NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
June 2019

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

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AMEND COMPLAINT.

SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, DESPITE THE PASSAGE OF SIX YEARS SINCE THE ACTION WAS COMMENCED, THE COURT DOES NOT EXAMINE THE MERITS OF THE PLEADING UNLESS THE LACK OF MERIT IS CLEAR AND FREE FROM DOUBT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend its complaint, which originally stemmed from the alleged encroachment of defendant's pipes (since removed), should have been granted, despite the passage of six years (during which a default judgment was vacated):

The Supreme Court should have granted that branch of the plaintiff's cross motion which was for leave to amend the complaint. Permission to amend a pleading should be "freely given" (CPLR 3025[b] …), where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the opposing party … . Mere lateness is not a basis for denying an amendment; " [i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'" … . The burden of establishing prejudice is on the party opposing the amendment … .

Here, notwithstanding the lengthy gap in time between the commencement of the action and the plaintiff's cross motion for leave to amend the complaint, the defendant has made no showing that it was surprised by the new allegations or would be significantly prejudiced … . Moreover, some portion of that delay is attributable to the defendant's effort to vacate its default and the parties' subsequent motion practice and negotiations, and there is no contention that discovery has been concluded … .

Contrary to the defendant's contentions, the proposed amendment is not palpably insufficient or patently devoid of merit. "No evidentiary showing of merit is required under CPLR 3025(b)'" … , and "a court shall not examine the legal sufficiency or merits of a pleading unless [the] insufficiency or lack of merit is clear and free from doubt" … . The allegations of the proposed amendment and the submissions in support of it adequately set forth the requisite elements for causes of action alleging private nuisance and trespass … . Krakovski v Stavros Assoc., LLC, 2019 NY Slip Op 05112, Second Dept 6-26-19

ARTICLE 78 TO ENFORCE TOWN RESOLUTION, PARTIES, MOTION TO INTERVENE.

THE COMMISSIONER OF AGRICULTURE AND MARKETS PROPERLY ENFORCED A TOWN RESOLUTION WHICH PROHIBITED CONNECTING A WATER MAIN SERVICING AN AGRICULTURAL AREA TO A NEW RESIDENTIAL SUBDIVISION; THE DEVELOPERS WERE 'INTERESTED PERSONS' AND WERE PROPERLY ALLOWED TO INTERVENE IN THE COMMISSIONER'S ARTICLE 78 ACTION TO ENFORCE THE TOWN RESOLUTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner, the Commissioner of Agriculture and Markets, had the authority to enforce a 2004 Town Board resolution which restricted the use of water provided by a water main to existing residential uses and agricultural uses. In 2016 the Town Board passed a resolution allowing a connection with the water main to service a new residential subdivision. The Commissioner brought an Article 78 proceeding to enforce the 2004 resolution and the developers of the residential subdivision were properly allowed to intervene:

Supreme Court did not abuse its discretion in permitting the developers to intervene. Petitioner may well be correct that the developers do not have standing to bring suit to challenge his determination, but "[t]he bases for permissive intervention are broader than they are for standing to originate the proceeding" … . The developers have property interests that will be impacted should petitioner succeed … and all share the view of the Town and respondent Town Supervisor that petitioner lacks authority to enforce restrictions on water main access that the Town Board later attempts to vitiate. In our view, this is sufficient to render them "interested persons" who can at least intervene with regard to that portion of the petition/complaint founded upon CPLR article 78 … . …

A local government enjoys broad autonomy under "the 'home rule' provision of the New York Constitution," but that autonomy does not extend to actions "that conflict with the State Constitution or any general law" (…see NY Const, art IX, § 2 [c] [ii]; Municipal Home Rule Law § 10 [1]). Among the general laws of New York is Agriculture and Markets Law article 25-AA, which "was enacted upon a finding that many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas" … . …

Petitioner was … within his rights to order the Town to comply with the 2004 resolution following an investigation and, upon the Town's failure to seek review of his determination and refusal to comply with it,

commence the present enforcement litigation … . Matter of Ball v Town of Ballston, 2019 NY Slip Op 04519, Third Dept 6-6-19

ARTICLE 78, MUNICIPAL LAW.

THE ARTICLE 78 PETITION SEEKING REVIEW OF THE DENIAL OF VARIANCES BY THE ZONING BOARD SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT PETITIONER DID NOT PROVIDE A TRANSCRIPT OF THE PROCEEDINGS, UNDER THE CPLR THE RESPONDENT MUST PROVIDE THE TRANSCRIPT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition seeking review of the zoning board's denial of variances should not have been dismissed on the ground that petitioner did not provide a transcript of the proceedings. CPLR 7804 requires that the respondent provide the transcript:

The Supreme Court denied the petition and dismissed the proceeding on the grounds that the petitioner had not provided "a copy of a transcript from the proceeding, . . . any of the submissions that he may have made in support of the requests, including the applications for any variances themselves" and had "also not provided an affidavit from a person with knowledge in support of [his] petition."

CPLR 7804(d) permits, but does not require, the petitioner to submit affidavits or other written proof in support of the verified petition. Further, CPLR 7804(e) provides that the respondent, not the petitioner, "shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court." Matter of D'Souza v Board of Appeals of the Town of Hempstead, 2019 NY Slip Op 04381, Second Dept 6-5-10

CIVIL RIGHTS LAW, APPEALS.

PETITIONER'S APPLICATION TO CHANGE THE DESIGNATION OF HIS RACE/NATIONALITY PROPERLY DENIED; EX PARTE ORDERS ARE NOT APPEALABLE, NOTICES OF APPEAL TREATED AS APPLICATIONS FOR REVIEW PURSUANT TO CPLR 5704 (a) (SECOND DEPT).

The Second Department determined petitioner's application to change his race/nationality from "black/African American" to "Moor/Americas Aboriginal" was properly denied. The court noted that an ex parte order is not appealable but deemed the notices of appeal applications pursuant to CPLR 5704 (a):

"An ex parte order is not appealable … . However, under the circumstances of this case, we deem it appropriate to treat the instant notices of appeal as applications for review pursuant to CPLR 5704(a) … .

We agree with the Supreme Court's denial of that branch of the petition which was to change the petitioner's race/nationality, as the petitioner presented no authority for the court to grant him such relief. Article 6 of the Civil Rights Law, which governs petitions for leave to assume another name, does not provide such authority. Further, a person's race is a matter of self-identification. As to nationality, the sole means by which the petitioner may renounce his nationality as a United States citizen is to satisfy one of the conditions set forth in 8 USC § 1481(a) … . The petitioner made no showing that he met any of these conditions. Matter of Keis, 2019 NY Slip Op 04944, Second Dept 6-19-19

DEBTOR-CREDITOR, FAMILY LAW.

THE DIVISION OF MARITAL PROPERTY PURSUANT TO A DIVORCE DOES NOT RENDER ONE FORMER SPOUSE THE JUDGMENT DEBTOR OF THE OTHER, THEREFORE A JUDGMENT DEBTOR WHO DOCKETS A JUDGMENT DOES NOT HAVE PRIORITY PURSUANT TO CPLR 5203 OVER A JUDGMENT OF DIVORCE WHICH HAS NOT BEEN DOCKETED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the 2015 judgment of divorce which awarded the wife, Andrea, a percentage of marital property, a home worth $5 million, did not make Andrea

a judgment creditor such that the failure to docket the judgment of divorce gave priority to a judgment debtor, Pangea, who had docketed a 2016 judgment:

The United States Court of Appeals for the Second Circuit has certified the following question to us: "If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law § 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?" We answer that question in the negative. * * *

Pangea's conception of Andrea as judgment creditor is utterly incompatible with our legislature's dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of "marital property" into Domestic Relations Law § 236, "the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law" … . … Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-spouse the creditor of another. Courts are empowered "not only to make an equitable disposition of marital property between [the spouses], but also to make a distributive award in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable in a lump sum or over a period of time" … . …

Andrea therefore cannot properly be considered a judgment creditor of John [her ex-husband]. Thus, CPLR 5203 (a), by its plain terms, has no application here, and Pangea can claim no priority. Pangea Capital Mgt., LLC v Lakian, 2019 NY Slip Op 05059, CtApp 6-25-19

DECLARATORY JUDGMENTS, JUDGES, SUA SPONTE.

HARDSHIP WAIVER TO ALLOW CONSTRUCTION OF A SINGLE FAMILY HOME IN THE CORE PRESERVATION AREA OF THE LONG ISLAND CENTRAL PINES BARRENS PROPERLY DENIED, ACCOMPANYING ACTION FOR DECLARATORY JUDGMENT SHOULD NOT HAVE BEEN SUMMARILY DENIED, SUA SPONTE, BY THE JUDGE BECAUSE THERE WAS NO REQUEST FOR THAT RELIEF (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that the Article 78 petition for a hardship waiver to allow petitioner to build a single family residence on property within the core preservation area of the Long

Island Central Pines Barrens was properly denied. However, the accompanying declaratory judgment action (alleging the denial of the waiver was an unconstitutional taking) should not have been summarily dismissed by the judge absent a motion for that relief:

… [C]ontrary to the petitioner's contention, the Commission's determination to deny its application for an extraordinary hardship waiver had a rational basis and was not arbitrary and capricious. In particular, the Commission rationally found, inter alia, that the alleged hardship was not the result of any unique circumstances peculiar to the subject property (see ECL 57-0121[10][a][i] …) and, in any event, that the alleged hardship was self-created (see ECL 57-0121[10][a][ii], [iii] …). The Commission also rationally found that the application did not satisfy the requirements of ECL 57-0121(10)(c) and reasonably distinguished the application from prior applications for which it granted an extraordinary hardship waiver … . …

"In a hybrid proceeding and action, separate 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 Armand Gustave, LLC v Pavacic, 2019 NY Slip Op 05125, Second Dept 6-26-19

DISCOVERY, ALCOHOL/DRUG TREATMENT/MENTAL HEALTH INFORMATION/HIV-RELATED INFORMATION.

DEFENDANTS DID NOT SHOW THERE WAS A COMPELLING NEED FOR DISCOVERY OF 'ALCOHOL/DRUG TREATMENT/MENTAL HEALTH INFORMATION/HIV-RELATED INFORMATION' IN THIS SLIP AND FALL CASE, DISCOVERY REQUEST SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the defendants request for discovery of "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information" in this slip and fall case was not supported by evidence of a compelling need:

"[A] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-

patient privilege by affirmatively putting his or her physical or mental condition in issue" … However, Public Health Law § 2785(1) provides that, "[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information," and the only exception to that prohibition that is pertinent in this case requires an application showing "a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding" (Public Health Law § 2785[2][a]).

Here, the defendants failed to proffer any showing of a compelling need for disclosure related to "HIV-Related Information." Further, the defendants failed to submit an expert affidavit or any other evidence that would establish a connection between "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information," and the cause of the accident, and failed to make any effort to link any such information to the plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life … . Nesbitt v Advanced Serv. Solutions, 2019 NY Slip Op 04961, Second Dept 6-19-19

DISCOVERY, EDUCATION-SCHOOL LAW, THIRD-PARTY ASSAULT.

DISCOVERY OF PRIOR ASSAULTS IN THIS STUDENT ON STUDENT THIRD-PARTY ASSAULT CASE SHOULD NOT HAVE BEEN LIMITED TO PRIOR SEXUAL ASSAULTS AND PRIOR ASSAULTS BETWEEN THE TWO STUDENTS, ASSAULTS OF ANY KIND MAY HAVE PUT THE SCHOOL ON NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that discovery in this third-party assault (negligent supervision) case should not have been restricted to prior sexual assaults in the school and prior assaults between the alleged (student) perpetrator and the (student) plaintiff:

We disagree with the Supreme Court's determination that the defendants were only required to provide records pertaining to "assaults of a sexual nature" and "all assaults of any nature between" the infant plaintiff and the student alleged to have sexually assaulted the infant plaintiff. Evidence of prior assaults at the school, particularly any assaults in the stairwell where the subject incident occurred, may be sufficient to establish that the defendants had actual or constructive notice of conduct similar to the subject incident … . Moreover, evidence of any prior assaults perpetuated by the offending student against students other than the infant plaintiff may be sufficient to establish that the defendants had actual or constructive notice of the offending student's dangerous propensities … . M.C. v City of New York, 2019 NY Slip Op 04372, Second Dept 6-5-19

DISCOVERY, INSPECTION OF PROPERTY.

PLAINTIFF'S DISCOVERY REQUEST FOR INSPECTION AND EXPERT EXAMINATION OF DEFENDANTS' PROPERTY IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF ALLEGED DEFENDANTS DIVERTED WATER ONTO A PUBLIC ROAD WHICH FORMED A PATCH OF BLACK ICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's request to enter the Rizzetta defendants' property to allow inspection and expert examination of the alleged diversion of water from the property onto a public road should have been granted. Plaintiff was injured riding his bicycle when he hit a patch of black ice, slipped and fell:

CPLR 3120(1)(ii) provides that a party may serve another party with notice "to permit entry upon designated land or other property in the possession, custody or control of the party served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon." Motions seeking such discovery "are routinely granted when a central issue in the case is the condition of the real property under inspection" … . …

Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion. A central issue in this litigation is the source of the water which allegedly caused the injury-producing ice condition. An owner of private land abutting a public roadway may be liable for injuries sustained from a fall on ice on the public roadway, if the "ice condition was caused and created by the artificial diversion of naturally flowing water from the private landowner's property onto the public roadway" … . The plaintiff's theory of the Rizzetta defendants' liability is premised upon the Rizzetta defendants' alleged diversion of water from their property onto the public roadway. Although the probative value of the inspection may be weakened by the passage of time since the accident occurred, such delay is not a basis for denying the plaintiff's discovery request where, as here, the inspection may still aid the parties in preparation for trial … . Zupnick v City of New Rochelle, 2019 NY Slip Op 04754, Second Dept 6-12-19

DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

DOCUMENTARY EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS DID NOT MEET THE CRITERIA REQUIRED BY CPLR 3211(a)(1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant insurer's (Reliastar's) motion to dismiss based on documentary evidence should not have been granted. Plaintiffs sued for breach of contract when Reliastar canceled the life insurance policy:

"To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law"… . "In order for evidence to qualify as documentary,' it must be unambiguous, authentic, and undeniable" … . "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" … . "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence" … . Here, in support of that branch of its motion which was pursuant to CPLR 3211(a)(1), Reliastar submitted the policy and certain policy notices, which, according to Reliastar, refuted the plaintiffs' contention that the policy cancellation was the result of Reliastar's breach of its obligations under the policy. The policy notices, however, were, in effect, letters, which fail to meet the requirements for documentary evidence within the meaning of CPLR 3211(a)(1) … . Magee-Boyle v Reliastar Life Ins. Co. of N.Y., 2019 NY Slip Op 05118, Second Dept 6-26-19

EMPLOYMENT LAW, ADMINISTRATIVE LAW, RES JUDICATA, COLLATERAL ESTOPPEL.

SCHOOL EMPLOYEE'S NEGLIGENCE ACTION AGAINST THE DEPARTMENT OF EDUCATION IS NOT GOVERNED BY THE COLLECTIVE BARGAINING AGREEMENT (CBA), NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES; DENIAL OF MEDICAL LEAVE DID NOT HAVE RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an employee's personal injury complaint against the NYC Department of Education (DOE), stemming from an elevator accident, should not have been dismissed.

The plaintiff-employee first applied to the DOE for line of duty injury paid medical leave pursuant to the collective bargaining agreement (CBA) and was denied. Plaintiff then commenced the personal injury action. The DOE argued that plaintiff had failed to exhaust the administrative remedies required by the CBA and, in the alternative, the denial of the line of duty pay should be given res judicata or collateral estoppel effect. Supreme Court decided plaintiff had failed to exhaust the administrative remedies. The Second Department held that her injury and the resulting negligence action were not covered by the CBA:

An employee covered by a collective bargaining agreement which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies … or face dismissal of the action …. Here, however, the plaintiff seeks to recover damages against the defendants for pain and suffering based upon a negligence theory of liability which is outside the scope of, and is not governed by, the CBA's "line of duty injury" paid leave grievance provisions… . There is no need to exhaust administrative remedies when the cause of action by the plaintiff is not governed by the CBA … .

The defendants' contention that dismissal is also warranted on the basis of collateral estoppel and res judicata is without merit … . Collateral estoppel is inapplicable, as the defendants failed to demonstrate that the issue that the plaintiff seeks to pursue here was necessarily decided by the DOE when it denied the plaintiff's "line of duty injury" paid leave application … . Likewise, the doctrine of res judicata, or claim preclusion, also is inapplicable to the plaintiff's complaint because the relief she seeks could not have been awarded within the context of the prior administrative proceeding … . Shortt v City of New York, 2019 NY Slip Op 04745, Second Dept 6-12-19

FAMILY LAW, SUMMARY JUDGMENT.

MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF MOTHER'S NEGLECT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined petitioner's motion for summary judgment against mother on the issue of neglect should have been denied:

"[I]n an appropriate case, the Family Court may enter a finding of neglect on a summary judgment motion in lieu of holding a fact-finding hearing upon the petitioner's prima facie showing of neglect as a matter of law and the respondent's failure to raise a triable issue of fact in opposition to the motion" … . "Summary judgment, of course, may only be granted in any proceeding when it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function" … .

Here, in support of that branch of its motion which was for summary judgment against the mother on the issue of neglect of the subject child, the petitioner included the evidence submitted at a hearing held pursuant to Family Court Act § 1028. At that hearing, the mother, who is deaf and communicated through a sign language interpreter, gave various explanations for the scratches and other marks on the child's skin. The mother testified that she had difficulty controlling the child, who has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder, and that she accidentally scratched the child while trying to restrain him. Under these circumstances, the evidence at the hearing revealed triable issues of fact as to whether the mother neglected the child. Matter of Joseph Z. (Yola Z.), 2019 NY Slip Op 04957, Second Dept 6-19-19

FORECLOSURE, DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE ON THE GROUND THAT THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION HAD EXPIRED SHOULD HAVE BEEN DISMISSED, THE BANK UTTERLY REFUTED THE ALLEGATION WITH DOCUMENTS DEMONSTRATING THE DEBT HAD NEVER BEEN ACCELERATED; CLEAR EXPLANATION OF THE REQUIREMENTS FOR DISMISSAL BASED ON DOCUMENTARY EVIDENCE AND ACCELERATION OF A MORTGAGE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive dissent, determined that the bank's (Deutsche Bank's) motion to dismiss the plaintiff's RPAPL article 15 action to cancel and discharge the mortgage should have been granted. The bank had started foreclosure proceedings in 2007 and plaintiff alleged in the complaint that the statute of limitations had run. However, the 2007 action had been dismissed because the bank did not have standing at the time it was brought. The Second Department determined the documentary proof of the dismissal of the 2007 action demonstrated, as a matter of law, that the debt had never been accelerated and, therefore, the statute of limitations had never started running. The decision provides a succinct and clear explanation of the requirements for a dismissal based on documentary evidence and the requirements for accelerating a mortgage debt:

… [C]ontrary to the plaintiff's contention and the opinion of our dissenting colleague, the commencement of the foreclosure action, which was dismissed on the ground that Deutsche Bank lacked standing, was ineffective to

constitute a valid exercise of the option to accelerate the debt since Deutsche Bank did not have the authority to accelerate the debt at that time … . The plaintiff did not identify the specific time when the mortgage was actually, legally accelerated. Furthermore, the notices of default were nothing more than letters discussing acceleration as a possible future event, which do not "constitute an exercise of the mortgage's optional acceleration clause" … . …

Consequently, the allegations in the complaint that the debt was accelerated as of April 30, 2007, the date when Deutsche Bank commenced the underlying foreclosure action, or prior to April 30, 2007, when the notices of default were sent, are utterly refuted by the documentary evidence submitted by Deutsche Bank, which included the written assignment of the mortgage [dated after April 30, 2007) "together with the . . . note" and the October 2009 order [dismissing the foreclosure action], in support of that branch of its motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint … . Moreover, Deutsche Bank, through the evidence it submitted with its motion, demonstrated that the plaintiff's allegation that the statute of limitations to foreclose the subject mortgage had expired was "not a fact at all," and that "it can be said that no significant dispute exists regarding it," warranting dismissal of the complaint pursuant to CPLR 3211(a)(7) … . J & JT Holding Corp. v Deutsche Bank Natl. Trust Co., 2019 NY Slip Op 04366, Second Dept 6-5-19

FORECLOSURE, SERVICE OF PROCESS.

PROCESS SERVER'S AFFIDAVIT OF SERVICE WAS REBUTTED BY SUFFICIENT EVIDENCE TO WARRANT A HEARING ON WHETHER DEFENDANT WAS SERVED WITH THE SUMMONS AND COMPLAINT IN THIS FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the process server's affidavit was rebutted by sufficient proof to warrant a hearing on whether defendant, David, was served with the summons and complaint in this foreclosure action:

A process server's affidavit of service gives rise to a presumption of proper service" … . "Bare and unsubstantiated denials are insufficient to rebut the presumption of service" … . However, "[w]here a defendant submits a sworn denial of receipt of process containing specific facts to rebut the statements in the process server's affidavit, the presumption of proper service is rebutted and an evidentiary hearing is required" … .

Here, an affidavit of service, in which the process server attested to having served David with copies of the summons and complaint by personal delivery to him at his residence at the subject property in Williston Park on April 16, 2014, at 8:08 p.m., constituted prima facie evidence of proper service on David … . However, in support of the motion, David submitted an affidavit of Patricia, who attested that David suffered a brain aneurysm in April 2008 and had resided in a nursing home in Glen Cove since July 2008 and, thus, could not have been personally served at the residence on April 16, 2014. These facts were supported by documents submitted with the affidavit, including minutes of a guardianship proceeding dated June 8, 2012, wherein the court noted that David resided in a nursing home in Glen Cove. Caliber Home Loans, Inc. v Silber, 2019 NY Slip Op 04907, Second Dept 6-19-19

FORECLOSURE, STANDING.

DESPITE LOSS OF THE NOTE, THE BANK CAN DEMONSTRATE STANDING WITH A LOST NOTE AFFIDAVIT WHICH MEETS THE REQUIREMENTS OF UCC 3-803 (SECOND DEPT).

The Second Department determined plaintiff bank properly established standing in this foreclosure proceeding, despite the note having been lost, with a lost note affidavit which met the requirements of UCC 3-803:

… "[P]ursuant to UCC 3-804, the owner of a lost note may maintain an action upon due proof of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms'" … . Accordingly, we agree with the referee that, as long as the affidavit of lost note meets the requirements of UCC 3-804, a mortgagee may establish standing based on its possession of the note, even where the original note has been lost. Here, the parties stipulated that "the factual criteria for the application of § 3-804 ha[ve] been satisfied." Moreover, while ownership of the note may be easier to establish where there is a valid assignment of the note and mortgage … , due proof of the plaintiff's ownership may also be provided by an affidavit of lost note setting forth details such as who acquired possession of the note and "when the search for the note occurred, who conducted the search, the steps taken in the search for the note, or when or how the note was lost" … . Bank of N.Y. Mellon v Hardt, 2019 NY Slip Op 05100, Second Dept 6-27-29

FORECLOSURE, STATUTE OF LIMITATIONS, DISCONTINUANCE.

QUESTION OF FACT WHETHER THE DISCONTINUANCE OF A PRIOR FORECLOSURE ACTION DE-ACCELERATED THE MORTGAGE RENDERING THE INSTANT ACTION TIMELY (FIRST DEPT).

The First Department determined there was a question of fact whether the discontinuance of a prior foreclosure action de-accelerated the mortgage. If the mortgage was not de-accelerated the instant action would be time-barred:

Acceleration only takes place when the holder of the note and mortgage takes "affirmative action . . . evidencing the holder's election" to do so … . This may be accomplished in the form of a notice to the borrower … . Affirmative action can also occur when the first foreclosure action is commenced … . The prior foreclosure action sought the accelerated mortgage amount.

There is an issue of fact in this particular case regarding whether plaintiff's discontinuance of the prior foreclosure action de-accelerated the mortgage … . We note that neither the motion seeking discontinuance or the order entered granting that relief provided that the mortgage was de-accelerated or that plaintiff would now be accepting installment payments from the defendant … . U.S. Bank N.A. v Charles, 2019 NY Slip Op 04997, First Dept 6-20-19

FORECLOSURE, STATUTE OF LIMITATIONS.

A PRIOR FORECLOSURE ACTION DISMISSED FOR LACK OF STANDING DID NOT ACCELERATE THE MORTGAGE DEBT, THE STATUTE OF LIMITATIONS, THEREFORE, DID NOT START TO RUN (SECOND DEPT).

The Second Department noted that the prior foreclosure action, which was dismissed on the ground the plaintiff lacked standing, did not accelerate the mortgage debt. Therefore the statute of limitations was not triggered by the dismissed action:

[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt" … . Acceleration occurs, inter alia, "when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" … . "[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" … .

Auguste contends that the commencement of the prior action in 2007 accelerated the debt, and that the commencement of the instant action, seven years later, was beyond the statute of limitations. Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration … . U.S. Bank N.A. v Auguste, 2019 NY Slip Op 04747, Second Dept 6-12-19

FORECLOSURE, STIPULATIONS, APPEALS.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION, AN ADMINISTRATIVE ORDER REQUIRING A FORECLOSURE AFFIRMATION AND A CERTIFICATE OF MERIT SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY, A STIPULATION AWARDING SUMMARY JUDGMENT TO THE BANK SHOULD NOT HAVE BEEN IGNORED, THE IMPROPER APPLICATION OF THE ADMINISTRATIVE ORDER RAISED A MATTER OF LAW THAT COULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined the plaintiff bank's motion to vacate a dismissal of a foreclosure action should have been granted. Supreme Court had improperly applied an administrative order (AO 548/10) requiring a "Foreclosure Affirmation/Certificate of Merit" that was not in effect at the time the bank made its motion for summary judgment. The parties had entered a stipulation which awarded the bank summary judgment in return for waiver of its right to seek a deficiency judgment. The court noted that the improper retroactive application of AO 548/10 could be raised for the first time on appeal because it is a question of law that could not be avoided if it had been raised at the proper time:

"[A] court may vacate its own judgment for sufficient reason and in the interest of substantial justice"… . "A foreclosure action is equitable in nature and triggers the equitable powers of the court" … . "Once equity is invoked, the court's power is as broad as equity and justice require" … .

Here, equity and justice require vacatur of the dismissal order in the interests of substantial justice … . Countrywide Bank, FSB v Singh, 2019 NY Slip Op 04353, Second Dept 6-5-19

JUDGES, PROHIBITION, MANDAMUS, CRIMINAL LAW.

COUNTY COURT DENIED PETITIONER'S MOTION TO DISMISS AN INDICTMENT ON THE GROUND THE PEOPLE HAD LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE INDICTMENT AT THE TIME HE PLED GUILTY TO A PRIOR INDICTMENT (CPL 40.40); PETITIONER'S REMEDY IS DIRECT APPEAL, NOT THE INSTANT ARTICLE 78 PETITION SEEKING PROHIBITION OR MANDAMUS (THIRD DEPT).

The Third Department determined petitioner must seek review of the denial of a motion to dismiss an indictment pursuant to CPL 40.40 by direct appeal, not by the instant Article 78 action for prohibition or mandamus re: the district attorney and the judge. Petitioner moved to dismiss the indictment on the ground that the People had legally sufficient evidence to support the indictment at the time he pled guilty to a prior indictment. County Court denied that motion without a hearing, even though County Court noted it could not determine whether the People had legally sufficient evidence at the time petitioner pled guilty:

The District Attorney contends that petitioner may not obtain collateral review of County Court's denial of his motion through a CPLR article 78 proceeding. We agree. "Neither [of the extraordinary remedies of] prohibition nor mandamus lies as a means to obtain collateral review of an alleged error of law particularly where, as here, there is an adequate remedy at law by way of a direct appeal" … . Any error in County Court's decision denying petitioner's motion to dismiss indictment No. 3 without a hearing is, at most, a mere error of law that does not justify the invocation of the extraordinary remedies sought … . Matter of Davis v Nichols, 2019 NY Slip Op 04794, Third Dept 6-13-19

JUDGES, SUA SPONTE, DEFAULT JUDGMENTS, APPEALS.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT AND VACATED THE DEFAULT JUDGMENT, ALTHOUGH A SUA SPONTE ORDER IS NOT APPEALABLE AS OF RIGHT, THE NOTICE OF APPEAL WAS DEEMED A MOTION FOR LEAVE TO APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court, held that Supreme Court should not have, sua sponte, dismissed plaintiff's complaint and vacated the default judgment as untimely, Plaintiff had timely moved for a default judgment. Although sua sponte orders are not appealable as of right, the First Department deemed the notice of appeal as a motion for leave to appeal:

An order issued sua sponte is not appealable as of right (see Sholes v Meagher, 100 NY2d 333, 335 [2003]). However, given the nature of the motion court's sua sponte relief in dismissing the complaint pursuant to CPLR 3215(c), we deem the notice of appeal to be a motion for leave to appeal, and grant such leave (…CPLR 5701[c]).

The record is clear that plaintiff had moved for a default judgment within one year, and thus, the motion court's sua sponte vacature of the judgment and dismissal of the complaint as untimely was in error … . In view of this decision, the merits of defendant's motion to vacate the default judgment are no longer moot and it is remanded back to the trial court for consideration on the merits. New Globaltex Co., Ltd. v Zhe Lin, 2019 NY Slip Op 04456, First Dept 6-6-19

JUDGES, SUMMARY JUDGMENT.

JUDGE WHO DID NOT HEAR THE ORAL ARGUMENT COULD DECIDE THE SUMMARY JUDGMENT MOTION ON A PURELY LEGAL QUESTION (FIRST DEPT).

The First Department determined it was appropriate for a judge to decide a summary judgment motion, despite the fact that another judge heard the oral argument:

The fact that oral argument was held before a different Justice than the Justice who ultimately decided the motion for summary judgment is not a proper basis for vacating the order granting summary judgment. Although Judiciary Law § 21 provides that a Supreme Court Justice "shall not decide or take part in the decision of a

question, which was argued orally in the court, when he was not present and sitting therein as a judge," reversal is not warranted on this ground, because the Justice who granted the motion decided a purely legal question … . Marti v Rana, 2019 NY Slip Op 05011, First Dept 6-20-19

JURISDICTION, CORPORATIONS.

THE NEW JERSEY TRAFFIC ACCIDENT INVOLVED NEW YORK RESIDENTS (PLAINTIFFS), A TRUCK LEASED BY DEFENDANT NEW JERSEY CORPORATION AND THE DEFENDANT TRUCK DRIVER FROM PENNSYLVANIA; NO GENERAL PERSONAL JURISDICTION OVER THE CORPORATION OR THE DRIVER; POSSIBLE LONG-ARM JURISDICTION OVER THE CORPORATION, BUT NOT THE DRIVER, BASED UPON BUSINESS CONDUCTED IN NEW YORK (SECOND DEPT).

The Second Department determined Supreme Court properly denied all but one of the defendants' motions to dismiss premised on lack of personal jurisdiction, pending further discovery. The traffic accident happened in New Jersey. The plaintiffs' van was struck from behind by a freight truck leased by Finkle (a New Jersey corporation) from Ryder Truck Rental and driven by defendant Larios, a resident of Pennsylvania. All the plaintiffs were residents of New York. The Second Department found that there was no general jurisdiction under CPLR 301, and no long-arm jurisdiction under CPLR 302 (a])(3) (tortious act outside the state causing injury within the state). However there may jurisdiction against Finkle pursuant to CPLR 302 (a) (1) (conducting business within the state):

… [Plaintiffs] have not alleged facts in opposition which would support the exercise of personal jurisdiction under New York's general jurisdiction statute, CPLR 301, over Larios, who was not domiciled in New York, or over Finkle, which was not incorporated in New York and did not have its principal place of business in New York … . …

Under CPLR 302(a)(3), "[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff" … . Here, since the accident which caused the injuries occurred in New Jersey, CPLR 302(a)(3) does not provide a basis for personal jurisdiction over these defendants in New York … .

… .Finkle asserted that it is a New Jersey corporation with its business address in New Jersey, and Larios stated that, at the time of the accident, he was transporting a load for the United States Postal Service within the State of New Jersey. However, Finkle admitted that it had terminals at four New York locations at which it parked its vehicles. Based upon these facts, and given Finkle's failure to submit trip logs, manifests, or other documentary evidence to support its assertion that the load Larios was transporting was being shipped within the State of New Jersey and had no relationship to Finkle's New York business, we agree with the Supreme Court's determination to deny as premature that branch of the appellants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Finkle, with leave to renew upon completion of discovery. Qudsi v Larios, 2019 NY Slip Op 04742, Second Dept 6-12-19

JURISDICTION, COURT OF CLAIMS, TOXIC TORTS.

CLAIMANTS DID NOT ALLEGE WHEN THE ALLEGED INJURIES RELATED TO TOXIC CONTAMINATION WERE INCURRED, CLAIMS PROPERLY DISMISSED AS JURISDICTIONALLY DEFECTIVE (FOURTH DEPT).

The Fourth Department determined the action alleging negligence and inverse condemnation stemming from toxic contamination of the vicinity of a defunct factory was properly dismissed because the allegations did not specify when the alleged injuries occurred:

The State of New York is sovereign and has consented to be sued only in strict accordance with the requirements of the Court of Claims Act (see Court of Claims Act § 8 …). Among those requirements is the claimant's duty to allege "the time when [the] claim arose" … . The requirements of section 11 (b) are jurisdictional in nature … , and the failure to satisfy them mandates dismissal of the claim without regard to whether the State was prejudiced … or had access to the requisite information from its own records … . As the Court of Appeals has explained, the State is not required "to ferret out or assemble information that section 11 (b) obligates the claimant to allege" … . …

Here, although claimants adequately specified when defendant's negligent acts allegedly occurred, they failed to supply any dates or ranges of dates regarding their alleged injuries, such as when they were exposed to toxins, when they developed symptoms, when they sought treatment, or when they were diagnosed with an illness. Instead, claimants alleged only the dates of their residence in Geneva and the dates when news of the contamination became public. Claimants' allegations are insufficient to enable defendant to adequately investigate the claims in order to ascertain its liability, if any. Given claimants' failure to provide any dates

regarding their alleged injuries, defendant could not realistically differentiate between those injuries attributable to toxic exposure and those injuries attributable to other causes. We therefore conclude that claimants failed to adequately plead when the claims arose for purposes of Court of Claims Act § 11 (b). Consequently, the court properly dismissed the claims as jurisdictionally defective … . Matter of Geneva Foundry Litig., 2019 NY Slip Op 05271, Fourth Dept 6-28-19

JURISDICTION.

DEFENDANT DID NOT DENY ALLEGATIONS IN THE COMPLAINT WHICH ALLEGED GENERAL JURISDICTION OVER THE DEFENDANT, THEREFORE JURISDICTION WAS CONFERRED ON THE COURT, THE MECHANICS OF SUCCESSFULLY DENYING JURISDICTION EXPLAINED (FIRST DEPT).

The First Department determined defendant's motion to dismiss the complaint based upon a lack of personal jurisdiction was properly denied because the defense was waived when defendant did not specifically deny an allegation of general jurisdiction made in the complaint. The court explained the mechanics of denying jurisdiction:

… [T]he defendant argues that it asserted a defense of lack of personal jurisdiction in its answer, and thus preserved the issue for adjudication in its present motion.

Personal jurisdiction is not an element of a claim, and matters that are not elements need not be pleaded in the complaint …. Where the plaintiff has not alleged facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant must assert lack of personal jurisdiction as an affirmative defense in order to give plaintiff notice that it is contesting it (see CPLR 3018). Where the plaintiff elects to allege facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant's denial of those allegations may be sufficient to preserve defendant's jurisdictional defense … . …

The specific allegations of plaintiff's complaint … track, almost verbatim, the language of personal jurisdiction in CPLR 302, which provides the bases for specific jurisdiction. Defendant's denial of these allegations is sufficient to provide notice to plaintiff that it is contesting specific jurisdiction.

The allegations of plaintiff's complaint paragraphs 83 and 84 purport to establish a basis for general jurisdiction. They were not denied by defendant, rather defendant admitted them to the extent that it "is a duly organized foreign corporation doing business in New York . . ." This answer, interposed in 2004, before the Supreme

Court's ruling in Daimler AG v Bauman, 571 US 117 (2014), would have provided a basis for general jurisdiction. It, therefore, does not qualify as a specific denial that would have put plaintiff on notice that the defendant is contesting general jurisdiction. Defendant's failure to clearly provide an objection to general jurisdiction in its answer waived the defense and conferred jurisdiction upon the court … . Matter of New York City Asbestos Litig., 2019 NY Slip Op 04777, First Dept 6-13-19

LIMITED LIABILITY COMPANIES, SERVICE OF PROCESS.

PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH THE SERVICE OF PROCESS REQUIREMENTS OF THE LIMITED LIABILITY COMPANY LAW (SERVICE UPON THE SECRETARY OF STATE) (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiffs did not demonstrate compliance with the service of process requirements of the Limited Liability Company Law:

"The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" … . Proof of service, often in the form of an affidavit of service (see CPLR 306 [d]), must include "the papers served, the person who was served and the date, time [and] address [of such service], . . . and set forth facts showing that the service was made by an authorized person and in an authorized manner" … . Additionally, "[b]ecause service of process is necessary to obtain personal jurisdiction over defendants, courts require strict compliance with the statutory methods of service" … . As relevant here, "[s]ervice of process on the secretary of state as agent of a domestic limited liability company . . . shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, . . . duplicate copies of such process together with the statutory fee" … . …

Although plaintiffs proffered an unsigned receipt of service purportedly generated by the Office of the Secretary of State, that receipt did not set forth the papers served, whether duplicate copies of those papers were delivered to the Secretary of State, the time of service or facts showing that service was made by an authorized person (see Limited Liability Company Law § 303 [a]; CPLR 306 [a], [d]). Cedar Run Homeowners' Assn., Inc. v Adirondack Dev. Group, LLC, 2019 NY Slip Op 04528, Third Dept 6-6-19

MOTION IN LIMINE, APPEALS.

PORTIONS OF THE RESPONDENTS' APPRAISAL REPORT IN THIS CONDEMNATION PROCEEDING SHOULD NOT HAVE BEEN STRUCK BECAUSE THE PROPER VALUATION METHOD WAS USED; THE EVIDENTIARY RULING ON THE MOTION IN LIMINE IS APPEALABLE BECAUSE THE RULING AFFECTS THE SCOPE OF THE TRIAL ISSUES (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that the portions of motion in limine seeking to strike parts of respondents' appraisal report in this condemnation proceeding should not have been granted. The court noted that the evidentiary ruling was appealable because it limited the scope of the trial issues. The court further noted that the proof of valuation offered at trial must be limited to the valuation method(s) described in the appraisal report:

Where, as here, "the highest and best use is the one the property presently serves and that use is income-producing, then the capitalization of income is a proper method of valuation" … . In our view, the stricken portion of respondents' appraisal report, although titled "investment valuation," applied an income capitalization approach using the standard income capitalization formula, i.e., value equals net income divided by a capitalization rate … , and applied factors that, according to respondents' appraiser, accurately reflect the property's value and would make the property more appealing to prospective purchasers. To the extent that petitioner contends that certain factors considered by respondents' appraiser in valuing the property do not accurately reflect market value, "[t]he fact that some aspects of the valuation methodology [of respondents' appraiser] may be subject to question goes to the weight to be accorded the appraisal[]," not its admissibility … . … Matter of Rochester Genesee Regional Transp. Auth. v Stensrud, 2019 NY Slip Op 04612, Fourth Dept 6-7-19

NECESSARY PARTIES, EXTENSION OF TIME TO SERVE, STATUTE OF LIMITATIONS.

SUPREME COURT SHOULD HAVE SUMMONED A NECESSARY PARTY WHICH WAS SUBJECT TO THE JURISDICTION OF THE COURT PURSUANT TO CPLR 1001; SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S SECOND MOTION FOR AN EXTENSION OF TIME TO SERVE A DEFENDANT IN THE INTEREST OF JUSTICE, DESPITE THE EXPIRATION OF THE STATUTE OF LIMITATIONS AND LAW-OFFICE-FAILURE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's second motion to extend the time to serve defendant (Bandolos). after the statute of limitations had run, should have been granted. The court further held that Supreme Court should have summoned a necessary party (Mother of Pearl, the record owner) because the party was subject to the court's jurisdiction:

The Supreme Court should have granted that branch of the plaintiff's motion which was, in effect, for leave to join Mother of Pearl as a party to the action … . "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the court should not proceed in the absence of a person who should be a party" (CPLR 3211[a][10]). However, CPLR 1001(b) provides that where the party "is subject to the jurisdiction of the court, the court shall order him [or her] summoned." Mother of Pearl, as the record owner of the property, is a necessary party to this action (see CPLR 1001[a]; RPAPL 1311[1]) subject to the jurisdiction of the court. Consequently, the court should have ordered Mother of Pearl summoned, rather than granting that branch of the mortgagors' cross motion which was pursuant to CPLR 3211(a)(10) to dismiss the complaint insofar as asserted against them … . …

Further, under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b for leave to extend the time to serve the summons and complaint upon Kelly Bandalos by publication in the interest of justice … . While the action was timely commenced, the statute of limitations has since expired. Although the plaintiff's only excuse for not serving Kelly Bandalos by publication is law office failure, it did make diligent efforts to serve her prior to the first extension of time to serve and the issuance of the order of publication. Further, Kelly Bandalos had actual notice of the action within 120 days of its commencement, she served and filed an answer, and there is no identifiable prejudice to her attributable to the delay in service … . Deutsche Bank Natl. Trust Co. v Bandalos, 2019 NY Slip Op 05106, Second Dept 6-26-19

NOTE OF ISSUE, STIPULATION OF CONFIDENTIALITY, TRADE SECRETS.

NOTE OF ISSUE AND CERTIFICATE OF READINESS CONTAINING INCORRECT INFORMATION (I.E., DISCOVERY WAS COMPLETE) SHOULD HAVE BEEN VACATED; STIPULATION OF CONFIDENTIALITY WAS SUFFICIENT TO PROTECT TRADE SECRETS (FOURTH DEPT).

The Fourth Department determined the motion to vacate the note of issue and a certificate of readiness because the information therein was not correct (discovery was not complete). The court further determined that the confidentiality stipulation was sufficient to protect trade secrets during discovery:

… [C]ontrary to the statements on the certificate of readiness, discovery was incomplete when the note of issue and certificate of readiness were filed. Thus, "a material fact in the certificate of readiness [was] incorrect," and the note of issue and certificate of readiness must be vacated … . …

… [D]efendants requested that the court issue a protective order that included the designation of a third-party neutral expert and an "attorney and expert eyes only" designation for disclosure. The court denied defendants' request, and directed the parties to execute a confidentiality stipulation and order and to proceed with discovery pursuant to Rule 11-g of the Rules of the Commercial Division of the Supreme Court (see 22 NYCRR 202.70). The confidentiality stipulation and order provides, inter alia, that "Confidential Information shall be utilized by the Receiving Party and its Counsel only for purposes of this litigation and for no other purposes. Any violation of this Stipulation and Order may be enforced as a contempt of Court." We conclude that the court provided defendants with adequate protection of their intellectual property and trade secrets. Backer & Assoc., LLC v PPB Eng'g & Sys. Design, Inc., 2019 NY Slip Op 04541, Fourth Dept 6-7-19

PARTIES, AMEND COMPLAINT, STATUTE OF LIMITATIONS.

PLAINTIFF SUED YANKEE TRAILS FIVE DAYS BEFORE THE STATUTE OF LIMITATIONS RAN IN THIS BUS TRAFFIC ACCIDENT CASE; THE OWNER OF THE BUS WAS ACTUALLY YANKEE TRAILS WORLD TOURS, A COMPANY WITH A DIFFERENT ADDRESS AND CEO; PLAINTIFF'S MOTIONS TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT AND TO AMEND THE COMPLAINT TO SUBSTITUTE THE CORRECT DEFENDANT, MADE AFTER THE STATUTE HAD RUN, SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined plaintiff should not have been allowed to have more time to serve defendant and amend the complaint to substitute the correct defendant. The action stemmed from a traffic accident involving a bus owned by Yankee Trails. Five days before the statute of limitations ran, plaintiff commenced an action against Yankee Trails World Tours, a different corporation with different addresses and different chief executive officers:

… [W]hether relief pursuant to CPLR 306-b and 305 (c) is available is not merely a matter of discretion. Significantly, "CPLR 306-b cannot be used to extend the time for service against a defendant as to which the action was never validly commenced" … . Similarly, although a court may allow amendment of a summons to correct the name of a defendant pursuant to CPLR 305 (c), such remedy is not available where a plaintiff seeks to substitute a defendant who has not been properly served … .

The fact that defendant and Yankee Trails use the same insurance carrier is of no significance in the circumstances presented; notably, the record reflects that the insurance carrier did not contact Yankee Trails until after the statute of limitations had expired. Nor may we consider plaintiff's error a mere misnomer that would allow relief to be granted pursuant to CPLR 305 (c) and CPLR 306-b … . Upon this record, plaintiff's attempt to "proceed against [Yankee Trails as] an unserved and entirely new defendant" after the statute of limitations had run should have been denied, as he failed to obtain jurisdiction over Yankee Trails for relief pursuant CPLR 306-b and, thus, to later amend the complaint pursuant to CPLR 305 … . Fadlalla v Yankee Trails World Tours, Inc., 2019 NY Slip Op 05044, Third Dept 6-20-19

REPLY PAPERS.

INFORMATION PROVIDED FOR THE FIRST TIME IN A REPLY TO OPPOSITION TO A SUMMARY JUDGMENT MOTION CAN NOT BE RELIED UPON TO MAKE OUT A PRIMA FACIE CASE, THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ON THE JOB INJURY CASE ON THE GROUND THAT APPELLANT WAS PLAINTIFF'S GENERAL EMPLOYER AND PLAINTIFF'S ONLY REMEDY WAS WORKERS' COMPENSATION PROPERLY DENIED (SECOND DEPT).

The Second Department determined that information provided for the first time in a reply affidavit could not be relied upon to sustain a movant's prima facie burden for a summary judgment motion. The plaintiff, who was injured on the job, alleged he was hired by the defendant Bright Star Messenger Service, LLC (hereinafter the appellant). In its motion for summary judgment the appellant alleged it was plaintiff's general employer and plaintiff's only remedy was Workers' Compensation. But included in appellant's papers was plaintiff's claim for Worker's Compensation benefits which listed plaintiff's employer as "Bright Star Courier." Therefore the appellant failed to make out a prima facie case that it was plaintiff's employer. The appellant then submitted a reply affidavit stating that Bright Star Courier had changed its name to Bright Star Messenger Center, LLC prior to the accident:

… Contrary to the appellant's contention, it failed to make a prima facie showing that it was the plaintiff's general employer. The appellant submitted the affidavit of a representative of the appellant, who stated that the plaintiff was employed by the appellant on the date of the accident, and that the appellant had procured workers' compensation insurance for the plaintiff. However, the appellant also submitted Workers' Compensation Board records showing that the plaintiff had filed a claim for benefits that listed the plaintiff's employer as "Bright Star Courier." Under these circumstances, the appellant failed to demonstrate, prima facie, that it was the plaintiff's general employer … . While the appellant submitted a reply affidavit from its representative averring that Bright Star Courier had changed its name to Bright Star Messenger Center, LLC, prior to the accident, a party cannot sustain its prima facie burden by relying on evidence submitted for the first time in its reply papers … . The appellant's failure to make a prima facie showing of its entitlement to judgment as a matter of law required the denial of its motion, regardless of the sufficiency of the plaintiff's opposition papers … . Matthews v Bright Star Messenger Ctr., LLC, 2019 NY Slip Op 04375, Second Dept 6-5-19

RES JUDICATA, FAILURE TO APPEAR.

A DISMISSAL BASED UPON PLAINTIFF'S FAILURE TO APPEAR TO OPPOSE A MOTION TO DISMISS IS NOT A DETERMINATION ON THE MERITS AND THEREFORE HAS NO RES JUDICATA EFFECT (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the prior dismissal of plaintiff's action because the plaintiff failed to appear in opposition to defendants' motion to dismiss was not a determination on the merits and therefore has no res judicata effect:

The plaintiff had commenced a prior action against, among others, the defendants, and the complaint in that action was dismissed insofar as asserted against them upon the plaintiff's failure to appear in opposition to their motion to dismiss. An order entered upon a party's default in appearing to oppose a motion to dismiss is not a determination on the merits … . Where a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply … . Accordingly, the doctrine of res judicata does not apply to bar the instant action … . Abdelfattah v Najar, 2019 NY Slip Op 04346, Second Dept 6-5-19

RES JUDICATA, MECHANIC'S LIEN.

ALTHOUGH THE SUBCONTRACTOR HAD THE RIGHT FILE A SECOND MECHANIC'S LIEN, THE ACTION TO FORECLOSE ON THE LIEN RAISED THE SAME ISSUES THAT WERE RAISED IN A PRIOR BREACH OF CONTRACT AND UNJUST ENRICHMENT ACTION WHICH WAS DISMISSED, THE RES JUDICATA DOCTRINE PRECLUDED THE SECOND ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the subcontractor's action seeking to foreclose a mechanic's lien was precluded by the doctrine of res judicata, despite its being based on theories different from those raised in the prior action:

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" … . " [O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" … . Accordingly, "a disposition on the merits bars litigation between the same parties, or

those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" … .

While a subcontractor may have the right to file a second mechanic's lien within the statutory time period, at least to cure an irregularity in a lien first filed, or to reassert a lien when the prior one has been lost by delay in its enforcement …, a second mechanic's lien is not immune from the doctrine of res judicata. Although the plaintiff framed its causes of action in the 2014 action as breach of contract and unjust enrichment causes of action, and its cause of action in this action as one to foreclose a mechanic's lien, these are merely different theories for the plaintiff's cause of action to recover monies allegedly owed to it under the subcontract. County Wide Flooring, Corp. v Town of Huntington, 2019 NY Slip Op 04354, Second Dept 6-5-19

SERVICE OF PROCESS.

THE PRESUMPTION OF PROPER SERVICE CREATED BY THE PROCESS SERVER'S AFFIDAVIT WAS REBUTTED BY DEFENDANT'S AFFIDAVIT CLAIMING THAT THE PLACE WHERE SERVICE WAS MADE HAD NO CONNECTION WITH HIM OR HIS BUSINESS, SUPREME COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT (SECOND DEPT).

The Second Department determined Supreme Court should have held a hearing to determine whether the defendant corporation, Advanced, and its principal, Trimarco, were properly served with the summons and complaint. The presumption of proper service created by the process server's affidavit was rebutted by Trimarco's affidavit stating that the place where service was made, and any person at that location, had no connection to him or the business:

Trimarco submitted an affidavit in which he claimed that both he and Advanced were improperly served at a residence that he had "sold to an unrelated third party three years ago." He further averred that, on the date service was purportedly made, he had no relationship with any person at [the residence], and no person at that address was authorized to accept service on behalf of Advanced. …

The Supreme Court should not have, in effect, denied that branch of the defendants' motion which was pursuant to CPLR 5015(a)(4) to vacate the judgment and dismiss the complaint without first conducting a hearing. "Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and,

therefore, gives rise to a presumption of proper service" … . "[W]here there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence" … .

With respect to service on Advanced, CPLR 311(a)(1) provides that personal service upon a corporation shall be made, among other ways, "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Personal service on a corporation must be made to one of the persons authorized by the statute to accept service, and an attempt to serve such person by substitute service pursuant to CPLR 308(2) or (4) will be insufficient to acquire jurisdiction over the corporation … . …

With respect to service on Trimarco, CPLR 308(2) provides, in relevant part, that service may be made upon a natural person "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served." Here, Trimarco's detailed affidavit, in which he claimed that the address where service was made was not his actual place of business, dwelling place, or usual place of abode, was sufficient to rebut the presumption of proper service created by the plaintiff's affidavit of service … . Finnegan v Trimarco, 2019 NY Slip Op 04361, Second Dept 6-5-19

STATUTE OF LIMITATIONS, TOXIC TORTS.

DEFENDANTS DID NOT DEMONSTRATE WHEN THE CAUSE OF ACTION FOR LEAD-PAINT EXPOSURE ACCRUED, THEREFORE THE SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT THE STATUTE OF LIMITATIONS HAD EXPIRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant's failed to demonstrate when the lead-paint-exposure cause of action accrued. Therefore the motion for summary judgment on the ground that the statute of limitations had passed should not have been granted:

In moving to dismiss the complaint on statute of limitations grounds, each defendant had "the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . and thus was required to establish, inter alia, when the plaintiff[s'] cause of action accrued" … Here, neither defendant established the relevant accrual date of plaintiffs' claims for injury caused by the latent effects of lead paint exposure and, in the absence of such evidence, neither defendant made a prima facie showing that the applicable limitations period had expired on

those claims … . Supreme Court thus erred in granting defendants' respective motions to that extent. We note that, at oral argument in these appeals, plaintiffs conceded that their claims for patent injuries arising from such exposure were properly dismissed as time-barred. Chaplin v Tompkins, 2019 NY Slip Op 04562, Fourth Dept 6-7-19

STIPULATIONS.

SUPREME COURT SHOULD NOT HAVE MODIFIED A SO-ORDERED STIPULATION ENTERED BETWEEN LANDLORD AND TENANT REQUIRING MONTHLY USE AND OCCUPANCY PAYMENTS OF OVER $100,000 DURING THE COURT PROCEEDINGS STEMMING FROM THE LANDLORD'S NOTICE OF TERMINATION OF THE LEASE, SUPREME COURT IMPROPERLY REDUCED THE MONTHLY PAYMENTS TO ZERO BASED UPON THE VALUE OF THE PROPERTY TO THE TENANT WHICH WAS ALLEGED TO HAVE BEEN RENDERED WORTHLESS BY THE NOTICE OF TERMINATION, AS OPPOSED TO THE FAIR MARKET RENTAL VALUE OF THE PROPERTY FROM THE LANDLORD'S PERSPECTIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the stipulation entered by plaintiff tenant and defendant landlord, pursuant to a Yellowstone Injunction, should not have modified by the judge. The defendant landlord notified plaintiff of several alleged defaults under the lease, and subsequently notified tenant of the termination of the lease. Plaintiff tenant sued defendant landlord and moved for a Yellowstone injunction which the court ordered. The parties entered a so-ordered stipulation requiring plaintiff tenant to pay over $100,000 per month for use and occupancy of the property during the court proceedings. More than a year later plaintiff tenant moved to move to modify the stipulation to reduce the monthly use and occupancy payments and the court reduced the payments to zero:

The so-ordered November 2015 stipulation was negotiated by the parties and accepted by the Supreme Court, and, as a result, may be considered a court order … . "Although the Supreme Court retains inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice, [a] court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect" … .

Nevertheless, "[u]nder almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief" … . …

Although the landlord generally has the burden of proving the amount owed by the tenant … , here, it was the plaintiff's burden, on its motion to modify the "September 22, 2015 order, as amended," to demonstrate that the payment of use and occupancy in the amount of $111,041.66 per month was unjust.

In concluding that the subject property had no value "as long as the Notice of Default remains on the property," the Supreme Court erroneously considered the value to the plaintiff of using and occupying the subject property after the lease was purportedly terminated, instead of considering the fair market rental value of the subject property, namely, the amount that a prospective commercial tenant would be willing to pay to lease the subject property from the defendant … . 255 Butler Assoc., LLC v 255 Butler, LLC, 2019 NY Slip Op 04344, Second Dept 6-5-19

VERDICT, MOTION TO SET ASIDE, DAMAGES.

DEFENDANT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY SHE WAS NOT TICKETED; DAMAGES FOR PAIN AND SUFFERING SHOULD NOT HAVE BEEN INCREASED UNCONDITIONALLY BY THE TRIAL JUDGE, THE PROPER PROCEDURE IS TO ORDER A NEW TRIAL UNLESS DEFENDANT STIPULATES TO THE INCREASED DAMAGES (FOURTH DEPT).

The Fourth Department noted that defendant, in this traffic accident case, should not have been allowed to testify that she did not receive a traffic ticket. The court also noted that the trial judge properly determined the damages for past pain and suffering should be increased, but that the proper procedure is to order a new trial unless the defendant stipulates to the increased amount. The trial judge had unconditionally increased the damages amount:

It is well established that "[e]vidence of nonprosecution is inadmissible in a civil action" … . In our view, however, that was the only error during trial … . We conclude that, "standing alone" … , the error was harmless, and therefore the court properly denied the motion insofar as it sought to set aside the jury verdict and a new trial on all issues (see CPLR 2002).

Plaintiff further contends that the jury's damages award for pain and suffering materially deviated from what would be reasonable compensation for plaintiff's injuries and that the deviation was not cured by the court's

increase of the award for past pain and suffering. We reject that contention. We conclude that the court properly determined that the jury's verdict for past pain and suffering should be increased to $125,000 and that the award for future pain and suffering did not materially deviate from what would be reasonable compensation for plaintiff's injuries (see CPLR 5501 [c]). The court, however, erred in unconditionally increasing the past pain and suffering award. " [T]he proper procedure when a damages award is inadequate is to order a new trial on damages unless [a] defendant stipulates to the increased amount' " … . Queen v Kogut, 2019 NY Slip Op 04863, Fourth Dept 6-14-19

VERDICT, MOTION TO SET ASIDE, VERDICT SHEETS.

PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED, THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE VERDICT SHEET DID NOT REFLECT THE TRIAL EVIDENCE ON THE APPLICABLE STANDARD OF CARE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's motion to set aside the defense verdict in this medical malpractice case should have been granted. Plaintiff alleged her bowel was perforated during surgery. The defense expert testified the bowel must be fully inspected as it is replaced, section by section. However, defendant surgeon testified he did not fully inspect the bowel. In addition the jury was asked to determine whether the bowel was subjected to a "focused inspection." However there was no trial evidence equating a "focused inspection" with the standard of care. A new trial was necessary:

The weight of the evidence greatly preponderates in favor of plaintiff due, in no small part, to defendant's testimony that he not only failed to perform a "focused inspection" of the bowel, but that "[he could not] not observe it" as he returned it into plaintiff's abdomen. In not "observing" the bowel, defendant plainly could not have conducted a careful visualization of the body part as it was returned to plaintiff's body; therefore he was plainly not performing a "focused inspection." Defendant also admitted that "[he] didn't specifically look for [bruising]" of the bowel, which his own expert testified is required when inspecting the bowel during an aortobifemoral bypass surgery.

Defendant also testified that he only looked at the bowel's top side. Although his expert did not testify that defendant was personally required to view the other side, she did explain that the other surgeon in the operating room must view that side so that both surgeons, collectively, can view the entire bowel. Defendant did not testify

that he ensured that the assisting surgeon carefully viewed the back side of the bowel, segment by segment. Moreover, the assisting surgeon did not testify that defendant instructed her to do so. Inasmuch as defendant's conduct does not meet the standard articulated by the expert witnesses, we conclude that the evidence so preponderates in plaintiff's favor that the court erred in denying her motion to set aside the verdict … Monzon v Porter, 2019 NY Slip Op 04855, Fourth Dept 6-14-19

VERIFICATION, MUNICIPAL LAW.

THE FACT THAT THE NOTICE OF CLAIM WAS NOT VERIFIED PROPERLY OVERLOOKED (SECOND DEPT).

The Second Department determined the fact that the notice of claim was not verified was properly overlooked:

By notice of motion dated January 6, 2016, the claimants sought leave to amend their notice of intention to file a claim, nunc pro tunc, or, alternatively, for leave to file a late notice of claim. A proposed amended notice of intention to file a claim was included with the motion, and it included the verification which was missing from the original. In the order appealed from, the Court of Claims granted the claimants' motion for leave to amend their notice of intention to file a claim, nunc pro tunc.

Pursuant to Court of Claims Act § 11(b), a "notice of intention to file a claim shall be verified in the same manner as a complaint in an action in the supreme court." The Court of Appeals has held that "there is no basis for treating an unverified or defectively verified claim or notice of intention any differently than an unverified or defectively verified complaint is treated under the CPLR in Supreme Court" … . Here, as the Court of Claims found, the defendant was not prejudiced by the omission of a verification. Moreover, the court noted that CPLR 2001 permits an omission or defect to be corrected, upon such terms as may be just … . Ordentlich v State of New York, 2019 NY Slip Op 04710, Second Dept 6-12-19