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ANSWER, MOTION TO EXTEND TIME.

BY JOINING IN A PRE-ANSWER MOTION TO DISMISS DEFENDANT EXTENDED ITS TIME TO ANSWER UNTIL TEN DAYS AFTER NOTICE OF ENTRY OF THE ORDER DECIDING THE MOTION TO DISMISS, SINCE DEFENDANT WAS NOT IN DEFAULT, IT COULD APPEAL THE ORDER FINDING IT IN DEFAULT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant did not default. Defendant (Advisors) had joined in a pre-answer motion to dismiss, which extended the time for serving an answer until ten days after notice of entry of the order deciding the motion to dismiss. Because defendant was not in default, it could appeal:

Defendant's time to answer the complaint was extended by virtue of its serving a notice of motion, together with its co-defendants, seeking dismissal of the causes of action asserted against the co-defendants, pursuant to CPLR 3211(f) (see also CPLR 320[a]; 3012[a], [c]). Generally, a CPLR 3211(a) motion to dismiss made against any part of a pleading extends the time to serve a responsive pleading to all of it … . Here, Advisors did not default, but appeared by joining in defendants' motion to dismiss the causes of action asserted against the individual named defendants, thereby extending its time to answer the complaint … . Thus, Advisors had ten days from service upon it of notice of entry of the order deciding the partial motion to dismiss, to answer the causes of action against it, pursuant to CPLR 3211(f).

Defendant's appeal from the order granting the default motion was proper, as it appeared and contested the application for entry of a default order below … . Accordingly, CPLR 5511, which generally prohibits an appeal from an order or judgment entered upon default, is inapplicable … . Levine v Singal, 2019 NY Slip Op 03438, First Dept 5-2-19

CPLR ARTICLE 16 DEFENSE, MEDICAL MALPRACTICE, ERROR IN JUDGMENT JURY INSTRUCTION.

THE HOSPITAL DEFENDANT WAS PROPERLY PRECLUDED FROM PRESENTING THE CPLR ARTICLE 16 DEFENSE AFTER THE OTHER POTENTIALLY LIABLE DEFENDANTS HAD BEEN SEVERED FROM THE ACTION AT THE HOSPITAL DEFENDANT'S REQUEST, AND AFTER THE HOSPITAL DEFENDANT HAD REPRESENTED TO THE COURT THE OTHER POTENTIALLY LIABLE DEFENDANTS WOULD NOT BE PART OF THE TRIAL, TWO JUSTICE DISSENT, THE HOSPITAL DEFENDANT'S REQUEST FOR THE ERROR IN JUDGMENT JURY INSTRUCTION WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined defendant hospital was properly precluded from presenting a CPLR article 16 defense (pursuant to the defense, a party deemed 50% liable or less pays only that portion of the damages) in this medical malpractice action. Plaintiff's decedent was first treated at defendant hospital and then at defendant rehabilitation facilities (the Elderwoods). When plaintiff's decedent was treated at the hospital she was given a high dosage of medication, Simvastatin, and that high dosage was continued at the Elderwoods. The dosage was four times higher than plaintiff's decedent's usual dosage. The high dosage caused plaintiff's decedent's extreme suffering and death. Earlier in the litigation, the Elderwoods moved for severance, the defendant opposed and the motion was denied. As the trial approached defendant moved to sever the Elderwoods, and represented to the court that the Elderwoods involvment would not be "a topic in the main action." Then, at the trial, after plaintiff rested, defendant gave notice that it would present evidence of the Elderwoods' negligence and asked to have them included on the verdict sheet pursuant to CPLR article 16. Noting that the plaintiff was not able to address the article 16 defense during the jury selection and trial, the Fourth Department held that the defendant was properly precluded from presenting the defense. The court also held that defendant's request for an error in judgment jury instruction was properly denied:

We agree with defendant that the fact that the third-party action was severed does not extinguish a defendant's article 16 defense. But, in this case, defendant represented before the trial started that the topic of care at the Elderwoods would not be discussed. If defendant had not made this representation, then plaintiff could have preempted or otherwise addressed this anticipated defense through opening statements and plaintiff's own lay and expert witnesses in plaintiff's case in chief, and thus could have suggested that the Elderwoods were not negligent before resting. As plaintiff's counsel asserts, he could have examined his witnesses at trial differently

had he known that the topic of the Elderwoods' care, and thus the CPLR article 16 defense, was still on the table. …

It is well settled that "a doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care" . An "error in judgment" charge "is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives" … .

This case does not fall within that narrow category … . There was simply no evidence that there was any judgment made by hospital personnel to administer 80 mg/daily of Simvastatin to decedent. Mancuso v Health, 2019 NY Slip Op 03520, Fourth Dept 5-3-19

DECLARATORY JUDGMENTS, CONTRACTUAL WAIVER.

WAIVER OF DECLARATORY JUDGMENT ACTIONS TO RESOLVE DISPUTES ARISING FROM A LEASE WAS NOT AGAINST PUBLIC POLICY AND WAS ENFORCEABLE, THE COMMERCIAL LEASE WAS NEGOTIATED BY SOPHISTICATED, COUNSELED PARTIES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, determined that the clause in a commercial lease which waived any action for a declaratory judgment concerning lease provisions, and required all disputes to be adjudicated in summary proceedings, was not against public policy and was therefore enforceable:

… [T]he declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. … [t]here is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting

disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the right to seek declaratory relief, the Legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants. 159 MP Corp. v Redbridge Bedford, LLC2019 NY Slip Op 03526, CtApp 5-7-19

DISCOVERY, MEDICAL MALPRACTICE, EMPLOYMENT LAW, PRIVILEGE.

IN THIS NEGLIGENT SUPERVISION, HIRING AND RETENTION CASE, THE MEDICAL RECORDS OF A NON-PARTY WITNESS WHO ALLEGED IMPROPER CONDUCT BY DEFENDANT DOCTOR ARE DISCOVERABLE ONLY TO THE EXTENT THEY INCLUDE NON-PRIVILEGED INFORMATION INDICATING DEFENDANT DOCTOR'S EMPLOYER WAS AWARE OF THE ALLEGATIONS, THE NON-PARTY WITNESS DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY DISCUSSING HER MEDICAL HISTORY IN A DEPOSITION (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the medical records of a non-party witness were discoverable only to the extent that they included non-privileged information demonstrating defendant Huntington Medical Group (HMG) was on notice that defendant doctor (Wishner) had acted improperly with patients. Plaintiff sued HMG alleging negligent hiring, supervision and retention of Wishner. Plaintiff had deposed a non-party witness who apparently had alleged improper conduct by Wishner. Defendants sought to discover the non-party witness's medical records. The Second Department noted that the defendants (1) had not shown the medical records were relevant to the improper conduct allegations and (2) the non-party witness had not waived the physician-patient privilege. The matter was remitted for an in camera review of the records by Supreme Court:

The physician-patient privilege seeks to protect confidential communications relating to the nature of the treatment rendered and the diagnosis made … . The physician-patient privilege applies to information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms … . "The privilege applies at examinations before trial, and it covers both oral testimony and documents, such as hospital records, which presumably are drawn up in large part based on communications imparted by the patient to the treating physician" … .

Here, the nonparty witness expressly declined to waive the physician-patient privilege as to her medical records, and her deposition testimony with respect to the facts of Wishner's alleged improper conduct during the subject physical examination and the facts and incidents of her medical history does not constitute privileged information … . Thus, the nonparty witness did not waive the physician-patient privilege as to her medical records … . …

… [P]rivileged medical records may contain nonprivileged information that could be discoverable if relevant … . Thus, we remit this matter to the Supreme Court, … for an in camera inspection of the nonparty witness' medical records stored by HMG for a determination of whether such records, or any parts thereof, contain any nonprivileged information relevant to the issue of whether HMG was on notice of Wishner's alleged improper conduct toward patients during his examination of them and, if so, for the entry of an order directing that such nonprivileged information, if any, shall be produced to the defendants. Mullen v Steven G. Wishner, 2019 NY Slip Op 04180, Second Dept 5-29-19

DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

PLAINTIFF'S VERIFIED COMPLAINT WAS NOT 'DOCUMENTARY EVIDENCE' WITHIN THE MEANING OF CPLR 3211, DEFENDANT'S MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED BASED UPON ALLEGATIONS IN PLAINTIFF'S VERIFIED COMPLAINT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff's verified complaint in this prescriptive easement action was not "documentary evidence" within the meaning of CPLR 3211 (a)(1) and therefore could not be the basis for granting defendant's motion to dismiss:

"A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint as barred by documentary evidence may be properly granted only if the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. To qualify as documentary evidence, the evidence must be unambiguous and of undisputed authenticity" … . "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deed, contracts, and any other papers, the contents of which are essentially undeniable" … . Also, as relevant here, "[a] party claiming a prescriptive easement must show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years" … .

Supreme Court, in granting defendant's motion to dismiss, relied solely on plaintiffs' verified complaint in which they admitted that, during the period of time that the right-of-way has been used by their patrons, plaintiffs were aware that defendant owned the subject property … . Accordingly, the court found that this knowledge rebutted the element of hostility and, as such, voided a necessary element of establishing a prescriptive easement. Although a complaint serves the important purpose of setting forth the plaintiff's allegations, we do not find that it is "so essentially undeniable as to qualify as documentary evidence that conclusively refutes any claim that [a] plaintiff might have" … . Further, in a motion to dismiss pursuant to CPLR 3211, a "court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [the] plaintiff the benefit of every possible inference" … ; therefore, the complaint cannot also conclusively refute itself, which is what Supreme Court attempted to do here. Koziatek v SJB Dev. Inc., 2019 NY Slip Op 03419, Third Dept 5-2-19

ELECTION LAW, DESIGNATING PETITIONS.

DESIGNATING PETITION PROPERLY INVALIDATED AND THE CANDIDATE'S NAME WAS PROPERLY STRUCK FROM THE PRIMARY BALLOT, THE CANDIDATE'S NAME APPEARED ON DESIGNATING PETITIONS FOR TWO DIFFERENT PUBLIC OFFICES WHICH PRESUMPTIVELY MISLED THE PUBLIC (SECOND DEPT).

The Second Department determined the designating petition was properly invalidated and the candidate's name (Duffy) was properly removed from the primary ballot. The Second Department noted that the failure to include the index number on the order to show cause and the petition was a mistake which could be disregarded. The index number was on the request for judicial intervention which was served with the order to show cause and petition (CPLR 2001). The Second Department further noted that the petition met the strict pleading requirements for fraud by by virtue of the incorporation of another document (objections) by reference (CPLR 3016 (b) and 3014).:

… [T]he Supreme Court granted the petition to invalidate the petition designating Duffy as a candidate for Council Member and directed that Duffy's name be removed from the primary ballot. The court found that Duffy and her agents did not intentionally seek to mislead enrolled party voters while gathering designating petition signatures, but that Duffy nevertheless knew that her name appeared simultaneously on two separate designating petitions for two different public offices, which presumptively misled enrolled voters as to which of the two public offices she was truly seeking. The court found that Duffy "failed to rebut this presumption by public action and/or filings in such a manner as to prevent election fraud." * * *

… [T]he voters were misled, warranting the invalidation of the designating petition for Council Member. In circulating the designating petition for that office, Duffy deleted from the committee's designating petition the name of a candidate who had been endorsed by the committee, substituted her name for the name of that candidate, and circulated the revised designating petition without the permission of Bouvier, whose name continued to appear on the designating petition. The designating petition, as altered and circulated, was "misleading in suggesting that the various candidates listed intended to run together" as a team … . While a single instance of adding another candidate's name without consent, standing alone, has been found insufficient to warrant the invalidation of an entire designating petition … , this case involves much more than the mere addition of a name to a designating petition. Here, Duffy affirmatively altered an existing designating petition containing other names by substituting her own name in place of the name of a candidate who had been endorsed by the committee. Moreover, under the circumstances of this case, the problem of misleading voters was compounded by the simultaneous circulation of two designating petitions designating Duffy for two separate public offices … . Matter of Lynch v Duffy, 2019 NY Slip Op 04168, Second Dept 5-29-19

ELECTION LAW, STANDING, DESIGNATING PETITIONS, VERIFICATION.

PETITIONER DID NOT LIVE IN THE TOWN WHERE THE CHALLENGED CANDIDATE WAS RUNNING FOR OFFICE AND THEREFORE DID NOT HAVE STANDING TO CHALLENGE THE DESIGNATING PETITIONS, SUPREME COURT SHOULD NOT HAVE STRUCK THE RESPONDENT CANDIDATES' ANSWER BASED UPON ALLEGED DEFECTS IN THE VERIFICATION AND DENIALS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the respondent candidates' answer should not have been stricken based upon alleged defects in the verification and denials and petitioner did not have standing to contest the designating petition because she did not reside in the town where the single challenged candidate was running for office:

CPLR 3026 provides that "[p]leadings shall be liberally construed" and that "[d]efects shall be ignored if a substantial right of a party is not prejudiced." Here, we conclude that petitioner did not establish substantial prejudice from any alleged defect in the verification, and thus candidate respondents' answer should not have been stricken on that ground … . Moreover, "the CPLR does not provide for the striking of improper denials" … .

Furthermore, we note that candidate respondents properly raised standing as an affirmative defense in their April 24 answer, and we agree with candidate respondents that petitioner lacked standing to commence this proceeding pursuant to Election Law article 16. A condition precedent to commencing a proceeding as an objector pursuant to section 16-102 is compliance with the requirements of section 6-154, including that the objector be a "voter registered to vote for such public office" (§ 6-154 [2]).

Here, petitioner served her specifications of objections upon Vickman and upon the chairwoman and the secretary of the Party only, and not on any of the other candidate respondents listed on the authorization. Petitioner, however, lacked standing to challenge the designating petition of Vickman or to challenge the authorization as it pertained to Vickman, who was running for public office in the Town of Farmersville, because petitioner was not a resident of that town … . Matter of Augostini v Bernstein, 2019 NY Slip Op 04312, Fourth Dept 5-30-19

ESPINAL FACTORS.

ALTHOUGH NO ESPINAL FACTORS WERE ALLEGED BY PLAINTIFF IN THIS SLIP AND FALL CASE, QUESTIONS OF FACT WHETHER DEFENDANT'S ORAL CONTRACT WITH THE PROPERTY OWNER TO REMOVE ICE AND SNOW ENTIRELY REPLACED THE PROPERTY OWNER'S DUTY, AND WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF A RECURRENT ICY CONDITION, PRECLUDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The plaintiff leased the ground floor apartment and defendant, the plaintiff's mother, leased the second floor apartment. Plaintiff slipped and fell on ice on the exterior front steps of the two-family house. Defendant demonstrated she had a contractual arrangement with the property owner to remove ice and snow and, because plaintiff was not a party to the agreement, no duty of care was owed plaintiff (no Espinal factors were alleged by the plaintiff). But defendant raised questions of fact in opposition:

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" … . However, the Court of Appeals has recognized three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a

force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .

Here, the defendant established … entitlement to judgment as a matter of law by demonstrating that she did not owe a duty of care to the plaintiff, since the plaintiff was not a party to the oral agreement between the defendant and the property owner … . Since the plaintiff did not allege facts in her pleadings that would establish the possible applicability of any of the Espinal exceptions, the defendant … was not required to affirmatively establish that these exceptions did not apply

However, in opposition … , the plaintiff raised a triable issue of fact as to whether … . defendant's oral agreement with the property owner regarding maintenance was comprehensive and exclusive so as to entirely displace the property owner's duty to maintain … the exterior front steps and the gutter … . Additionally, the plaintiff raised a triable issue of fact as to whether the defendant had actual notice of an alleged recurrent dangerous condition regarding ice formation on the steps due to the leaky gutter, and was thus chargeable with constructive notice of each specific occurrence of the condition … . Sampaiolopes v Lopes, 2019 NY Slip Op 03835, Second Dept 6-15-19

EXPERT OPINION, MEDICAL MALPRACTICE.

SUMMARY JUDGMENT IS NOT APPROPRIATE IN A MEDICAL MALPRACTICE ACTION WHERE THERE ARE CONFLICTING MEDICAL EXPERT OPINIONS ABOUT A DEPARTURE FROM ACCEPTED STANDARDS OF CARE, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice action, determined plaintiff's expert affidavit raised questions of fact about whether defendant's treatment of plaintiff's decedent departed from accepted standards of practice. Granting summary judgment to defendants is not appropriate where there are conflicting medical expert opinions:

… [V]ascular surgeon Jon Kirwin from Kings County Hospital surgically created an arteriovenous fistula (hereinafter AVF) in the decedent's upper left arm as an access site for dialysis treatments. … [D]uring one of the decedent's scheduled dialysis visits … , a nurse examined the decedent and, believing that the AVF was infected, conferred with … [the] attending nephrologist, who directed that the decedent be transferred to Kings

County Hospital's emergency room for evaluation. The decedent presented to Kings County Hospital where he was evaluated by Kirwin, who cleared him for dialysis. The decedent underwent dialysis at Kings County Hospital without incident that day, and two days later reported to Utica for his scheduled dialysis treatment. The decedent underwent dialysis at Utica on August 27, 2010, and August 30, 2010, without incident. On August 31, 2010, the decedent was found unconscious at home and died on the way to the hospital. The cause of death was a rupture of the AVF. * * *

… [I]n support of their separate motions for summary judgment dismissing the complaint insofar as asserted against each of them, the moving defendants submitted expert affirmations that established, prima facie, that none of them departed from good and accepted standards of medical practice in their treatment of the decedent and that no alleged departure was the proximate cause of the plaintiff's injuries … . However, in opposition, the plaintiff raised triable issues of fact through her expert affirmations as to whether the defendants departed from accepted standards of practice by continuing with dialysis on an AVF that presented with infection and aneurysmal dilatation and whether the continued dialysis caused the AVF to rupture. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" … . Hutchinson v New York City Health & Hosps. Corp., 2019 NY Slip Op 03775, Second Dept 5-15-19

FAMILY LAW, APPEALS.

ORDER ENTERED UPON CONSENT IS NOT APPEALABLE, COERCION ARGUMENT MUST BE RAISED IN A MOTION TO VACATE THE ORDER (THIRD DEPT).

The Third Department, dismissing the appeal in this neglect proceeding, noted that an order entered upon consent is not appealable. The argument that the consent was coerced must be raised in a motion to vacate the order:

Following consultation with her counsel, respondent … consented on the record to a finding of neglect. Family Court then entered an order that adjudicated the children to be neglected and contained the agreed-upon terms of disposition. Respondent appeals.

It is well settled that an order entered upon consent is not appealable … . Respondent's claim that her consent was involuntary because she was coerced into accepting the settlement offer should have been raised in Family Court by way of a motion to vacate the order (see Family Ct Act § 1051 [f] …). As the record does not reveal

that any such application was made, the appeal is not properly before this Court. Matter of Vicktoriya DD. (Sheryl EE.), 2019 NY Slip Op 03411, Third Dept 5-2-19

FAMIY LAW, JURISDICTION.

BECAUSE NO PETITION HAD BEEN FILED IN THIS SUPPORT ENFORCEMENT PROCEEDING, FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION, A DEFECT THAT MAY BE BROUGHT UP AT ANY TIME (THIRD DEPT).

The Third Department determined Family Court did not have subject matter jurisdiction over the support enforcement proceeding because no petition had been filed. The support magistrate had erroneously treated a request by Florida to register the Florida support judgment in New York as an "enforcement petition:"

The Uniform Interstate Family Support Act (see Family Ct Act art 5-B) provides that "[a] registered support order issued in another state . . . is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state" (Family Ct Act § 580-603 [b]). In New York, proceedings for the violation of a support order "shall be originated by the filing of a petition containing an allegation that the respondent has failed to obey a lawful [support] order," and Family Court lacks subject matter jurisdiction to determine a violation claim without that petition (Family Ct Act § 453 …). DSS was free to, and eventually did, file a petition alleging that the father had failed to comply with the support provisions contained in the 2014 judgment (see Family Ct Act §§ 453 [a]; 580-603 [b]). This proceeding did not arise out of that petition, however, and was not rendered viable by its filing … . Family Court accordingly lacked subject matter jurisdiction to render the appealed-from order, and "the claim that a court lacked subject matter jurisdiction 'may be raised at any time and may not be waived'" … . Matter of Pudvah v Pudvah, 2019 NY Slip Op 03414, Third Dept 5-2-19

FEIGNED QUESTION OF FACT, SUMMARY JUDGMENT.

DEFENDANT DRIVER ATTEMPTED TO RAISE A FEIGNED FACTUAL ISSUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BY CONTRADICTING A STATEMENT ATTRIBUTED TO DEFENDANT IN THE POLICE REPORT, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this intersection traffic accident case should have been granted. Defendant driver (Karen) made a statement included in the police report indicating she did not see plaintiffs' motorcycle before the accident. In response to plaintiffs' motion for summary judgment defendant driver (Karen) averred that she came to a stop at the stop sign, pulled out into the intersection and then saw the motorcycle moving "extremely fast." The Second Department held that defendant had raised a feigned factual issue. The court also noted that, although the motion for summary judgment was made before discovery was complete, defendants did not show that additional discovery would lead to relevant evidence:

In support of their motion, the plaintiffs submitted, among other things, affidavits from the injured plaintiff and a witness, Shahiem Smith, who observed the collision. According to those affidavits, Karen drove … into the intersection without yielding the right-of-way to the injured plaintiff's motorcycle in violation of Vehicle and Traffic Law § 1142(a) and struck the motorcycle as it was lawfully proceeding through the intersection … . "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" … . Moreover, the plaintiffs also submitted a copy of a police accident report which contained Karen's statement that she did not see the injured plaintiff. Therefore, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability … . Kerolle v Nicholson, 2019 NY Slip Op 03959, Second Dept 5-22-19

FORECLOSURE, BUSINESS RECORDS EXCEPTION.

DOCUMENTS RELIED UPON BY PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT MEET THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, DOCUMENTS SUBMITTED IN REPLY DID NOT SATISFY PLAINTIFF'S BURDEN TO MAKE OUT A PRIMA FACIE CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the documentary evidence relied upon by plaintiff in this foreclosure action did not meet the criteria for the business records exception to the hearsay rule. Plaintiff's motion for summary judgment should not have been granted. The court noted that documents submitted in reply could not be considered to satisfy the plaintiff's burden of making out a prima facie case:

Although "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" … . While [plaintiff's vice president] averred, inter alia, that his affidavit was based on books and records maintained by the plaintiff, he did not state that Bank of America's records were provided to the plaintiff and incorporated into the plaintiff's own records, or that the plaintiff routinely relied upon such records in its business, or that he had personal knowledge of Bank of America's business practices and procedures. Thus, he failed to lay the proper foundation for admission of these records … . The affidavit and documents submitted by the plaintiff for the first time in reply to the defendants' opposition could not be used to satisfy the plaintiff's prima facie burden. Tri-State Loan Acquisitions III, LLC v Litkowski, 2019 NY Slip Op 03398, Second Dept 5-1-19

FORECLOSURE, CONFIRM REFEREE'S REPORT.

THERE IS NO REQUIREMENT THAT A MOTION TO CONFIRM A REFEREE'S REPORT IN A FORECLOSURE PROCEEDING BE MADE BEFORE A JUDGMENT OF FORECLOSURE MAY BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a plaintiff in a foreclosure action need not make a motion to confirm a referee's report before a judgment of foreclosure can be granted:

… [T]he plaintiff moved … to confirm the referee's report and for a judgment of foreclosure and sale. The court denied the motion without prejudice to renew upon confirmation of the referee's report. The plaintiff appeals.

CPLR 4403 authorizes a court to confirm or reject a referee's report and, thereafter, to "render decision directing judgment in the action." There is no requirement under the statute that a motion to confirm a referee's report be made before a motion for a judgment of foreclosure and sale may be brought. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination on the merits of the plaintiff's motion … . Real Estate Mtge. Network, Inc. v Pretto, 2019 NY Slip Op 03390, Second Dept 5-1-19

FORECLOSURE, MOTION TO DISMISS.

SUPREME COURT DID NOT HAVE THE AUTHORITY TO DISMISS THIS FORECLOSURE ACTION PURSUANT TO CPLR 3216 OR CPLR 3215 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed pursuant to CPLR 3216 or 3215 because the statutory criteria were not met. Issue had not been joined so dismissal pursuant to CPLR 3216 was not permitted. And plaintiff had not abandoned the action pursuant to CPLR 3215:

We agree with the plaintiff's contention that the Supreme Court was without authority to direct dismissal of this action pursuant to CPLR 3216. CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. Indeed, "[a] court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined.

We also agree with the plaintiff's contention that the Supreme Court had no authority to direct dismissal of this action under CPLR 3215(c). "An action is deemed abandoned where a default has occurred and a plaintiff has failed to take proceedings for the entry of a judgment within one year thereafter" (…see CPLR 3215[c]). It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) … . Nor is a plaintiff required to specifically seek the entry of a judgment within a year … . As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) … .

Here, the plaintiff commenced the action on April 16, 2009. The Supreme Court granted the plaintiff's motion for an order of reference only five months later, on September 14, 2009—well within one year of the commencement of the action. Although the plaintiff later withdrew its motion for a judgment of foreclosure and sale, in doing so, it stated that it "will not be discontinuing [this] action." Thus, the plaintiff explicitly informed the court that it was not abandoning the action … . National City Mtge. Co. v Sclavos, 2019 NY Slip Op 03605, Second Dept 5-8-19

LACHES.

PLAINTIFFS' ACTION SEEKING TO ENJOIN THE CONSTRUCTION OF A HOME PLAINTIFFS CONTENDED WAS IN VIOLATION OF THE TOWN CODE SHOULD HAVE BEEN DISMISSED PURSUANT TO THE DOCTRINE OF LACHES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the doctrine of laches applied to plaintiffs' action seeking to enjoin defendant's construction of a house. Plaintiffs alleged the construction violated the Town Code:

" To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant'" … . " The mere lapse of time without a showing of prejudice will not sustain a defense of laches. In addition, there must be a change in circumstances making it inequitable to grant the relief sought'" … . "Moreover, as the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense" … . …

The plaintiffs commenced this action nearly three years after the building permit was first issued in May 2012 and after [plaintiff] Kverel withdrew his administrative appeal, two years after the parties entered into the stipulation, and more than six months after construction purportedly commenced in August 2014. Although the building permit was amended several times thereafter and as late as February 2015, the record demonstrates that the plaintiffs were aware as early as July 2012, when the subject property remained undeveloped and before the defendant purchased the subject property, of their claim that the defendant's construction was in violation of the Town Code. Although the record unequivocally demonstrates that the plaintiffs were opposed to the defendant's construction on the subject property, the plaintiffs did not seek administrative review by the ZBA or injunctive relief until they commenced this action. Kverel v Silverman, 2019 NY Slip Op 04152, Second Dept 5-29-19

LONG-ARM JURISDICTION.

OHIO FIREARMS DEALER DID NOT HAVE MINIMUM CONTACTS WITH NEW YORK SUFFICIENT FOR THE EXERCISE OF LONG-ARM JURISDICTION OVER HIM, A GUN PURCHASED IN OHIO BY AN OHIO RESIDENT WAS SOLD ON THE BLACK MARKET IN NEW YORK AND WAS USED IN NEW YORK TO SHOOT PLAINTIFF (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion and a three-judge dissenting opinion, determined that an Ohio firearms dealer (Brown) did not have "minimum contacts" with New York sufficient for the exercise of long-arm jurisdiction (CPLR 302) over him. A gun sold by Brown to Bostic, an Ohio resident, in Ohio, was sold on the black market to a member of a gang in Buffalo, New York, who shot plaintiff:

Defendant Charles Brown, a federal firearm licensee, was authorized to sell handguns only in Ohio and only to Ohio residents, which he primarily accomplished through retail sales at gun shows held in various locations in Ohio. Brown did not maintain a website, had no retail store or business telephone listing, and did no advertising of any kind, except by posting a sign at his booth when participating in a gun show. In a series of transactions in 2000, Brown sold handguns to James Nigel Bostic and his associates. Prior to the transaction involving the gun at issue here, Brown consulted with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to ensure its legality. For each transaction, the necessary forms required by the ATF were properly completed and submitted, the purchaser passed the required Federal Bureau of Investigation (FBI) background check before the firearms were transferred, Brown verified that the purchaser had government-issued identification demonstrating Ohio residency, and notification of the purchases was timely sent to local law enforcement and the ATF as

required by the federal Gun Control Act (see 18 USC § 922). During the transactions, Bostic indicated he was in the process of becoming a federal firearms licensee and was acquiring inventory for the eventual opening of a gun shop. * * *

… "[A] non-domiciliary tortfeasor has minimum contacts with the forum State . . . if it purposefully avails itself of the privilege of conducting activities within the forum State" …,"thus invoking the benefits and protections of [the forum state's] laws"… . This test envisions something more than the "fortuitous circumstance" that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of defendant … . Put another way, "the mere likelihood that a product will find its way into the forum" cannot establish the requisite connection between defendant and the forum "such that [defendant] should reasonably anticipate being haled into court there" … .

The constitutional inquiry "focuses on the relationship among the defendant, the forum, and the litigation'" … . Significantly, "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction" … . Williams v Beemiller, Inc., 2019 NY Slip Op 03656, CtApp 5-9-19

MEDICAL MALPRACTICE VS NEGLIGENCE, AMEND COMPLAINT.

ADEQUATE SUPERVISION OF PLAINTIFF AFTER SURGERY RESULTING IN MEMORY LOSS WAS PART OF PLAINTIFF'S TREATMENT, THEREFORE A CAUSE OF ACTION RESULTING FROM PLAINTIFF'S LEAVING THE HOSPITAL SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, ALTHOUGH PARTIALLY GRANTED, SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY (SECOND DEPT).

The Second Department determined plaintiff's action against defendant hospital sounded in medical malpractice, not negligence, and plaintiff's motion to amend the complaint to add a medical-malpractice cause of action (which was granted by Supreme Court) and other allegations should have been granted in its entirety. Plaintiff suffered memory loss after surgery and repeatedly threatened to leave the hospital. She did in fact leave and was not found for five days. The Second Department determined the failure to supervise plaintiff was an element of her treatment and therefore the actions sounded in medical malpractice:

… [W]hen the complaint challenges the medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice … .

… [T]he allegations at issue essentially challenged the hospital's assessment of the plaintiff's supervisory and treatment needs … . Thus, the conduct at issue derived from the duty owed to the plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment … . …

… "Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" … . Here, there was no showing of prejudice, and the plaintiff's proposed amended complaint was not papably insufficient or patently devoid of merit. Therefore, the court should not have limited the allegations that the plaintiff could include in her amended complaint. Jeter v New York Presbyt. Hosp., 2019 NY Slip Op 04148, Second Dept 5-29-19

PARTIES, CORPORATIONS VS PRINCIPALS.

QUEENS COUNTY ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND IT WAS SUBSTANTIALLY THE SAME AS THE NASSAU COUNTY ACTION, A CORPORATION IS NOT THE SAME PARTY AS A PRINCIPAL OF THE CORPORATION WITHOUT A SHOWING THE CORPORATE VEIL SHOULD BE PIERCED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Queens County action did not involve the same parties as the Nassau County action and therefore should not have been dismissed pursuant to CPLR 3211(a)(4). A corporation is not the same party as an individual principal of the corporation and should not be so considered in the absence of a demonstration the corporate veil should be pierced:

" Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same'" … . "[W]hile a complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4), there must be a substantial' identity of parties, which generally is present when at least one plaintiff and one defendant is common in each action'" … .

Here, there is no common plaintiff in the Nassau County action and the instant action. Although Queens NY Realty and the plaintiff share the same owner, who was added as a third-party plaintiff in the Nassau County action, " [i]ndividual principals of a corporation are legally distinguishable from the corporation itself' and a court may not find an identity of parties by, in effect, piercing the corporate veil without a request that this be done and, even more importantly, any demonstration by defendant that such a result is warranted'" … . Furthermore, the relief sought by the plaintiff in this action is not substantially the same as the relief sought by Queens NY Realty in the Nassau County action … . Mason ESC, LLC v Michael Anthony Contr. Corp., 2019 NY Slip Op 03962, Second Dept 5-22-19

PARTIES, SUBSTITUTION.

SURVIVING PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION DID NOT TIMELY MOVE TO SUBSTITUTE A REPRESENTATIVE FOR THE DECEDENT PURSUANT TO CPLR 1021, ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the medical malpractice action brought on behalf of a deceased plaintiff by the surviving plaintiff was properly dismissed for failure to timely substitute a representative for the decedent pursuant to CPLR 1021:

"A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction" over a deceased party's successors in interest, and such motion "is not a mere technicality" … . CPLR 1021 provides, in pertinent part, "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made." "The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit" … .

Here, the record does not support a finding that the surviving plaintiff diligently sought to substitute a representative for the decedent. The proffered explanation for the surviving plaintiff's delay in obtaining letters of administration was unsubstantiated and insufficient to constitute a reasonable excuse. Moreover, the surviving plaintiff failed to submit an affidavit of merit by a medical expert and did not rebut the defendants' allegations that they had been prejudiced by the delay in substitution. Contrary to the surviving plaintiff's contention, the underlying pleadings and verified bill of particulars, standing alone, do not establish the potential merit of the medical malpractice action. Green v Maimonides Med. Ctr., 2019 NY Slip Op 03573, Second Dept 5-8-19

PRIVATE RIGHT OF ACTION, VICTIM WITNESS PROTECTION ACT.

NEITHER THE VICTIM WITNESS PROTECTION ACT NOR THE MANDATORY VICTIM RESTITUTION ACT PROVIDES A PRIVATE RIGHT OF ACTION FOR A JUDGMENT BASED SOLELY UPON RESTITUTION ORDERED IN A CRIMINAL CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that neither the Victim Witness Protection Act (VWPA) nor the Mandatory Victim Restitution Act (MVRA) provided for a private right of action for a judgment based solely upon restitution ordered in a criminal case:

… [T]he VWPA makes civil remedies available to collect restitution but does not make restitution a civil judgment that can simply be enforced in a private suit … . Rather, a victim may pursue a civil action for damages in connection with the injuries that resulted in a restitution order, and the restitution order may provide assistance in proving liability, but the petitioner may not rely entirely on the restitution order and the amount ordered in the criminal action. Thus, the petitioner can separately plead and prove liability and damages under either a statutory or a common-law cause of action if the restitution order fails to satisfy the victim … . …

Some cases may support the conclusion that under the MVRA, a victim who has obtained a lien on property based on a restitution order may enforce that lien in a special court proceeding … . However, these cases provide no support for the conclusion that a victim may enforce the abstract judgment itself without obtaining a lien, especially given that this would contradict the language of 18 USC § 3664(m), explicitly requiring a lien. Petitioner has obtained an abstract of judgment, but never recorded it as a lien on defendant's property or brought an action to enforce it. … [T]he MVRA does not provide a cause of action for a private victim to enforce an abstract judgment on a restitution order, which is exactly what petitioner is seeking to do. Therefore, petitioner has no standing under the MVRA. Matter of Mikhlov v Festinger, 2019 NY Slip Op 04046, First Dept 5-23-19

RELATION-BACK DOCTRINE, MUNICIPAL LAW, CIVIL RIGHTS LAW.

THE CITY AND DEFENDANT CORRECTION OFFICER ARE NOT UNITED IN INTEREST BECAUSE THE CITY IS NOT VICARIOUSLY LIABLE FOR ITS EMPLOYEES' VIOLATION OF 42 USC 1983, THEREFORE THE RELATION-BACK DOCTRINE CAN NOT BE RELIED UPON TO SUBSTITUTE THE CORRECTION OFFICER FOR "JANE DOE" AFTER THE STATUTE OF LIMITATIONS HAS RUN (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the relation-back doctrine could not be relied upon to substitute the name of a correction officer for "Jane Doe" in the complaint in this 42 USC 1983 action. The correction officer and the city are not "united in interest." The city cannot be held vicariously liable for its employees' violation of 42 USC 1983:

In this action alleging a claim of deliberate indifference under the Eighth Amendment and 42 USC § 1983, plaintiff did not serve the Jane Doe correction officer defendant before the statute of limitations ran. Although the claims against the intended defendant arise out of the same transaction as the claims alleged in the complaint, plaintiff cannot rely on the relation-back doctrine. The correction officer and defendant City are not "united in interest" because "the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983" … . Nor can plaintiff's more than two-year delay in seeking to add the new defendant as a party after learning her identity be characterized as a mistake for relation-back purposes … .

Plaintiff's reliance on CPLR 1024 is unavailing, as he does not demonstrate diligence in seeking to identify the unknown correction officer prior to the expiration of the statute of limitations … . Burbano v New York City, 2019 NY Slip Op 03937, First Dept 5-21-19

RES JUDICATA, CORPORATION LAW, FIDUCIARY DUTY, JUDGES, SUA SPONTE, SEARCH THE RECORD.

RES JUDICATA APPLIES TO ISSUES WHICH COULD HAVE BEEN RAISED IN A SMALL CLAIMS ACTION, NO NEED TO PIERCE THE CORPORATE VEIL TO BRING A BREACH OF FIDUCIARY DUTY ACTION AGAINST A FORMER PARTNER IN A PROFESSIONAL CORPORATION, JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND RENDERED SUMMARY JUDGMENT WHERE NEITHER PARTY REQUESTED THAT RELIEF (SECOND DEPT).

The Second Department, modifying Supreme Court, determined: (1) although the Small Claims Act provides that collateral estoppel (issue preclusion) does not apply to fact-findings made in a small claims action, the doctrine of res judicata does apply to any issue which could have been, but was not, raised in the small claims action; (2) a breach of fiduciary duty cause of action does not entail piercing the corporate veil in a proceeding against a former partner in a professional corporation; (3) the judge should not have searched the record to render summary judgment when neither party requested that relief:

… "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" … . Contrary to the Supreme Court's finding, it is not necessary to pierce the corporate veil in order to maintain a cause of action alleging breach of fiduciary duty against former partners in a professional corporation. …

Since … neither party moved for summary judgment with respect to the counterclaims and none of the issues raised in the first, second, or third counterclaims were litigated in the summary judgment motion, or the small claims action, the Supreme Court should not have, in effect, searched the record and awarded the plaintiff summary judgment dismissing those counterclaims … . Weinberg v Picker, 2019 NY Slip Op 03400, Second Dept 5-1-19

SEALING.

MOLINEUX/SANDOVAL HEARING IN THE HARVEY WEINSTEIN SEXUAL MISCONDUCT PROSECUTION WAS PROPERLY CLOSED TO THE PUBLIC AND THE RECORD OF THE HEARING WAS PROPERLY SEALED, NEWS-MEDIA COMPANIES' PETITION TO UNSEAL THE RECORD DENIED (FIRST DEPT).

The First Department denied the Article 78 petition brought by news-media companies seeking to unseal the Molineux/Sandoval hearing transcript in the felony sexual misconduct prosecution of Harvey Weinstein. The presiding judge had closed the hearing to the public and sealed the record of it:

While the First Amendment guarantees the public and the press a qualified right of access to criminal trials … , this right of access may be limited where courtroom closure is necessitated by a compelling state governmental interest, and where the closure is narrowly tailored to serve that interest … . Such compelling interests may include the defendant's right to a fair trial, including the right to "fundamental fairness in the jury selection process" … . …

Proceedings cannot be closed unless specific findings are made on the record, demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest" … . Where the interest asserted is the right of the accused to a fair trial, specific findings must be made demonstrating that, "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent," and "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights" … .

The subject matter of the Molineux /Sandoval hearing – allegations of prior uncharged sexual offenses by the defendant, the admissibilty of which is disputed – was likely to be prejudicial and inflammatory. Further, some or all of the allegations may have been determined to be inadmissible at trial, or may not be offered at trial even if found potentially admissible. Contrary to petitioners' suggestion, the People have represented that some of the information has not yet been made public. Matter of New York Times Co. v Burke, 2019 NY Slip Op 03903, First Dept 5-16-19

STATUTE OF LIMITATIONS, WAIVER.

THE PURPORTED WAIVER OF THE STATUTE OF LIMITATIONS DEFENSE WAS NOT IN WRITING AS REQUIRED BY GENERAL OBLIGATIONS LAW 17-103, PLAINTIFF'S BREACH OF CONTRACT ACTION IS TIME-BARRED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Friedman, determined that, because the defendant's (CFA's) purported waiver of the statute of limitations defense was not in writing as required by General Obligations Law 17-103, plaintiff's breach of contract action was time-barred:

To govern the … "subtle interplay . . . between the freedom to contract and New York public policy" … , the legislature enacted General Obligations Law § 17-103 ("Agreements waiving the statute of limitation"), the first paragraph of which provides:

"A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise" (General Obligations Law § 17-103[1] …).

"An agreement to extend the statute of limitations that does not comply with these requirements [of § 17-103(1)] has no effect'" … . Sotheby's, Inc. v Mao, 2019 NY Slip Op 03477, First Dept 5-2-18

SUMMARY JUDGMENT, VACATION OF NOTE OF ISSUE.

ALLEGED ASSAULT BY DOCTOR WAS OUTSIDE THE SCOPE OF THE DOCTOR'S EMPLOYMENT BY DEFENDANT HOSPITAL, THE ACTION AGAINST THE HOSPITAL PURSUANT TO THE DOCTRINE OF RESPONDEAT SUPERIOR SHOULD HAVE BEEN DISMISSED, TIME FOR SUMMARY JUDGMENT MOTION STARTED ANEW AFTER THE NOTE OF ISSUE WAS VACATED, FAILURE TO ATTACH PLEADINGS TO MOTION FOR SUMMARY JUDGMENT NOT FATAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined this third-party assault case against the defendant hospital based upon an alleged sexual assault by an employee-doctor should have been dismissed. Because the alleged assault and battery was not in furtherance of defendant's business, the doctrine of respondeat superior did not apply. The Second Department noted that the defendant's motion for summary judgment was not untimely because the note of issue had been vacated, which started the time for summary judgment anew. The Second Department also noted that the failure to attach the pleadings to the motion for summary judgment was not fatal because they were attached to the reply:

Pursuant to CPLR 3212(b), a court will grant a motion for summary judgment when, viewing the evidence in the light most favorable to the opponent of the motion, it determines that the movant's papers justify holding, as a matter of law, that the cause of action has no merit. "The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment" … . "An employee's ations fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business'" … . "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment" … . Thus, where an employee's actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment … .

A sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives … . Here, the evidence submitted by the defendants demonstrated that the doctor's alleged conduct was not in furtherance of

St. John's business and was a departure from the scope of his employment, having been committed for wholly personal motives … . Montalvo v Episcopal Health Servs., Inc., 2019 NY Slip Op 04158, Second Dept 5-29-19

UNJUST ENRICHMENT, CONVERSION.

UNJUST ENRICHMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED, CONVERSION DOES NOT LIE WHEN PROPERTY INVOLVED IS REAL PROPERTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiffs' unjust enrichment cause of action should not have been dismissed and noted that a conversion cause of action does not lie where the property involved is real property. The facts of the case are too complex to fairly summarize here. In a nutshell the plaintiffs, to avoid paying a broker's fee, arranged to have defendants' deceased father purchase real property on their behalf. Defendants (the Passalacquas) took out a mortgage on the property (Wells Fargo mortgage), in violation of the agreement defendants' father had with plaintiffs, which plaintiffs paid off when they sold the property. Plaintiffs sought to recover the amount of the mortgage from the Passalacquas under unjust enrichment and conversion theories:

Here, the amended complaint sufficiently alleges that the Passalacquas were unjustly enriched, at the plaintiffs' expense, by the plaintiffs' payment of the Passalacquas' debt to Wells Fargo, and that it would be against equity and good conscience to permit the Passalacquas to retain what is sought to be recovered … . To the extent that the Passalacquas contend that they used proceeds of the Wells Fargo mortgage to benefit the premises, that contention involves factual issues not properly resolved on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) … . Contrary to the determination of the Supreme Court, the plaintiffs do not have an adequate remedy at law by suing to enforce the consolidated note … . Further, even if the plaintiffs are entitled to assignment of the consolidated note from Wells Fargo, obtaining such an assignment would require an action in equity … . The unjust enrichment cause of action is also not barred by the existence of the plaintiffs' contract of sale with the Passalacquas' late father … .

Contrary to the Passalacquas' contention, advanced as an alternative ground for affirmance … , the unjust enrichment cause of action was timely asserted. The parties agree that the unjust enrichment cause of action is subject to a six-year statute of limitations (see CPLR 213[1]). Such a cause of action accrues "upon the occurrence of the alleged wrongful act giving rise to the duty of restitution" … . Here, the amended complaint alleges that the plaintiffs' payment to Wells Fargo was necessitated by the Passalacquas' default in making payments on the consolidated note, which resulted in Wells Fargo's acceleration of the debt and the threat of a

foreclosure action. Accordingly, this cause of action accrued, at the earliest, in late 2010, when the Passalacquas stopped making payments on the Wells Fargo consolidated mortgage. Mannino v Passalacqua, 2019 NY Slip Op 03961, Second Dept 5-22-19

VERDICT SHEETS.

NEW TRIAL ORDERED BECAUSE THE INCONSISTENCY IN THE VERDICT SHEET COULD NOT BE REMEDIED AFTER THE JURY WAS DISCHARGED, THE JURY HAD AWARDED PLAINTIFF-STUDENT $1 MILLION IN A SUIT AGAINST A SCHOOL DISTRICT STEMMING FROM BULLYING BY OTHER STUDENTS (THIRD DEPT).

The Third Department determined a new trial was necessary because of an inconsistency in the jury's answers on the verdict sheet. The trial court attempted to cure the inconsistency after the jury was discharged by speaking with the jury foreman, who was still in the courthouse when the problem was noticed. The jury had awarded plaintiff-student $1 million in a negligent supervision suit against a school district stemming from bullying by other students:

The taking of this verdict was fatally flawed. Pursuant to CPLR 4111 (c), when the answers on a verdict sheet "are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial" … . The jury's consideration of question No. 5 was inconsistent with its answer to question No. 4 and should have been brought to the jury's attention with a curative charge, followed by a return to deliberations to resolve the inconsistency … . However, because the jury had already been discharged, this was not possible and Supreme Court's consultation with the jury foreperson alone, although done in open court, could not take the place of full jury reconsideration … . In essence, the window of opportunity for Supreme Court to fix the problem closed when the other jurors left the courthouse. Supreme Court's subsequent efforts, while well intentioned, were futile and, given this timeline, our only course of action is to order a new trial … . Motta v Eldred Cent. Sch. Dist., 2019 NY Slip Op 03714, Third Dept 5-9-19

VERDICT, MOTION TO SET ASIDE, COMMENTS MADE IN SUMMATION.

PLAINTIFF'S MOTION TO SET ASIDE THE JURY VERDICT IN THE INTEREST OF JUSTICE SHOULD NOT HAVE BEEN GRANTED, THE COURT GRANTED THE MOTION BASED UPON REMARKS MADE BY DEFENSE COUNSEL DURING SUMMATION, REMARKS TO WHICH NO OBJECTION HAD BEEN MADE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict in this personal injury case should not have been granted. The jury found that plaintiff did not suffer a serious injury within the meaning of the no-fault law (Insurance Law § 5102(d)), and awarded plaintiff $50,000 for lost wages, reduced by $25,000 for failure to wear a seatbelt. The trial judge granted the motion in the interest of justice primarily based upon comments made by defense counsel during summation, comments to which no objection was made:

… [T]he Supreme Court identified eight specific statements made by defense counsel in his closing that the court characterized as improper, in addition to the remarks quoted above. However, none of these statements were objected to. We recognize that common courtesy requires that an attorney allow opposing counsel the opportunity to argue his or her case to the jury without undue or repetitive interruptions. Nevertheless, where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks … . Where objection is not, or cannot appropriately be, interposed during summation, counsel should, upon the conclusion of the summation, make appropriate objections, seek curative instructions, or request a mistrial … . Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial … . This standard was not met in this case. We stress that the plaintiff's counsel made no complaint regarding the allegedly prejudicial nature of the defendant's closing statement until after an adverse verdict was rendered. The verdict that the plaintiff did not sustain a serious injury was supported by the evidence, and the jury had ample reason to reject the plaintiff's claims and accept the arguments of the defendants.

Accordingly, we reverse the order insofar as appealed from, deny the branch of the plaintiff's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages in the interest of justice and for

a new trial on the issue of damages, and reinstate the jury verdict. Kleiber v Fichtel, 2019 NY Slip Op 03778, Second Dept 5-15-19

VERDICT, MOTION TO SET ASIDE, NOWEWORTHY JURY INSTRUCTION.

PLAINTIFF HAD NO MEMORY OF THE ACCIDENT AND THE JURY WAS GIVEN THE NOSEWORTHY CHARGE, DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IN THIS TRAFFIC ACCIDENT CASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the motion to set aside the verdict in this traffic accident case was properly denied. Plaintiff had no memory of the accident and testified about his habit or routine practice of riding his bicycle home from work. The court had given the Noseworthy jury instruction:

The plaintiff testified that, while he did not recall the accident, he did recall leaving work and getting on his bicycle with the intent of taking the route he usually took home, which route he detailed, explaining that he took the same route every day, except for when he took the bus. While that route would have had the plaintiff traveling with traffic at the time of the accident, the defendant testified, inter alia, that the plaintiff was traveling against traffic … . …

The jury could have credited the plaintiff's testimony as to his habit or routine practice, as to which the plaintiff submitted sufficient evidence "to allow the inference of its persistence" at the time of this accident … , while also making reasonable inferences based on the defendant's own testimony that, inter alia, the defendant failed to see that which through proper use of the driver's senses she should have seen, for which the defendant could be found liable even if the plaintiff, as the defendant here argues, could not establish that he obeyed all the rules of the road … . Ortega v Ting, 2019 NY Slip Op 03977, Second Dept 5-22-19

YOUTHFUL OFFENDERS, DNA PROFILE.

PETITIONER, WHO CONSENTED TO PROVIDING A DNA SAMPLE AFTER ARREST, MAY SEEK DISCRETIONARY EXPUNGEMENT OF THE DNA PROFILE AND UNDERLYING DOCUMENTS UPON BEING ADJUDICATED A YOUTHFUL OFFENDER, RESPONDENT JUDGE DIRECTED TO DECIDE WHETHER EXPUNGEMENT IS APPROPRIATE UNDER THE FACTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, granted a writ of mandamus directing the respondent-judge to consider whether the expungement of DNA evidence derived from a sample provided with petitioner's consent after arrest is appropriate. The petitioner was subsequently adjudicated a youthful offender (YO) and sought expungement on that ground. The DNA evidence is maintained by the New York City Office of Chief Medical Examiner (OCME). The First Department concluded that the OCME is subject to the State Executive Law and a court has the discretionary authority to expunge the YO's DNA profile from the SDIS (index system used for mutual exchange, use and storage of DNA records), along with the underlying DNA records:

[Re: the propriety of the Article 78 proceeding:] In the absence of an available remedy at law (see CPL 450.20), the important issues raised on this appeal will escape this Court's review unless this petition proceeds … . Moreover, this Court has original jurisdiction over the issues raised because they concern a sitting justice (CPLR 506[b][1]; 7804[b] …). …

There is abundant support for the conclusion that OCME's responsibilities in testing, analyzing and retaining DNA data is subject to the State Executive Law. Respondent's arguments that the statutory reference to a "state" DNA identification index in Article 49-B necessarily excludes a local DNA laboratory like that the one operated by OCME, is unavailing. …

… [W]e hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case. …

Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal

investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances. Matter of Samy F. v Fabrizio, 2019 NY Slip Op 04120, First Dep 5-28-19

ZONE OF DANGER.

GRANDMOTHER WAS IN THE ZONE OF DANGER WHEN PIECES OF THE FACADE OF A BUILDING FELL AND KILLED HER TWO-YEAR-OLD GRANDCHILD, BECAUSE GRANDMOTHER IS NOT 'IMMEDIATE FAMILY' SHE CANNOT RECOVER UNDER A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS THEORY, THE MOTION TO AMEND THE COMPLAINT TO ADD THAT THEORY SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, over an extensive two-justice dissent, determined the grandmother of a two-year-old child who witnessed the child's death was not a member of the child's "immediate family" and therefore could not recover for negligent infliction of emotional distress, despite the grandmother's being in the zone of danger when the child was struck by falling pieces of a building-facade. The motion to amend the complaint to add the negligent infliction of emotional distress cause of action should not have been granted:

… [I]n Trombetta v Conkling (82 NY2d 549, 551), the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, despite the fact that the niece's mother had died when the niece was 11 years old, and the aunt had allegedly been the maternal figure in the niece's life. At the time of the accident, the plaintiff was 37 years old and her aunt was 59 years old (see id. at 551). In rendering its determination, the Court of Appeals stated: "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (id. at 553).

In Jun Chi Guan v Tuscan Dairy Farms (24 AD3d 725), this Court held that the relationship of grandparent and grandchild does not constitute "immediate family" so as to permit recovery for negligent infliction of emotional distress. In Jun Chi Guan, the plaintiff grandmother was pushing her infant grandson in a stroller, when a truck owned and operated by the defendants struck the stroller, killing the infant (see id. at 725). This Court rejected the grandmother's argument that she should be considered immediate family because she was the family member who spent the most time with the infant during his waking hours (see id. at 726). Further, this Court held that "it

is not appropriate for this Court to expand the class [of persons constituting immediate family] absent further direction from the Court of Appeals or the New York State Legislature" (id.). Greene v Esplanade Venture Partnership, 2019 NY Slip Op 03771, Second Dept 5-15-19