NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
January 2019

Decision-Summaries Addressing "Civil Procedure" Posted on the New York Appellate Digest Website in January, 2019.

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BORROWING STATUTE.

LEGAL MALPRACTICE ACTION BROUGHT BY A NEW JERSEY RESIDENT IS UNTIMELY PURSUANT TO NEW YORK'S BORROWING STATUTE, NEW YORK'S SHORTER STATUTE OF LIMITATIONS WAS APPLIED (FIRST DEPT).

The First Department determined Supreme Court properly applied New York's borrowing statute (CPLR 202) and chose the shorter of the statutes of limitations for a legal malpractice action. New York's statute is three years and New Jersey's is six years. Plaintiff was a New Jersey resident:

The court correctly found the complaint time-barred under CPLR 202, New York's "borrowing statute," which requires a claim to be timely under both the New York limitations period and that of the jurisdiction where the claim is alleged to have arisen (*Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580[1st Dept 2010]).

Plaintiff, a New Jersey resident, alleged legal malpractice in connection with defendants' representation of him for numerous real estate transactions, a cause of action which has a three year statute of limitations in New York (CPLR 214 [6]), and a six year limitations period in New Jersey (NJ Stat Ann § 2A:14-1). The latest that the alleged malpractice could have occurred was February 7, 2013, the date set for closing on the last of the real estate matters. Because plaintiff commenced the action on October 28, 2016, more than three years later, it was correctly dismissed as untimely. **Soloway v Kane Kessler, PC, 2019 NY Slip Op 00026 [168 AD3d 407], First Dept 1-3-19**

DEBTOR-CREDITOR, JOINT TENANTS, SAFETY DEPOSIT BOX.

THE CONTENTS OF A SAFE DEPOSIT BOX CONSTITUTED THE PROPERTY OF JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP, THEREFORE THE CONTENTS ARE AVAILABLE TO SATISFY A JUDGMENT AGAINST ONLY ONE OF THE JOINT TENANTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, in a matter of first impression, determined the presumption of joint tenancy with rights of survivorship applied to the contents of a safe deposit box. The judgment debtor NYCB was owed $11 million by one of two persons (Rachel and Ari) who signed rental agreements for a safe deposit box. The First Department held that Supreme Court properly ordered the safe deposit box opened and the contents turned over to satisfy the judgment against Ari:

CPLR 5225(b) provides for an expedited special proceeding by which a judgment creditor can recover "money or other personal property" belonging to a judgment debtor "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest" in order to satisfy a judgment … . When two or more persons open a bank account, making a deposit of cash, securities, or other property, a presumption of joint tenancy with right of survivorship arises (Banking Law § 675[b] …). If the presumption is applied, each named tenant "is possessed of the whole of the account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants" … .

By relying on the terms of the rental agreement, NYCB met its burden of establishing Ari and Rachel as joint tenants with rights of survivorship of the safe deposit box account. The safe deposit box is controlled by each of them, each of them has access to the box at all times, and each of them can deposit property into the box or remove property from it without each other's permission. Should either one of them die, the survivor would have access to the box and could remove all its contents … . Matter of New York Community Bank v Bank of Am., N.A., 2019 NY Slip Op 00544, First Dept 1-24-19

DISCOVERY, ATTORNEY-CLIENT PRIVILEGE, WAIVER.

NEW YORK CITY HOUSING AUTHORITY COULD NOT AVOID DISCLOSURE OF RELEVANT DOCUMENTS BY RELYING ON ATTORNEY-CLIENT PRIVILEGE BECAUSE IT HAD PLACED THE KNOWLEDGE OF ITS LAW DEPARTMENT AT ISSUE, MOTION TO COMPEL WAS PROPERLY GRANTED, MONETARY SANCTIONS WERE PROPERLY ORDERED, WILLFUL AND CONTUMACIOUS BEHAVIOR NEED NOT BE SHOWN UNLESS A DRASTIC REMEDY LIKE STRIKING THE PLEADINGS IS IMPOSED (FIRST DEPT).

The First Department, over a dissent, determined Supreme Court properly sanctioned the defendant, the New York City Housing Authority (NYCHA), for failure to turn over documents in the discovery phase of a contract action. NYCHA alleged that third party defendants "engaged in [a]conspiracy to defraud NYCHA by submitting fraudulent certifications attesting that plaintiff's former owners had not been charged or convicted of a crime. … Third-party defendants maintain that they informed NYCHA that the charges … had been terminated with a conditional discharge based upon the payment of less than $200 in court costs. They assert that NYCHA extended all three of the contracts … while having full knowledge of these facts." NYCHA alleged the contested documents were protected by attorney-client privilege:

[Supreme Court] granted plaintiff and third-party defendants' motion to compel [NYCHA] to comply with discovery orders to the extent of ordering NYCHA to produce discovery material previously redacted on the ground of attorney-client privilege … and … to pay $3,000 as a sanction for its behavior during discovery and for violation of prior court orders, and to certify that it did not possess additional documents responsive to the discovery demands or court orders … . * * *

The court correctly found that having placed the knowledge of its law department at issue, NYCHA waived attorney-client privilege with respect to the subject documents. NYCHA cannot seek to prevent the disclosure of evidence showing that its attorneys — the very individuals who performed the bid review function for NYCHA — recommended that NYCHA award the contracts to plaintiff despite knowledge of the operative facts … .

Further, NYCHA may not rely on attorney-client privilege while selectively disclosing other self-serving privileged communications … .

The motion court providently exercised its discretion in finding that NYCHA's conduct during discovery warranted sanctions. …

… [I]t is unnecessary to demonstrate willful and contumacious behavior in order to impose a sanction like a monetary sanction or preclusion, as opposed to a more drastic sanction such as the striking of a pleading … . Metropolitan Bridge & Scaffolds Corp. v New York City Hous. Auth., 2019 NY Slip Op 00526, First Dept 1-24-19

DISCOVERY, CLASS ACTIONS.

TIMELINESS OF A MOTION SEEKING CLASS CERTIFICATION IS MEASURED BY THE INITIAL MOTION, NOT A SUBSEQUENT MOTION TO RENEW AFTER DENIAL WITHOUT PREJUDICE, DEFENDANTS WERE EFFECTIVELY PREVENTING PLAINTIFFS FROM RENEWING THE CLASS CERTIFICATION MOTION BY REFUSING TO TURN OVER PAYROLL DATA TO WHICH THE PLAINTIFFS WERE ENTITLED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the class action allegations of the complaint should not have been granted and plaintiffs' motion to compel the production of payroll data should have been granted. Plaintiffs are home health aides employed by defendants. Plaintiffs sought class certification for their Labor Law underpayment claims. Their initial motion for class certification was denied without prejudice. The defendants subsequently moved to dismiss alleging the plaintiffs did not timely move to renew their motion for class certification. The Second Department held that it is the initial motion for class certification which determines timeliness, not any subsequent motion to renew. The court further held that defendants were effectively preventing plaintiffs from renewing their motion by refusing to turn over the payroll data:

The time limitation to file a motion for class certification "applies only to a motion for the initial certification of the class" … . Here, the plaintiffs' initial motion for class certification was timely made. Moreover, while the defendants contend that the plaintiffs failed to timely renew their motion, the defendants refused to provide material sought by the plaintiffs which was needed to determine whether the prerequisites of a class action set forth in CPLR 901(a) could be satisfied and to address the considerations set forth in CPLR 902 for determining whether the matter may proceed as a class action … . The items of discovery sought are material and necessary to the determination of whether the plaintiffs "will fairly and adequately protect the interests of the class"… , and the evaluation of whether prosecuting or defending separate actions would be impractical or inefficient and any "difficulties likely to be encountered in the management of a class action" … . Melamed v Americare Certified Special Servs., Inc., 2019 NY Slip Op 00268, Second Dept 1-16-19

DISCOVERY, RESPONDEAT SUPERIOR, NEGLIGENCE, MUNICIPAL LAW.

CITY'S POTENTIAL LIABILITY FOR THE ACTIONS OF A CITY BUS DRIVER WAS BASED ON RESPONDEAT SUPERIOR, THEREFORE A NEGLIGENT HIRING AND RETENTION ACTION WAS NOT VIABLE AND THE DRIVER'S PERSONNEL FILE WAS NOT DISCOVERABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's motion to vacate the order compelling disclosure of the city bus driver's personnel file should have been granted. Plaintiff alleged she was injured when she fell on a city bus. The city acknowledged that the driver was acting within the scope of his employment when the accident occurred. Therefore the city's potential liability was based upon respondeat superior, and a negligent hiring and retention action was not viable. Therefore the personnel records were not discoverable:

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention"… . In light of the defendants' formal concession that the bus driver was acting within the scope of his employment when the accident occurred, the personnel records of the bus driver are not discoverable… . Furthermore, the plaintiff failed to show any other basis to justify granting her request for the personnel records, as "any prior acts of carelessness or incompetence of the defendant's employee would not be admissible at trial" … . Therefore, the additional discovery sought by the plaintiff is not relevant or reasonably calculated to lead to evidence relevant to the issue of the driver's alleged negligence … . Trotman v New York City Tr. Auth., 2019 NY Slip Op 00631, Second Dept 1-30-19

DISCOVERY, SOCIAL MEDIA, PHYSICAL ACTVITIES.

MOTION TO COMPEL ACCESS TO PLAINTIFF'S DEVICES, EMAIL ACCOUNTS AND SOCIAL MEDIA ACCOUNTS TO OBTAIN EVIDENCE OF PLAINTIFF'S PHYSICAL ACTIVITIES SINCE THE TRAFFIC ACCIDENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the motion to compel "access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities" should have been granted:

Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" … . Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities … . Vasquez-Santos v Mathew, 2019 NY Slip Op 00541, First Dept 1-24-19

FORECLOSURE, AFFIRMATION.

AFFIRMATION CONTESTING SERVICE DID NOT CONFORM TO NEW YORK LAW AND THEREFORE DID NOT REBUT THE PROCESS SERVER'S AFFIDAVIT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined that defendant's affirmation did not conform to New York law and therefore was not sufficient to rebut the process server's

affidavit of service. Defendant's made his affirmation in front of a notary in Israel, but the affirmation did not indicate it was made under penalty of perjury:

"[A]ny person who, for religious or other reasons, wishes to use an affirmation as an alternative to a sworn statement may do so," but such affirmation "must be made before a notary public or other authorized official," and the affirmant must "be answerable for the crime of perjury should he make a false statement" … . Furthermore, an affirmation from a person physically located outside the geographic boundaries of the United States must comply with the additional formalities of CPLR 2309 (c), and must, in substance, affirm that the statement is true under the penalties of perjury under the laws of New York (*see* CPLR 2106 [b]). While the defendant's identity was verified by an authorized official in Israel acting in the capacity of a notary, the affirmation itself failed to indicate that the statements made therein were true under the penalties of perjury. Therefore, the affirmation was without probative value … . U.S. Bank N.A. v Langner, 2019 NY Slip Op 00492 [168 AD3d 1021], Second Dept 1-23-19

FORECLOSURE, JUDGES, SUA SPONTE.

JUDGE WAS NOT PRESENTED WITH ANY EXTRAORDINARY CIRCUMSTANCES JUSTIFYING, SUA SPONTE, DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT)

The Second Department, reversing Supreme Court, determined there was no basis for the judge's, sua sponte, dismissal of the complaint in this foreclosure action:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … .

Administrative Order 548/10, issued by the Chief Administrative Judge on October 20, 2010, and amended by Administrative Order 431-11 [requiring confirmation of the accuracy of the execution and notarization of an affidavit of merit] … , was not in effect at the time the order of reference and the judgment of foreclosure and sale were issued … . In this case, no substantial right of the defendant would have been affected by the substitution of a new affidavit of merit … . Accordingly, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint … . LaSalle Bank N.A. v Lopez, 2019 NY Slip Op 00104, Second Dept 1-9-19

FORECLOSURE, STANDING, APPEALS.

PLAINTIFF, AFTER FAILING TO ARGUE THAT DEFENDANTS WAIVED THE LACK OF STANDING DEFENSE BEFORE SUPREME COURT, COULD NOT RAISE DEFENDANTS' WAIVER OF THE DEFENSE FOR THE FIRST TIME ON APPEAL, PLAINTIFF DID NOT DEMONSTRATE STANDING TO COMMENCE THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined plaintiff did not demonstrate standing to bring the foreclosure action, and, further, could not raise defendant's waiver of the lack-of-standing defense for the first time on appeal:

The defense of lack of standing in an action to foreclose a mortgage is waived if the defendant does not raise it in a pre-answer motion to dismiss or as an affirmative defense (see CPLR 3018[b]…). Here, in opposition to the plaintiff's motion for summary judgment and in support of their cross motion to dismiss, the defendants argued that the plaintiff lacked standing to commence this action. The plaintiff, in its "reply . . . in further support of plaintiff's motion for summary judgment, and in opposition to defendant's [sic] cross-motion to dismiss," entirely disregarded the defendants' waiver of the standing defense. Instead, the plaintiff sought to establish that it had standing to commence the action. Now, having litigated the standing defense on the merits in the Supreme Court—both on the original motion and in opposition to reargument—the plaintiff argues on appeal that the issue of standing was waived. Having neglected to raise that dispositive issue in the Supreme Court, the plaintiff may not raise it for the first time on this appeal … .

The plaintiff also failed, on the merits, to establish prima facie that it had standing to commence the action. The loan servicer's affidavit, which asserted that the named plaintiff "was in possession of the Note at the time of commencement of this action," provided no specifics as to the date of delivery or the date of commencement. The plaintiff's conclusory assertion as to possession on the date of commencement is insufficient to establish standing … . BAC Home Loans Servicing, LP v Alvarado, 2019 NY Slip Op 00584, Second Dept 1-30-19

FORECLOSURE, STANDING.

DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THAT PLAINTIFF BANK DID NOT HAVE STANDING IN THIS FORECLOSURE ACTION BY MERELY POINTING OUT ALLEGED GAPS IN PLAINTIFF'S CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, THEREFORE, SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant did not make a prima facie showing that plaintiff bank lacked standing in this foreclosure action, as opposed to pointing to alleged gaps in plaintiff's case. Therefore defendant's motion for summary judgment should not have been granted:

"On a motion for summary judgment, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied'" … . "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law" … . Here, the defendant merely pointed to alleged gaps in the plaintiff's case and failed to meet her burden of establishing, prima facie, the plaintiff's lack of standing as a matter of law … . Cenlar FSB v Lanzbom, 2019 NY Slip Op 00092, Second Dept 1-9-19

FORECLOSURE, STANDING.

MERE DENIAL OF THE ALLEGATIONS IN A FORECLOSURE COMPLAINT THAT THE PLAINTIFF IS THE OWNER AND HOLDER OF THE NOTE AND MORTGAGE IS NOT SUFFICIENT TO ASSERT THE DEFENSE THAT THE PLAINTIFF LACKS STANDING, PRECEDENT TO THE CONTRARY OVERRULED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Castro, over an extensive dissenting opinion, determined that a denial of the allegations in a foreclosure complaint that the plaintiff is the owner and holder of the note and mortgage is not sufficient to assert that plaintiff lacks standing, a defense that is waived if not asserted:

… [T]he issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose. * * *

Taken to its logical conclusion, the … defendants' position would mean that their denials preserve all conceivable affirmative defenses that can be parsed from reading the factual allegations of the complaint in conjunction with their corresponding and conclusory denials, so that these defenses may be raised at some subsequent point in the case. Such a result would render the obligation under CPLR 3018(b) to specifically plead affirmative defenses in the answer meaningless, delay the legislatively favored prompt adjudication of the defenses at an early point in the litigation, and cause prejudice and surprise to plaintiffs. Moreover, the practical realities of mortgage foreclosure litigation are that foreclosure complaints invariably allege that the plaintiff is the holder and/or assignee of the note, and answering defendants reflexively deny (or deny knowledge as to the truth of) most or all of the allegations in their responsive pleadings. Were such denials by themselves sufficient to place standing in issue, then standing would effectively become a prima facie element of the plaintiffs' claims in all contested foreclosure actions, an unwarranted consequence. Rather, if a defendant in a foreclosure action genuinely believes that she or he has a basis upon which to contest standing, it is not too much to ask her or him to specifically and affirmatively assert that position in the answer as the CPLR requires.

To the extent that some decisions of our Court have strayed from the foregoing principles by indicating that a mere denial in the answer of factual allegations set forth in the complaint will suffice to place standing in issue, thereby injecting uncertainty into this formerly settled area … . US Bank N.A. v Nelson, 2019 NY Slip Op 00494, Second Dept 1-23-19

FORECLOSURE, STANDING.

PLAINTIFF BANK WAS PROPERLY ALLOWED TO RECOMMENCE THE FORECLOSURE ACTION AFTER IT WAS DISMISSED AS ABANDONED PURSUANT TO CPLR 3215, HOWEVER PLAINTIFF DID NOT DEMONSTRATE IT HAD STANDING AND ITS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff bank did not demonstrate it had standing to bring this foreclosure action. Therefore plaintiff's summary judgment motion should not have been granted. The court noted that Supreme Court properly allowed plaintiff an additional six months to commence another action (CPLR 205 (a)) after the first was dismissed as abandoned pursuant to CPLR 3215 (c):

… [P]laintiff failed to demonstrate that it has standing as the assignee of the mortgage from MERS. By its express terms, the initial written assignment from MERS only assigns the mortgage, not the note, and no proof was submitted establishing that MERS was ever conferred with the requisite authority to assign the note… . Moreover, contrary to Supreme Court's holding, this Court has held that merely attaching the note with a blank indorsement to the complaint is not sufficient for plaintiff to meet its prima facie burden on the issue of standing or to prove plaintiff's possessory interest in the note; proof of actual possession is required … ….

Plaintiff similarly failed to establish its standing by demonstrating that it had physical possession of the note at the time of the commencement of the action. In support of its motion for summary judgment, plaintiff submitted, among other things, a copy of its complaint, the mortgage, the unpaid note (indorsed in blank), the relevant assignments of the mortgage and proof of defendants' default. Plaintiff also tendered the affidavit of the authorized officer for Caliber Home Loans, Inc., the mortgage loan servicing agent and attorney-in-fact for plaintiff … . The affidavit of the authorized officer indicates the source of her knowledge to be her "review of the electronic records of Caliber Home Loans, Inc." regarding defendants' delinquent account, which includes, among other things, "electronic images of the note and electronic records maintained by Caliber Home Loans, Inc." Other than alleging that she reviewed these electronic records, the authorized officer's affidavit fails to provide any indication that she actually examined the original note, nor did it provide any details with regard to whether plaintiff ever obtained possession thereof and, if so, how and when it came into its possession … . Moreover, the complaint is equivocal and alleges in the alternative that plaintiff is "the current owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note." Such language is insufficient to establish that plaintiff

had physical possession of the note at the time it commenced this action … . U.S. Bank Trust, N.A. v Moomey-Stevens, 2019 NY Slip Op 00016, Third Dept 1-3-19

INSURANCE LAW, CONTRACT LAW, CONSEQUENTIAL DAMAGES.

THERE IS NO HEIGHTENED PLEADING REQUIREMENT FOR CONSEQUENTIAL DAMAGES STEMMING FROM A BREACH OF AN INSURANCE CONTRACT, PLAINTIFF ALLEGED THE INSURER'S DELAY IN PAYING THE CLAIM FOR DAMAGE TO PLAINTIFF'S BUILDING, WHICH SHIFTED WHEN WORK WAS DONE ON AN ADJOINING BUILDING, RESULTED IN AN ARRAY OF CONSEQUENTIAL DAMAGES, THE CONSEQUENTIAL DAMAGES ASPECT OF THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had sufficiently alleged consequential damages stemming from the insurer's alleged delay in paying a claim for damage to plaintiff's building which shifted after work on an adjoining building. The First Department noted that there is no heightened pleading requirement for consequential damages stemming from a breach of contract. The consequential damages aspect of the complaint should not have been dismissed:

The complaint alleges that rather than pay the claim, defendant has made unreasonable and increasingly burdensome information demands throughout the three year period since the property damage occurred. Plaintiff contends that this was a tactic by defendant to make the claim so expensive to pursue that plaintiff would abandon it altogether. Plaintiff contends defendant's investigatory process has taken so long and become so attenuated that the structural damage to the building has worsened. Among the consequential damages alleged are engineering costs, painting, repairs, monitoring equipment, and moisture abatement to address water intrusion, loss of rents, and other expenses attributable to mitigating further damage to the property. …

A plaintiff may sue for consequential damages resulting from an insurer's failure to provide coverage if such damages ("risks") were foreseen or should have been foreseen when the contract was made … . … [T]he inquiry is not whether plaintiff will be able to establish its claim, but whether plaintiff has stated a claim.

Here, plaintiff's allegations meet the pleading requirements of the CPLR with respect to consequential damages, whether in connection with the first cause of action or the second cause of action for breach of the covenant of good faith and fair dealing in the context of an insurance contract … . … [T]here is no heightened pleading standard requiring plaintiff to explain or describe how and why the "specific" categories of consequential damages alleged were reasonable and forseeable at the time of contract. There is no heightened pleading requirement for consequential damages …. Furthermore, an insured's obligation to "take all reasonable steps to protect the covered property from further damage by a covered cause of loss" supports plaintiff's allegation that some or all the alleged damages were forseeable … . D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., 2019 NY Slip Op 00347, First Dept 1-21-19

JUDGES, JURORS.

TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY AFTER RECEIVING A NOTE INDICATING THAT A JUROR COULD NOT CONTINUE, INSTEAD THE JUDGE REPLACED THE JUROR WITH AN ALTERNATE WITHOUT AN INQUIRY, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new trial, determined the trial court in this medical malpractice action should have conducted an inquiry before replacing a juror with an alternate:

In 2013, CPLR 4106 was amended to provide that a trial court may discharge a regular juror and replace that juror with an alternate juror, even after deliberations have begun, if the juror has "become[ ] unable to perform the duties of a juror" (CPLR 4106 …). In determining whether discharge and replacement of a juror is appropriate, a trial court must, after receiving notice that a juror may not be able to perform his or her duty, make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and replaced with an alternate juror … .

In this medical malpractice action, the Supreme Court received a note during deliberations that "a juror cannot come to a fair decision due to emotional distress." The court, however, refused to conduct any inquiry as to the nature of the juror's difficulty, and refused even to speak to the juror individually. Instead, over objection, it excused the juror and seated an alternate. The court's failure to make adequate inquiry was error, requiring a new trial … . Garbie v Ahmad, 2019 NY Slip Op 00098, Second Dept 1-9-19

JUDGES, SUA SPONTE, DECLARATORY JUDGMENTS.

IN THIS HYBRID ARTICLE 78-DECLARATORY JUDGMENT ACTION, THE PORTIONS OF THE PETITION WHICH SOUGHT A DECLARATION THAT AMENDMENTS TO THE ZONING CODE ARE ILLEGAL AND RELATED DAMAGES SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, IN THE ABSENCE OF A SPECIFIC DEMAND FOR DISMISSAL (SECOND DEPT).

The Second Department determined that the zoning code provisions enacted by the village board of trustees, which concerned the maximum floor space and coverage on residential lots, were consistent with the village's comprehensive plan and properly enacted. The Second Department further found that the requirements of the State Environmental Quality Review Act (SEQRA) were met. However, the portions of the petition which sought declaratory relief and related damages should not have been summarily dismissed along with the portions which sought Article 78 relief because no demand for dismissal of the declaratory relief portions had been made:

… [I]n the absence of a dispositive motion addressed to the fifth, sixth, seventh, and eighth causes of action, which sought declaratory relief and damages not in the nature of CPLR article 78 relief, the Supreme Court should not have, in effect, dismissed those causes of action. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" … . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" … . Matter of Bonacker Prop., LLC v Village of E. Hampton Bd. of Trustees, 2019 NY Slip Op 00432, Second Dept 1-23-19

JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THIS DIVORCE ACTION ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department determined Supreme Court should not have dismissed the complaint in this divorce action, sua sponte, on a ground not raised by the parties:

The Supreme Court should not have granted the defendant's motion for summary judgment on a ground not raised in the defendant's motion … . "[O]n a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court"… . The plaintiff had no opportunity to address the issue regarding the allegedly defective summons, and this "lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" … .

Since the Supreme Court did not consider the merits of the motion and cross motion, the matter must be remitted to the Supreme Court, Richmond County, for a determination of the motion and cross motion on the merits … . Patel v Sharma, 2019 NY Slip Op 00452, Second Dept 1-23-19

JURISDICTION, FOREIGN CORPORATIONS.

A CORPORATION'S REGISTRATION WITH THE DEPARTMENT OF STATE IS NO LONGER DEEMED CONSENT TO BE SUED IN NEW YORK, FORD'S AND GOODYEAR'S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED, THE SUIT STEMMED FROM A ROLLOVER ACCIDENT IN VIRGINIA (SECOND DEPT).

The Second Department, in full-fledged opinion by Justice Brathwaite-Nelson, determined that a products liability case (stemming from a traffic accident in Virginia) against Ford, the manufacturer of the vehicle which rolled over, and Goodyear, the manufacturer of a tire which allegedly failed, could not be brought in New York. The plaintiffs alleged general jurisdiction over both companies based upon business done generally in New York and registration with the NY Department of State. The plaintiffs did not allege long-arm jurisdiction. Neither the vehicle nor the tire was manufactured or purchased from the defendants in New York. The plaintiff had purchased the vehicle from a New York nonparty and had used the vehicle in New York.

We consider on these appeals whether, following the United States Supreme Court decision in Daimler AG v Bauman (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not. * * *

We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent

of the foreign corporation to general jurisdiction, would be "unacceptably grasping" under Daimler (Daimler AG v Bauman, 571 US at 138).

The Court of Appeals does not appear to have … relied upon its consent-by-registration theory since International Shoe was decided. We think that this is a strong indicator that its rationale is confined to that era … and that it no longer holds in the post-Daimler landscape. We conclude that a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York. Aybar v Aybar, 2019 NY Slip Op 00412, Second Dept 1-23-19

JURISDICTION, LONG-ARM.

PLAINTIFF'S DECEDENT WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR LAW 240 (1) AND 241 (6) WHEN A BRIDGE FORM HE WAS UNLOADING FELL ON HIM, PLAINTIFF MADE A SUFFICIENT SHOWING OF LONG-ARM JURISDICTION TO WARRANT DISCOVERY (THIRD DEPT).

The Third Department determined the Labor Law 240 (1) and 241 (6) causes of action were properly dismissed because plaintiff's decedent was not involved in construction work when a 2500 pound bridge form fell on him. The court further found that plaintiff had made a sufficient showing that long-arm jurisdiction may apply to Spillman, the manufacturer of the bridge form, to allow discovery:

In support of her claimed violations of Labor Law §§ 240 (1) and 241 (6), plaintiff alleged that, at the time that decedent sustained the fatal injuries, he had been unloading a bridge form that had been delivered to the manufacturing facility operated by LHV so that it could be used in the manufacture and fabrication of construction materials that would be eventually used during unspecified construction at an unspecified construction site. As Supreme Court aptly concluded, these allegations "do not support any contention that the work being done at the time of the incident was, in any manner, an integral part of an ongoing construction contract or was being performed at an ancillary site, incidental to and necessitated by such construction project, where the materials involved were being readied for use in connection with a covered activity," so as to bring it within the ambit of Labor Law § 240 (1) … . …

For the same reasons, plaintiff's factual allegations did not support a conclusion that decedent's injuries occurred in an "area[] in which construction, excavation or demolition work [was] being performed" (Labor Law § 241 [b]) and, thus, Supreme Court's dismissal of plaintiff's Labor Law § 241 (6) claim was proper … . …

Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we agree with Supreme Court that the foregoing provided the "sufficient start" required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over Spillman under CPLR 302 (a) (3), while also comporting with federal due process requirements … . Archer-Vail v LHV Precast Inc., 2019 NY Slip Op 00341, Third Dept 1-17-19

ORDER TO SHOW CAUSE, SERVICE DIRECTIONS.

FAILURE TO COMPLY WITH THE SERVICE DIRECTIONS IN THE ORDER TO SHOW CAUSE DEPRIVED SUPREME COURT OF JURISDICTION TO ENTERTAIN THE ORDER TO SHOW CAUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to comply with the service directions in an order to show cause required the denial of the motion to hold defendant in contempt:

… [T]he service requirements set forth in the order to show cause … , were jurisdictional in nature. The plaintiff's undisputed failure to comply with these requirements by serving the order to show cause pursuant to CPLR 308(4), instead of CPLR 311-a, deprived the Supreme Court of jurisdiction to entertain the plaintiff's order to show cause … . Contrary to the plaintiff's contention, the defendant may challenge the validity of the [subsequent] order … , on the ground that the court was without jurisdiction to enter the order … . Accordingly, the plaintiff's motion to hold the defendant in contempt for failure to comply with the order … , should have been denied. Boucan NYC Café, LLC v 467 Rogers, LLC, 2019 NY Slip Op 00416, Second Dept 1-23-19

PARTIES, NECESSARY PARTIES, JOINDER.

FAILURE TO JOIN A NECESSARY PARTY JUSTIFIED DISMISSAL AFTER THE STATUTE OF LIMITATIONS HAS RUN (FIRST DEPT).

The First Department determined dismissal of the Article 78 proceeding, rather than joinder of the condominium board as a necessary party, was the proper remedy. The New York City Department of Environmental Protection had denied petitioner's request to order removal of backflow prevention devices installed in the condominium unit:

Petitioner's failure to join as a party the condominium board, which installed the backflow prevention device in dispute, constitutes a failure to join a necessary party (*see Matter of Ferrando v New York City Bd. of Stds. & Appeals*, 12 AD3d 287, 288 [1st Dept 2004]). Since the applicable statutory period has expired and the condominium board can no longer be joined, and proceeding in its absence would potentially be highly prejudicial to it, the proper remedy is dismissal of the proceeding rather than joinder of the condominium board (*id.*; *see also* CPLR 1001, 1003). Matter of Stephen & Mark 53 Assoc. LLC v New York City Dept. of Envtl. Protection, 2019 NY Slip Op 00072 [168 AD3d 440], First Dept 1-8-19

PARTIES, RELATION-BACK DOCTRINE, RESPONDEAT SUPERIOR.

THE RELATION BACK DOCTRINE ALLOWED PLAINTIFF TO SERVE A SUPPLEMENTAL SUMMONS AND COMPLAINT ON THE DRIVER'S EMPLOYER IN THIS TRAFFIC ACCIDENT CASE PURSUANT TO THE RESPONDEAT SUPERIOR THEORY OF LIABILITY, AFTER THE ACTION WAS STARTED PLAINTIFF LEARNED THAT THE DRIVER OF THE CAR IN WHICH PLAINTIFF'S DECEDENT WAS A PASSENGER WAS PAID BY THE EMPLOYER TO TRANSPORT THE OTHER EMPLOYEES IN THE CAR TO WORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the relation-back doctrine (CPLR 203(f)) allowed plaintiff, Polanco, to serve a supplemental summons and complaint against the employer of Elias-

Tejada, the driver of the car in which plaintiff's decedent was a passenger. The Elias-Tejada car stalled on a bridge and was struck from behind. Plaintiff (Polanco) did not learn until after the action was started that Elias-Tejada was paid by his employer, Fairway, to transport the other occupants of his car, all Fairway employees, to work. Plaintiff (Polanco) sought to add Fairway as a defendant under a respondeat superior theory and the First Department held he could do so:

The claims that Polanco seeks to assert against Fairway arise out of the same occurrence as alleged in the complaint against Elias-Tejada [and the other two defendant drivers]. … [W]e find that Polanco also satisfied the second condition, because under the doctrine of respondeat superior, an employer will be vicariously liable for the negligence of an employee committed while the employee is acting in the scope of his or her employment … . Based on Elias-Tejada's employer/employee relationship with Fairway, they are united in interest because a judgment against one of them will similarly affect the other … . … [T]he Fairway defendants can, therefore, be charged as having notice of Polanco's potential claims against them, based upon the claims asserted against Elias-Tejada in the original summons and complaint … . …

… Only later, after depositions were held, including those of a key Fairway employee and Elias-Tejada, did [plaintiff] learn that Fairway compensated Elias-Tejada for hosting the car pool and that this travel arrangement was condoned, if not actually implemented and encouraged, by Fairway's human resources department because Fairway reimbursed him for tolls and mileage. Ramirez v Elias-Tejada, 2019 NY Slip Op 00021, First Dept 1-3-19

PARTIES, VICARIOUS LIABILITY.

BECAUSE THE ANESTHESIOLOGY GROUP (ATLANTIC) WAS ADDED AS A PARTY AFTER THE STATUTE HAD RUN BASED SOLELY ON VICARIOUS LIABILITY FOR ITS EMPLOYEE (DEBRADY) WHO HAD BEEN TIMELY SERVED, ATLANTIC'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION CEASED WHEN DEBRADY'S MOTION FOR SUMMARY JUDGMENT WAS GRANTED, ATLANTIC COULD NOT BE HELD LIABLE FOR THE ACTIONS OF ANOTHER EMPLOYEE WHO WAS NEVER A PARTY (CANTALUPO), ALTHOUGH PLAINTIFF SUED A JOHN DOE, NO STEPS WERE TAKEN TO SUBSTITUTE CANTALUPO FOR THE JOHN DOE, ATLANTIC'S MOTION FOR

SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the relation-back doctrine did not allow plaintiff in this medical malpractice action to sue an anesthesiology group (Atanitic) as a defendant after the statute of limitations had been expired. Atlantic had been added as a defendant after the statute ran when it was discovered that a defendant anesthesiolgist, DeBrady, worked for Atlantic at the time the procedure was performed on plaintiff. DeBrady's motion for summary judgment was not opposed and was granted. But Supreme Court held that Atlantic could remain a defendant because of the potential liability of another employee of Atlantic, non-party Cantalupo. The Second Department held that Atlantic's liability was based solely upon respondeat superior as the employer of DeBrady, who was no longer a defendant. The court noted that, although the complaint named a "John Doe, MD," Cantalupo could not be substituted as a party because plaintiff never moved to substitute Cantalupo and the requirements of CPLR 1024 were not met:

In order for a cause of action asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that "(1) the [cause of action] arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well (… see CPLR 203[b]). In malpractice actions, such as this one, "the defendants are considered united in interest when one is vicariously liable for the acts of the other"… . The second prong of the relation-back doctrine requires unity of interest with a party in the action … .

Since Atlantic was made a party to the action after the expiration of the statute of limitations based solely on its unity of interest with DeBrady, who was timely served, Atlantic's liability in the instant action cannot be predicated upon vicarious liability for the alleged negligent acts of other employees of Atlantic who are not parties to this action, including nonparty Cantalupo. Accordingly, Atlantic demonstrated its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it, upon dismissal of the action as against DeBrady … . Ferrara v Jerome Zisfein, 2019 NY Slip Op 00096, Second Dept 1-9-19

RES JUDICATA, COLLATERAL ESTOPPEL.

THE STATE ACTION ON A MULTI-MILLION DOLLAR DEBT SHOULD NOT HAVE BEEN DISMISSED ON CLAIM PRECLUSION OR RES JUDICATA GROUNDS BASED UPON THE DISMISSAL OF A FEDERAL ACTION AGAINST A DEFENDANT WHO WAS NOT A PARTY IN THE STATE ACTION, THE FACT THAT THE PLAINTIFFS IN THE STATE ACTION MAY HAVE BEEN ABLE TO INTERVENE OR ASSIGN THEIR RIGHTS TO THE DEFENDANT IN THE FEDERAL ACTION WAS NOT A PROPER GROUND FOR CLAIM PRECLUSION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court determined that the dismissal of action in federal court to recover on a multi-million dollar notes did not preclude the state action on claim preclusion (res judicata) grounds. The opinion is fact-specific and too complicated to be fairly summarized here:

Supreme Court dismissed the action with prejudice on claim preclusion grounds, and denied the motion to amend as moot. The court found that plaintiffs herein should have intervened in the federal action, or assigned their claims to [the defendant in the federal action,] Varshavsky. The failure to do so was a "blatant misuse of the federal forum," which resulted in a "stunning" amount of discovery, and several motions, which Supreme Court found were wasted because plaintiffs herein failed to use the federal forum to resolve all "claims aris[ing] from a common nucleus of operative facts." * * *

The doctrine of claim preclusion does not bar plaintiffs' claims herein. Varshavsky, the sole defendant in the federal action, was not himself the creditor of the subject loans and had no standing to assert a counterclaim for recovery of plaintiffs' loans in that action. Plaintiffs' putative rights to intervene as party defendants in the federal action, or to assign their claims to Varshavsky, are far from clear. Either option, intervention or assignment, might have been rejected by the federal court as an attempt to evade the strictures of diversity jurisdiction. Apart from the efficacy of these options, even if intervention or assignment were possible, there is no legal doctrine that would compel plaintiffs herein to litigate in the federal action. In short, plaintiffs herein, as nonparties to the federal litigation, are not precluded from asserting claims that no party in the federal litigation had standing to pursue. To hold otherwise would mean that a debtor may, by suing a creditor's principal or associate, require the creditor to participate in the action or have its claims precluded. Avilon Auto. Group v Leontiev, 2019 NY Slip Op 00058, First Dept 1-3-19

VERDICT, MOTION TO SET ASIDE, DAMAGES.

MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE JURY FOUND THE INJURY TO BE PERMANENT BUT DID NOT AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING, DAMAGES FOR PAST PAIN AND SUFFERING TOO LOW, MAY HAVE BEEN AN IMPERMISSIBLE COMPROMISE VERDICT (SECOND DEPT)

The Second Department, reversing Supreme Court and granting a new trial, determined the jury's damages verdict in this rear-end collision, traffic accident case should have been granted. The jury found that plaintiff suffered a permanent injury but did not award plaintiff with damages for future pain and suffering. The Second Department further determined the $12,500 verdict for past pain and suffering was too low:

A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence… . Here, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages for past pain and suffering and future pain and suffering, as the verdict with respect to those damages was contrary to the weight of the evidence. The jury's determination that the plaintiff was not entitled to damages for future pain and suffering was inconsistent with the jury's finding that his injuries were permanent in nature and were proximately caused by the accident … . Furthermore, whereas the jury was presented with conflicting evidence and theories as to the cause of the plaintiff's injuries, and the jury's award for past pain and suffering was inexplicably low, it appears that the verdict with respect to damages for past pain and suffering may have been the result of an impermissible compromise … . Avissato v McDaniel, 2019 NY Slip Op 00084, Second Dept 1-9-19

VERDICT, MOTION TO SET ASIDE, DOG-BITE.

VERDICT IN THIS DOG BITE CASE WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE, EVIDENCE THAT THE DOG BIT PLAINTIFF'S FACE WHILE ATTEMPTING TO BITE THE FOOD IN PLAINTIFF'S HAND AND EVIDENCE THAT THE DOG ONLY BECAME RAMBUNCTIOUS AROUND FOOD SUPPORTED THE JURY'S CONCLUSION THAT THE DOG HAD NOT EXHIBITED VICIOUS PROPENSITIES (SECOND DEPT).

The Second Department determined the motion to set aside the verdict as against the weight of the evidence in this dog bite case was properly denied. Infant plaintiff was bitten in the face when the dog jumped and attempted to bite the food in plaintiff's hand. The jury found that the dog did not have vicious propensities. The evidence that the dog only became excited and rambunctious around food supported the jury's verdict:

Pursuant to CPLR 4404(a), a court may set aside a jury verdict as contrary to the weight of the evidence. A verdict is contrary to the weight of the evidence when " the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence'" … . "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors" … . The discretionary power to set aside a jury verdict must be exercised with considerable caution, "for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict"… . Additionally, in making this determination courts should keep in mind that "[i]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" … .

To recover in strict liability for damages caused by a dog bite, a plaintiff must prove that " the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities'" … . This knowledge may be established with evidence of "prior acts of a similar kind of which the owner had notice" … . However, "normal canine behavior" does not establish vicious propensities, and "rambunctious behavior will show awareness of a vicious propensity only if it is the very behavior that resulted in [a] plaintiff's injury" … . M.B. v Hanson, 2019 NY Slip Op 00106, Second Dept 1-9-19

VERDICT, MOTION TO SET ASIDE, EXPERT OPINION.

PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION SET ASIDE IN THE INTEREST OF JUSTICE, DEFENDANTS WERE NOT ALLOWED TO CROSS EXAMINE PLAINTIFF'S EXPERTS ABOUT THE POSSIBLE NEGLIGENCE OF TWO NON-PARTY DOCTORS WHO ALSO TREATED PLAINTIFF, IN ADDITION, PLAINTIFF'S EXPERTS WERE NOT SHOWN TO BE QUALIFIED TO OFFER OPINION EVIDENCE CONCERNING EMERGENCY MEDICINE (SECOND DEPT).

The Second Department, reversing Supreme Court, set aside the verdict in this medical malpractice case in the interest of justice. The defendants (Kirschen, Roberts and Winthrop) were involved in emergency treatment of the plaintiff for back pain. Subsequently surgery was performed by two additional (non-party) doctors (Obedian and Sonstein) to deal with an abscess on plaintiff's spine. At trial the defendants were not allowed to cross-examine plaintiff's experts about the possible negligence of the surgeons, which was deemed reversible error. The Second Department further held plaintiff's experts should not have been allowed to testify as experts in emergency medicine because no specialized knowledge of emergency medicine was demonstrated:

" A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise'"… . In considering such a motion, "[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'" … . …

… [T]the evidence at trial failed to demonstrate that the plaintiff's injuries were capable of any reasonable or practicable division of allocation among Kirschen, Roberts, and Winthrop, and Obedian and Sonstein … . Thus, if, as Kirschen, Roberts, and Winthrop propose, a jury were to find that Obedian and Sonstein departed from accepted medical practice and that this departure was a substantial factor in depriving the plaintiff of a substantial chance for an improved outcome, Obedian and Sonstein could be found at fault together with Kirschen, Roberts, and Winthrop … . As a result, any evidence as to the culpability of Obedian and Sonstein was relevant under CPLR 1601(1) … . The court's error in precluding Kirschen, Roberts, and Winthrop from cross-examining two of the plaintiff's expert witnesses on this issue deprived Kirschen, Roberts, and Winthrop of "substantial justice" … . Daniele v Pain Mgt. Ctr. of Long Is.. 2019 NY Slip Op 00093, Second Dept 1-9-19

VERDICT, MOTION TO SET ASIDE, PROXIMATE CAUSE.

DEFENSE VERDICT IN THIS SLIP AND FALL CASES SHOULD HAVE BEEN SET ASIDE, THE JURY FOUND DEFENDANT NEGLIGENT BUT FURTHER FOUND THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE FALL, HOWEVER, THE NEGLIGENCE AND PROXIMATE CAUSE WERE INEXTRICABLY INTERTWINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion to set aside the verdict in this slip and fall case should have been granted:

The plaintiff alleged that after entering the auditorium to attend the showing of a movie at the defendant's multiplex theater, she entered a row of seats, slipped on what she believed to be popcorn oil, and fell. After the movie ended, the plaintiff realized that she was injured when she had difficulty rising from her seat.

… [T]he jury rendered a verdict finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries.

Where, as here, the issues of negligence and proximate cause were inextricably interwoven, the jury's finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries, was not supported by a fair interpretation of the evidence … . The plaintiff, and her friend who accompanied her on the day of the accident, both consistently testified that the plaintiff slipped and fell on an oily substance on the floor of the auditorium. The defendants failed to submit any evidence to refute this testimony. Thus, the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict should have been granted. Mitchell v Quincy Amusements, Inc., 2019 NY Slip Op 00430, Second Dept 1-23-19

VEXATIOUS LITIGATION, LEGAL MALPRACTICE.

PLAINTIFF'S PRO SE LEGAL MALPRACTICE COMPLAINT WAS PROPERLY DISMISSED AND LIMITS ON PLAINTIFF'S ABILITY TO ENGAGE IN FUTURE VEXATIOUS LITIGATION PROPERLY IMPOSED (SECOND DEPT).

The Second Department determined Supreme Court properly dismissed plaintiff's pro se legal malpractice action and properly limited plaintiff's ability to file additional motions:

"Public policy generally mandates free access to the courts" … . Although a pro se litigant is afforded " some latitude,'" he or she is not entitled to rights greater than any other litigant and may not disregard court rules or deprive an adversary of rights normally enjoyed by an opposing party … . Accordingly, "when a litigant is abusing the judicial process by harassing individuals solely out of ill will or spite, equity may enjoin such vexatious litigation" … . Here, the plaintiff's pattern of vexatious and duplicative motion practice warranted the modest limitation of directing the plaintiff to bring future motions via order to show cause … . Strujan v Kaufman & Kahn, LLP, 2019 NY Slip Op 00630, Second Dept 1-30-19