISCOVERY, SPOLIATION.

PLAINTIFF WAS NOT ENTITLED TO THE PRESUMPTION DEFENDANT RECEIVED A LETTER ALLEGEDLY REQUESTING THAT SURVEILLANCE VIDEO BEFORE AND AFTER PLAINTIFF'S SLIP AND FALL BE PRESERVED AS THERE WAS NO PROOF OF MAILING, DEFENDANT SHOULD NOT HAVE BEEN SANCTIONED FOR SPOLIATION PURSUANT TO CPLR 3126 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the plaintiff was not entitled to the "presumption of receipt" with respect to a letter alleged to have been sent to the defendant requesting that surveillance video from 6 hours before to 2 hours after plaintiff's slip and fall be preserved. Only a two-minute clip showing plaintiff's fall had been preserved and Supreme Court had precluded the defendant from presenting video evidence as a sanction for spoliation pursuant to CPLR 3126:

… [T]he plaintiff did not establish that the defendant failed to preserve all of the surveillance video footage taken on the date of the accident after the defendant was placed on notice that the evidence might be needed for future litigation … . The letter dated February 23, 2016, which was submitted for the first time with the plaintiff's reply papers, may be considered, since the defendant had an opportunity to respond and submit papers in surreply … . However, the defendant denied receiving this letter and we reject the plaintiff's argument that he is entitled to the presumption of receipt. The mere assertion in the reply affirmation of the plaintiff's attorney that the letter dated February 23, 2016, was "sent" to the defendant, unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice or procedure designed to ensure that the letter was properly addressed and mailed, was insufficient to give rise to the presumption of receipt that attaches to letters duly addressed and mailed … . Sanders v 210 N. 12th St., LLC, 2019 NY Slip Op 02737, Second Dept 4-10-19

FAMILY LAW, CHOICE OF LAW.

DESPITE THE PROVISION IN THE SEPARATION AGREEMENT REQUIRING THAT ANY MODIFICATION OF SUPPORT APPLY NEW JERSEY LAW, BECAUSE ALL PARTIES RESIDED IN NEW YORK WHEN THE MODIFICATION APPLICATION WAS MADE, NEW YORK LAW CONTROLS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined that. despite the choice of law provision in the separation agreement, New York law applied to any modification of child support. The family lived in New Jersey when the separation agreement, providing that New Jersey law would control support modification, was executed. But all parties were living in New York when the application for modification was made:

… [W]e conclude that the court had jurisdiction pursuant to the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B) to resolve the issues raised in the mother's petition and objections … . The UIFSA unequivocally provides that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order" … . Furthermore, we agree with the mother that New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that "[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification" (Family Ct Act § 580-613 [b]). …

Although courts will generally enforce a choice of law clause ” so long as the chosen law bears a reasonable relationship to the parties or the transaction’ ” … , courts will not enforce such clauses where the chosen law violates ” some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal’ ” … . It is long settled that New York has a “strong public policy that obligates a parent to support his or her child” . Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act ([CSSA] Family Ct Act § 413), and ” [t]he duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement’ ” … . In addition, whereas … Jersey law provides that child support obligations generally end when a child reaches the age of 19 … , in New York, “[a] parent’s duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy” … . Under the circumstances, and given that the parties do not have a valid agreement to opt out of the CSSA (see generally Domestic Relations Law § 240 [1-b] [h]), we conclude that enforcement of the parties’ choice of law provision would violate those strong New York public policies. Matter of Brooks v Brooks, 2019 NY Slip Op 03164, Fourth Dept 4-26-19

FAMILY LAW, JURISDICTION.

NEW YORK DID NOT HAVE SUBJECT MATTER JURISDICTION OVER A CUSTODY MATTER BECAUSE THE CHILD HAD NOT LIVED IN NEW YORK FOR SIX MONTHS AT THE TIME THE PROCEEDINGS WERE COMMENCED, NEW JERSEY STILL HAD JURISDICTION AT THAT TIME BECAUSE THE CHILD HAD BEEN REMOVED FROM NEW JERSEY LESS THAN SIX MONTHS BEFORE THE NEW YORK PROCEEDINGS WERE COMMENCED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, reversing Family Court, determined that New York did not have subject matter jurisdiction over a child custody proceeding. At the time the proceeding was brought the child had not lived in New York for six months and New Jersey still had jurisdiction. The Fourth Department went through the history of jurisdictional issues in custody matters and through each of the grounds for jurisdiction codified in the Domestic Relations Law:

Instead of claiming home state jurisdiction under Domestic Relations Law § 76 (1) (a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76 (1) (d), which confers jurisdiction to make custody determinations when, insofar as relevant here, “no court of any other state would have jurisdiction under the criteria specified in [section 76 (1)] (a).” …

We reject the mother's reliance on section 76 (1) (d). Under the special UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] definition of "home state" applicable to infants under six months old (Domestic Relations Law § 75-a [7]; NJ Stat Ann § 2A:34-54), New Jersey was the child's "home state" between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015) … . Because the UCCJEA confers continuing jurisdiction on the state that "was the home state of the child within six months before the commencement of the proceeding" if a parent lives in that state without the child (Domestic Relations Law § 76 [1] [a]; NJ Stat Ann § 2A:34-65 [a] [1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 … . Thus, New York lacked jurisdiction under section 76 (1) (d) because New Jersey could have exercised jurisdiction under the criteria of section 76 (1) (a) on the date of this proceeding's commencement … . Matter of Nemes v Tutino, 2019 NY Slip Op 03236, Fourth Dept 4-26-19

FAMILY LAW, POSTNUPTIAL AGREEMENT.

ALLEGATIONS THAT A POSTNUPTIAL AGREEMENT WAS UNCONSCIONABLE SURVIVED THE MOTION TO DISMISS, THE SUBSTANTIVE AND PROCEDURAL CRITERIA FOR THE DISMISSAL OF COUNTERCLAIMS AND AFFIRMATIVE DEFENSES ALLEGING FRAUD, DURESS, COERCION AND UNCONSCIONABILITY DISCUSSED IN SOME DEPTH (SECOND DEPT).

The Second Department, modifying Supreme Court, dealt with the analytical criteria for motions to dismiss counterclaims and affirmative defenses in the context of a postnuptial agreement which was alleged to have been tainted by fraud, coercion, duress and unconscionability. The "unconscionable" allegations survived the dismissal motion. The decision covers all these substantive and procedural issues in some depth and cannot, therefore, be fairly summarized here:

An unconscionable agreement is "one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" … . Because of the fiduciary relationship between spouses, postnuptial agreements "are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" … . "To warrant equity's intervention, no actual fraud need be shown, for relief will be

granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching" … . "Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that [if] the execution of the agreement . . . be fair, no further inquiry will be made'" … .

Here, at this stage of the action, the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion … , are sufficient to allege both procedural and substantive unconscionability. Shah v Mitra, 2019 NY Slip Op 02739, Second Dept 4-10-19

FORECLOSURE, NYSCEF ELECTRONIC FILING.

PURSUANT TO AN EXCEPTION IN 22 NYCRR 202.5-b, USING THE NYSCEF ELECTRONIC FILING SYSTEM DID NOT CONSTITUTE PROPER SERVICE OF A NOTICE OF ENTRY ON DEFENDANTS, THE TIME FOR DEFENDANTS TO ANSWER THEREFORE NEVER STARTED TO RUN AND DEFENDANTS WERE NOT IN DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a notice of entry in this foreclosure action, although the NYSCEF electronic filing system was used, was not properly served and therefore defendants' time to answer never started running and defendants were not in default:

Contrary to the determination of the Supreme Court, since the plaintiff never served the Dedvukaj defendants with notice of entry of the June 2015 order denying their motion to dismiss the complaint, their answer was timely served, as their time to answer never started to run (see CPLR 3211[f] …). …

Pursuant to 22 NYCRR 202.5-b, the court rule governing electronic filing for the Supreme Court, a party may serve an interlocutory document upon another party by filing the document electronically: "Upon receipt of [the] interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action . . . . Except as provided otherwise in subdivision (h)(2) of this section, the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein" … .

Subdivision (h)(2), which appears in a subsection entitled "Entry of Orders and Judgments and Notice of Entry," provides, in relevant part: "[a] party may serve [an order or judgment and written notice of its entry] electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of

receipt of the documents, which shall constitute service . . . by the filer. In the alternative, a party may serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103(b)(1) to (6). If service is made in hard copy by any such method and a copy of the order or judgment and notice of its entry and proof of such hard copy service are thereafter filed with the NYSCEF site, transmission by NYSCEF of notification of receipt of those documents shall not constitute additional service of the notice of entry on the parties to whom the notification is sent" … . JBBNY, LLC v Dedvukaj, 2019 NY Slip Op 02692, Second Dept 4-10-19

FORECLOSURE, DISMISSAL BASED ON LOCAL RULE.

DENIAL OF DEFENDANT'S MOTION TO VACATE HIS DEFAULT IN THIS FORECLOSURE ACTION DID NOT PRECLUDE DEFENDANT'S MOTION TO DISMISS BASED UPON PLAINTIFF BANK'S FAILURE TO MOVE FOR A JUDGMENT OF FORECLOSURE WITHIN ONE YEAR AS REQUIRED BY KINGS COUNTY LOCAL RULE 8 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the denial defendant's motion to vacate a default judgment did not preclude defendant's motion to dismiss the foreclosure action based upon plaintiff bank's failure to comply with Rule 8 (Kings County Supreme Court Uniform Civil Rules) :

In August 2013, the plaintiff commenced this mortgage foreclosure action against the defendant Andy McAlpin (hereinafter the defendant) and others. The defendant did not answer or appear in the action, and in February 2014, the plaintiff moved, inter alia, for leave to enter a default judgment and for an order of reference. In an order dated October 24, 2014, the Supreme Court granted the plaintiff's motion. The plaintiff did not move for a judgment of foreclosure and sale, and in May 2016, the defendant moved, inter alia, pursuant to CPLR 5015(a)(4) to vacate the order of reference and to dismiss the complaint insofar as asserted against him on the ground that he had not been served with the summons and complaint, for leave to serve a late answer, and to dismiss the complaint on the ground that the plaintiff failed to comply with Part F, rule 8, of the Kings County Supreme Court Uniform Civil Term Rules (hereinafter Rule 8). Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference. …

Contrary to the Supreme Court's determination, the defendant was not precluded from seeking relief under Rule 8 by the denial of that branch of his motion which was to vacate his default … . Bank of Am., N.A. v McAlpin,b2019 NY Slip Op 02843, Second Dept 4-17-19

FORECLOSURE, JUDGES, SUA SPONTE.

JUDGE'S SUA SPONTE DISMSSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION DEPRIVED PLAINTIFF OF NOTICE AND A CHANCE TO BE HEARD, A VIOLATION OF DUE PROCESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint as abandoned without giving plaintiff a chance to be heard in this foreclosure action:

… [B]y notice of motion dated August 15, 2014, the plaintiff … moved, inter alia, to extend its time to serve a copy of the order of reference with notice of entry … , nunc pro tunc, to March 23, 2007 (hereinafter the second extension of time motion). In an order dated February 26, 2015 (hereinafter the February 2015 order), the Supreme Court denied the second extension of time motion, and, sua sponte, directed the dismissal of the complaint as abandoned, noting, inter alia, that "[t]he order of reference at issue was signed in 2007" and the appointed referee was no longer on the fiduciary list. …

The Supreme Court's sua sponte determination to direct dismissal of the complaint deprived the plaintiff of notice and opportunity to be heard and amounted to a denial of the plaintiff's due process rights (see CPLR 3216 …). Accordingly, the court should have granted that branch of the plaintiff's motion which was to vacate the February 2015 order. Chase Home Fin., LLC v Plaut, 2019 NY Slip Op 02494, Second Dept 4-3-19

FORECLOSURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE COMPLAINT IN THE ABSENCE OF THE PRECONDITIONS REQUIRED BY CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the court was without power to dismiss for neglect to prosecute because the preconditions in CPLR 3216 were not met. Supreme Court dismissed the complaint in this foreclosure action, finding that plaintiff bank had not complied with an oral directive issued at a status conference:

Following settlement conferences held pursuant to CPLR 3408, the action was released from the foreclosure settlement conference part without any resolution. In an order … (hereinafter the dismissal order), the Supreme

Court directed dismissal of the action on the ground that the plaintiff failed to comply with an oral directive issued at a status conference … , to resume prosecution of the action. …[T]he plaintiff moved to vacate the dismissal order and to restore the action to the calendar. [T]he Supreme Court … denied the plaintiff's motion. …

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . Specifically, issue must have been joined, at least one year must have elapsed since joinder of issue, the defendant or the court must have served on the plaintiff a written demand to serve and file a note of issue within 90 days, and the plaintiff must have failed to serve and file a note of issue within the 90-day period (see CPLR 3216[b] …). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days … . Citimortgage, Inc. v Ferrari, 2019 NY Slip Op 02847, Second Dept 4-17-19

FORECLOSURE, NOTICE REQUIRMENTS, REPLY PAPERS.

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; EVIDENCE OFFERED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED IF THE OPPOSING PARTY HAS THE OPPORTUNITY TO RESPOND (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not demonstrate it had complied with the notice requirements of RPAPL 1304. The court noted that evidence submitted in reply was properly considered because the opposing party had an opportunity to respond:

… [T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. RPAPL 1304(1) provides that at least 90 days before a lender, an assignee, or a mortgage loan servicer commences an action to foreclose the mortgage on a home loan as defined in RPAPL 1304, such lender, assignee, or mortgage loan servicer must give notice to the borrower. RPAPL 1304(1) sets forth the requirements for the content of such notice and RPAPL 1304(2) further provides that such notice must be sent "by registered or certified mail and also by first-class mail" to the last known address of the borrower. "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" … .

Here, even considering the affidavit of Victoria Bressner submitted by the plaintiff for the first time in opposition to the defendant's cross motion, the plaintiff failed to establish strict compliance with RPAPL 1304. Bressner did not have personal knowledge of the purported mailing and did not make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . Moreover, the record indicates that the notices were not mailed by the plaintiff. LNV Corp. v Sofer, 2019 NY Slip Op 02860, Second Dept 4-17-19

FRAUD, CONSTRUCTIVE FRAUD.

COMPLAINT STATED A CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD BUT THE HEIGHTENED PLEADING REQUIREMENTS FOR ACTUAL FRAUD WERE NOT MET (FIRST DEPT).

The First Department, in an action alleging members of defendant liability company fraudulently transferred funds from the LLC to the defendant members to render the LLC insolvent. The First Department determined the constructive fraud cause of action was sufficiently pled but the allegations did not support an actual fraud cause of action:

… [T]he complaint implicitly alleges that a necessary element of fair consideration, i.e., good faith, was lacking when the transfers were made. …

However, the complaint fails to state a cause of action for actual fraud under Debtor and Creditor Law §§ 276 and 276-a. … [U]nlike the allegations supporting the constructive fraud claim, the allegations supporting the actual fraud claim are subject to the heightened pleading standard of CPLR 3016(b), and the allegations about fair consideration do not meet that standard, because they were made upon information and belief, and the source of the information was not disclosed … .

Nor does the complaint allege any other badges of fraud. Brennan v 3250 Rawlins Ave. Partners, LLC, 2019 NY Slip Op 03002, First Dept 4-23-19

JUDGES, SUA SPONTE, DEFAULT JUDGMENT.

JUDGE SHOULD NOT HAVE, SUA SPONTE, VACATED A DEFAULT JUDGMENT IN THE ABSENCE OF A MOTION OR REQUEST, NO APPEAL AS OF RIGHT FROM A SUA SPONTE ORDER (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the judge did not have the authority to vacate a default judgment in absence of a request for that relief. The First Department treated the notice of appeal as a motion for leave to appeal, noting that a sua sponte order is not appealable as of right:

While an order entered sua sponte is not appealable as of right … , given the lack of evidence of the timeliness of the service of the answer and given the motion court's failure to identify a legal basis for vacating the prior order, we deem the notice of appeal a motion for leave to appeal, and grant leave … .

The court exceeded its authority in sua sponte vacating the prior order granting plaintiff's motion for a default judgment … . In the absence of a motion or other request for relief from the order, the court's discretion to correct the order was limited to curing any mistake, defect or irregularity "not affecting a substantial right of a party" (CPLR 5019[a]). Betts v Tsitiridis, 2019 NY Slip Op 02970, First Dept 4-22-19

JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ACTION FOR NEGLECT TO PROSECUTE WITHOUT MEETING THE REQUIREMENTS OF CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the case for neglect to prosecute in the absence of the prerequisites mandated by CPLR 3216:

… [T]he court directed the plaintiff to file a note of issue within 90 days, and warned that "[i]f plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court (CPLR 3216)." Five months later … the court, sua sponte, in effect, directed dismissal of the action … . …

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . "Effective January 1, 2015, the Legislature amended, in several

significant respects, the statutory preconditions to dismissal under CPLR 3216" … . One such precondition is that where, as here, a written demand to resume prosecution of the action is made by the court, "the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … . Here, the certification order did not set forth any specific conduct constituting neglect by the plaintiff … .

Additionally, before issuing an order dismissing the case based on a party's failure to comply with the 90-day demand, the court must give the party notice so that the party has an opportunity to "show a justifiable excuse for the delay and a good and meritorious cause of action" … . Here, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, in effect, directing dismissal of the action pursuant to CPLR 3216 … . Sadowski v W. David Harmon, 2019 NY Slip Op 02918, Second Dept 4-17-19

JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT FOR FAILURE TO PROSECUTE WITHOUT FOLLOWING THE REQUIREMENTS OF CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, dismissed the complaint for neglect to prosecute without following the procedure required by CPLR 3216:

The Supreme Court should not have, in effect, pursuant to CPLR 3216, sua sponte, dismissed the amended complaint, as the statutory preconditions to dismissal were not met … . A court cannot dismiss an action, sua sponte, pursuant to CPLR 3216(a) unless the conditions set forth in CPLR 3216(b) have been met, including the requirement that: "[t]he court or party seeking such relief . . . shall have served a written demand . . . requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed" (CPLR 3216[b][3] [emphasis added] …). Moreover, the court should not have administratively dismissed the amended complaint without further notice to the parties … . Marinello v Marinello, 2019 NY Slip Op 02697, Second Dept 4-10-19

JUDGMENT AS A MATTER OF LAW, SPOLIATION, LAW OF THE CASE.

MOTION FOR A JUDGMENT AS A MATTER OF LAW MADE DURING JURY SELECTION WAS PREMATURE, GRANTING THE MOTION ON SPOLIATION GROUNDS VIOLATED THE LAW OF THE CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to strike defendant's answer on spoliation grounds in this medical malpractice and wrongful death action, made during jury selection, should not have been granted. It was not a proper motion for a judgment as a matter of law pursuant to CPLR 4401 and the ruling violated the law of the case:

During jury selection, the plaintiff made an oral application, in effect, to strike the defendant's answer and for judgment as a matter of law on the issue of liability based on the defendant's alleged spoliation of evidence relating to certain telemetry strips and the defendant's failure to perform an autopsy on the decedent. In opposition, the defendant argued, among other things, that the Supreme Court had previously denied that branch of a prior motion by the plaintiff which was to strike the defendant's answer based on the defendant's alleged spoliation of evidence. …

"A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable" … . Here, the plaintiff's oral application, which was made during jury selection, was not based on any admissions by the defendant, and the Supreme Court should not have considered the merits of the plaintiff's application at that juncture … .

"The doctrine of the law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" … . The doctrine forecloses reexamination of an issue previously determined by a court of coordinate jurisdiction "absent a showing of newly discovered evidence or a change in the law" … .

Here, the Supreme Court violated the doctrine of law of the case by disregarding the prior order denying that branch of the plaintiff's earlier motion which was to strike the defendant's answer based upon the same evidentiary issues … . Fishon v Richmond Univ. Med. Ctr., 2019 NY Slip Op 02682. Second Dept 4-10-19

LAW OFFICE FAILURE, FAILURE TO ANSWER.

LAW OFFICE FAILURE WAS A REASONABLE EXCUSE FOR FAILING TO ANSWER, DEFENDANT'S MOTION TO EXTEND THE TIME TO APPEAR SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined low office failure was a legitimate excuse for failing to serve an answer. Defendant had made a pre-answer motion to dismiss, thereby demonstrating defendant did not intend to abandon the action:

Defendants satisfied the requirements of CPLR 3012(d), which authorizes an extension of time to appear or plead "upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Here, the delay in filing an answer was occasioned by law office failure, which can constitute a reasonable excuse … . Defendants' counsel explained that its failure to file its answer was due to an error in its office's case management system, which, upon the entry of a pre-answer motion to dismiss, marked the complaint answered. Notably, service of the pre-answer motion to dismiss revealed that defendants did not intend to abandon the action. Plaintiff does not argue that it has been prejudiced as a result of defendants' three month delay in submitting its answer … , and our determination comports with New York's strong public policy in favor of litigating matters on the merits … . Hertz Vehicles, LLC v Mollo, 2019 NY Slip Op 03270, First Dept 4-30-19

PRIVATE RIGHT OF ACTION.

NO PRIVATE RIGHT OF ACTION UNDER NEW YORK'S MENTAL HEALTH PARITY LAW (TIMOTHY'S LAW) (SECOND DEPT).

The Second Department determined that New York's mental health parity law (Timothy's Law, Insurance Law 3221(1)(5) and 4303(g)) did not create a private right of action over and above the administrative enforcement provisions. Plaintiff alleged the health insurance benefits administered by defendants were far more restrictive for mental health than for general medical claims:

… [T]he Court of Appeals has held that " regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme'" … . Thus, where "the legislature clearly contemplated administrative enforcement of the statute, "[t]he question then becomes whether, in

addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme"'" … . …

… .[D]eterminations of whether the law had been violated require[] complex, fact-based determinations about medical necessity, and DFS [NYS Department of Financial Services] had implemented a comprehensive system to evaluate appeals following denials of coverage … . … "[A]llowing people to litigate these issues in court might yield duplicative or inconsistent results" … . Kamins v United Healthcare Ins. Co. of N.Y., Inc., 2019 NY Slip Op 02507, Second Dept 4-3-19

SERVICE OF PROCESS, PROOF BURDEN.

ALTHOUGH DEFENDANT WAS AMBIVALENT ABOUT WHEN HE WAS SERVED, THE MOTION TO DISMISS SHOULD NOT HAVE BEEN DENIED ON THAT GROUND, IT IS PLAINTIFF'S BURDEN TO DEMONSTRATE A DEFENDANT WAS TIMELY SERVED WITH A SUMMONS AND COMPLAINT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion to dismiss the complaint because defendant was not timely served should have been granted. The defendant was ambivalent about when he was served and the motion was denied on that ground. However, it is the plaintiff's burden to prove when service was made:

… [T]he defendant Malka Hayut averred that she had been served on May 12, 2016, more than 120 days after the filing of the summons and complaint, and the defendant Meir Marc Hayut (hereinafter the appellant) averred only that he "may have been served" on May 12, 2016. … [T]he Supreme Court, inter alia, denied that branch of the defendants' renewed motion … to dismiss the complaint insofar as asserted against the appellant [Meir], on the ground that the appellant was equivocal as to whether he was timely served.

The burden of proving that personal jurisdiction was acquired over a defendant rests with the plaintiff … . Although the failure to file an affidavit of service with the court pursuant to CPLR 308(4) is generally a procedural irregularity which may be cured … , in this case, the plaintiff did not cure the defect. In the absence of evidence that the appellant was properly served, that branch of the defendants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against the appellant for lack of personal jurisdiction should have been granted … . Deb v Hayut, 2019 NY Slip Op 02676, Second Dept 4-10-19

STATUTE OF LIMITATIONS, DEFAMATION.

HYPERLINK TO A 2007 ALLEGEDLY DEFAMATORY ARTICLE IS NOT A REPUPLICATION OF THE ARTICLE WHICH WOULD START THE STATUTE OF LIMITATIONS RUNNING AGAIN, THE DEFAMATION ACTION WAS THEREFORE TIME-BARRED (FIRST DEPT),

The First Department determined a hyperlink in an email to an allegedly defamatory article is not a republication of the article which would start the statute of limitations running again. The defamation action was therefore time-barred:

… [t]he email sent by defendant to New Yorker magazine subscribers in April 2017 containing a hyperlink to an article published in the magazine in July 2010 does not constitute republication of the article … . The article was unmodified and had been continuously archived on the same website since the printed version was first published. Moreover, it is not alleged that the 2017 email, which included the link to the article in controversy, contained any defamatory statements about plaintiff. A reference to an article that does not restate the defamatory material is not a republication of the material … . **Biro v Condé Nast, 2019 NY Slip Op 02615 [171 AD3d 463], First Dept 4-4-19**

YOUTHFUL OFFENDERS, QUESTIONS ABOUT CHARGES.

A PERSON ADJUDICATED A YOUTHFUL OFFENDER CAN REFUSE TO ANSWER QUESTIONS ABOUT THE CHARGES, THE POLICE INVESTIGATION, THE PLEA AND THE ADJUDICATION, BUT CANNOT REFUSE TO ANSWER QUESTIONS ABOUT THE UNDERLYING FACTS (SECOND DEPT).

The Second Department determined defendant's youthful offender adjudication allows defendant to refuse to answer questions about the charges, the police investigation, whether she pled guilty and whether a youthful offender adjudication was made, but defendant cannot refuse to answer questions about the facts underlying the adjudication. Here plaintiff sued defendant for personal injuries stemming from a fight with defendant, which was the basis for the youthful offender adjudication:

"[A] person adjudicated a youthful offender may refuse to answer questions regarding the charges and police investigation, whether he or she pleaded guilty, and whether a youthful offender adjudication was made" … . However, "not all of the information contained within the protected records is necessarily privileged" … . The

statutory grant of confidentiality afforded to official records and the information contained therein does not extend to the facts underlying the incident which gave rise to the youthful offender adjudication (see CPL 720.35[2]). Thus, an eligible youth may not refuse, on grounds of confidentiality, to answer questions about the facts underlying the subject incident, even though those facts also form the basis of his or her youthful offender adjudication … . Arma v East Islip Union Free Sch. Dist., 2019 NY Slip Op 03019, Second Dept 4-24-19

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