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APPEALS, MOTIONS IN LIMINE.

THE DENIAL OF DEFENDANT'S MOTION TO LIMIT THE EXPERT TESTIMONY PLAINTIFF COULD OFFER AT TRIAL DID NOT LIMIT THE ISSUES TO BE TRIED; THEREFORE ANY APPEAL MUST AWAIT THE CONCLUSION OF THE TRIAL; APPEAL DISMISSED (THIRD DEPT).

The Third Department determined defendant doctor could not appeal the denial of defendant's motion to limit the expert testimony which plaintiff could offer at trial in this medical malpractice action. The motion court's ruling did not limit the issues to be tried. Therefore an appeal must be brought after trial:

It is well settled that "an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" … . Here, Supreme Court's decision merely permits the infant to offer various testimony of his expert witnesses and does not limit the scope of issues to be tried … . Therefore, appellate review of the court's ruling "must await the conclusion of a trial so that the relevance of the proffered evidence, and the effect of [the court's] ruling with respect thereto, can be assessed in the context of the record as a whole" … . Accordingly, this appeal must be dismissed … . C.H. v Dolkart, 2019 NY Slip Op 05614, Third Dept 7-11-19

ARTICLE 78, VERIFICATION, RES JUDICATA, COLLATERAL ESTOPPEL.

ALTHOUGH THE ARTICLE 78 PETITION WAS VERIFIED BY AN ATTORNEY, THE VERIFICATION WAS VALID BECAUSE THE ATTORNEY HAD FIRST-HAND KNOWLEDGE OF THE FACTS; IN ADDITION, ANY DEFECTS IN THE VERIFICATION WERE WAIVED BY RESPONDENTS; PRIOR ARBITRATION PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT WAS NOT AN OBSTACLE TO THE PETITION ALLEGING A VIOLATION OF THE EDUCATION LAW CONCERNING THE SUSPENSION OF A SCHOOL PRINCIPAL (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the verification of an Article 78 petition by petitioner's attorney was valid because the attorney had first hand knowledge of the contents and, even if the verification was invalid, the respondent had waived any objection to it. The matter concerns the suspension of a school principal which had been the subject of arbitration pursuant to the collective bargaining agreement. The arbitration was not an obstacle to these proceedings brought pursuant to the Education Law because the issues are not the same. The issue involved in the Article 78 petition, an interpretation of Education Law 2566 (6), was not the kind of issue which must first be brought before the Commissioner of Education:

Although the verification requirement of CPLR 7804 (d) must ordinarily be completed by a party, a verification "may be made by [a party's] attorney [where, as here,] all the material allegations of the pleading are within the personal knowledge of . . . [that] attorney' " … Moreover, a party challenging the sufficiency of a verification is required "to give notice with due diligence to the attorney of the adverse party that he [or she] elect[ed]' to treat the petition as a nullity" … . Thus, even assuming, arguendo, that the verification by petitioner's attorney was insufficient, we conclude that respondents waived any challenge to the petition on that ground by failing to make the requisite diligent efforts and instead waiting a month before seeking dismissal of the petition on that basis … . …

… .[A]lthough Education Law § 310 provides … that any party aggrieved by an official act or decision of school authorities "may appeal by petition to the [C]ommissioner of [E]ducation," the Commissioner exercises primary jurisdiction only where the matter involves an issue requiring his or her specialized knowledge and expertise … . Petitioner's contention regarding section 2566, however, requires no more than the interpretation and application of the plain language of that statute for which no deference to the Department of Education is required

… . Matter of Buffalo Council of Supervisors & Adm'rs, Local #10 v Cash, 2019 NY Slip Op 05895, Fourth Dept 7-31-19

ARTICLE 78, JUDGES, CRIMINAL LAW.

ARTICLE 78 ACTION SEEKING TO PROHIBIT THE TRIAL JUDGE IN A CRIMINAL CASE FROM EXCLUDING TESTIMONY AS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE DISMISSED AS INAPPROPRIATE; MATTER CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

The Third Department determined the Article 78 proceeding brought by the district attorney against the trial judge in a criminal case seeking prohibition should have been dismissed. The trial judge had ruled that the conversations between an attorney and the defendant at the scene of the crime were protected by attorney-client privilege. The Article 78 action sought to prohibit the trial judge from adhering to that ruling. At the time of this Article 78 proceeding the criminal trial was over and defendant had been convicted. The matter was considered as an exception to the mootness doctrine:

Prohibition is an extraordinary remedy and, in cases involving the exercise of judicial authority, "is available only where there is a clear legal right, and then only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers" … . Respondent had jurisdiction over the criminal action against Mercer … and was empowered to preclude Doyle from testifying about matters protected by the attorney-client privilege … . Petitioner's core complaint is that respondent erred in determining the scope of that privilege, and she may be correct … . Nevertheless, "prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power" … . To allow review of such matters would have an array of negative impacts, encouraging gamesmanship, "erect[ing] an additional avenue of judicial scrutiny in a collateral proceeding and . . . frustrat[ing] the statutory or even constitutional limits on review" … . Thus, inasmuch as petitioner does not point to "an unlawful use or abuse of the entire action or proceeding," but rather "an unlawful procedure or error in the action or proceeding itself related to the proper purpose of the action or proceeding," prohibition will not lie … . Matter of Heggen v Sise, 2019 NY Slip Op 05620, Third Dept 7-10-19

ARTICLE 78, SUBJECT MATTER JURISDICTION.

THE APPELLATE DIVISION DID NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PETITIONER'S REQUEST FOR AN ADMINISTRATIVE HEARING HAD BEEN DENIED, THE ARTICLE 78 PETITION, SEEKING REVIEW OF THE DISQUALIFICATION OF A BID ON A CONSTRUCTION PROJECT, WAS THEREFORE DISMISSED (THIRD DEPT).

The Third Department determined it did not have subject matter jurisdiction and therefore the Article 78 petition seeking review of the disqualification of a bid on a construction project must be denied. The appellate division, by statute, has jurisdiction only after an administrative hearing. Here petitioner's request for a hearing was denied:

To commence this proceeding here, petitioner relied on Executive Law § 313 (5) (c), which states that, "[w]ithout limiting other grounds for the disqualification of bids . . . on the basis of non-responsibility, a contracting agency may disqualify the bid . . . as being non-responsible for failure to remedy notified deficiencies contained in the contractor's utilization plan within a period of time specified in regulations promulgated by the director after receiving notification of such deficiencies from the contracting agency." The statute further provides that "[w]here the contracting agency states that a failure to remedy any notified deficiency in the utilization plan is a ground for disqualification[,] the contractor shall be entitled to an administrative hearing, on a record[.] . . . A final administrative determination made following such hearing shall be reviewable in a proceeding commenced under [CPLR] article [78] . . . [and] shall be commenced in [this Court]" (Executive Law § 313 [5] [c]). The last quoted portion of the statute grants this Court original jurisdiction in a proceeding to challenge a final administrative determination that was made following a specified type of hearing, which is otherwise provided for in that paragraph. Respondent's determination at issue here was not made following a hearing; indeed, the determination dismissed petitioner's request for a hearing and petitioner is now seeking, as relief in this proceeding, a court order compelling respondent to conduct such a hearing. As no statute grants this Court original jurisdiction to review the determination that petitioner is challenging, we must dismiss the petition for lack of subject matter jurisdiction … . Matter of Accadia Site Contr., Inc. v Erie County Med. Ctr. Corp., 2019 NY Slip Op 05730, Third Dept 7-18-19

ATTORNEYS, VIRTUAL LAW OFFICE.

USING A NEW YORK VIRTUAL LAW OFFICE PROGRAM (VLOP) ONLY AS A MAILING ADDRESS AND AS AN AGENT TO ACCEPT SERVICE DOES NOT SATISFY THE REQUIREMENT THAT AN ATTORNEY PRACTICING IN NEW YORK HAVE A PHYSICAL OFFICE IN NEW YORK, HOWEVER THE ACTION BROUGHT BY THE VLOP ATTORNEY IS NOT A NULLITY AND SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined using a Virtual Law Office Program (VLOP) only as a mailing address and as an agent to accept service in New York is not enough to satisfy the Judiciary Law requiring an attorney practicing in New York to have a physical office in New York. However the action started by the attorney with the virtual law office is not, as Supreme Court held, a nullity:

To the extent that counsel uses the VLOP only as a mailing address and an agent authorized to accept service of process, it is insufficient to meet the physical presence requirement of Schoenefeld. While the additional services VLOP provides may well satisfy physical presence, an attorney needs to actually take advantage of those services to meet the requirements of Judiciary Law § 470. At bar, counsel does not claim that he actually uses the VLOP for anything but the delivery of mail and packages and for service of process. Although office space and conference rooms may be available to him, there is no claim that he actually uses those services. …

Counsel's correspondence and the papers served on his adversary and/or filed in court contradicted any physical presence in New York. …

Notwithstanding that we find that counsel is not authorized to maintain this action in New York State, we do not believe that it should have been dismissed. The Court of Appeals recently held that a nonresident attorney's failure to comply with the requirement of Judiciary Law § 470 of maintaining a physical office in New York State at the time a complaint is filed does not render the filing a nullity and therefore that dismissal of the action is not required … . The party may cure the statutory violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel … . Accordingly, we vacate the order and remand the matter to afford plaintiff an opportunity to cure the violation. Marina Dist. Dev. Co., LLC v Toledano, 2019 NY Slip Op 05480, First Dept 7-9-19

BANKRUPTCY.

FAILURE TO DISCLOSE THE SLIP AND FALL ACTION AS AN ASSET IN A BANKRUPTCY PROCEEDING DEPRIVED PLAINTIFF OF THE LEGAL CAPACITY TO SUE (SECOND DEPT).

The Second Department determined plaintiff did not have the legal capacity to sue in this slip and fall case because the action was not listed as an asset in a prior bankruptcy proceeding:

"The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity to sue subsequently on that cause of action'" … .

Here, it is undisputed that the plaintiff did not disclose, in the bankruptcy petition that she filed in October 2015, the existence of the cause of action to recover damages for personal injuries that she had previously asserted against the defendant. The defendant established, prima facie, that when the petition was filed, the plaintiff knew or should have known of the existence of her cause of action, and the plaintiff failed to raise a triable issue of fact in opposition to that prima facie showing … . Jean-Paul v 67-30 Dartmouth St. Owners Corp., 2019 NY Slip Op 05965, Second Dept 7-31-19

CLASS ACTIONS.

COMMISSIONER OF LABOR AND INDUSTRIAL BOARD OF APPEALS COULD NOT PURSUE STATE WAGE CLAIMS ON BEHALF OF CLAIMANTS WHO ARE SUBJECT TO A CLASS ACTION SETTLEMENT IN FEDERAL DISTRICT COURT IN WHICH THE STATE WAGE CLAIMS WERE RELEASED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, determined that the Commissioner of Labor and the Industrial Board of Appeals (IBA) were bound by the federal district court's release in a class action alleging failure to pay minimum wages, failure to pay overtime wages and unlawful deductions. The IBA had awarded two members of the class state wage claims together with interest and penalties:

Procedurally, IBA erred in entertaining this issue. In the final approval order, the District Court clearly and unmistakably retained exclusive and continuing subject matter jurisdiction of the Stewart class action "for the purposes of supervising the implementation, effectuation, enforcement, construction, administration and interpretation of the Settlement Agreement and this Judgment." Undoubtedly, the District Court "has the power to enforce an ongoing order against relitigation so as to protect the integrity of a complex class settlement over which it retained jurisdiction" … . … * * *

Because we have determined that claimants have released their dual wage claims, the focus now necessarily concerns the concept of privity, and whether it exists between claimants and respondents [Commissioner of Labor, et al]. We find that the holding in Applied Card Sys., Inc. (11 NY3d at 124) is dispositive of this issue.

The Applied Card Court addressed whether the state Attorney General was precluded under the doctrine of res judicata from pursuing on the class members' behalf their restitution claims released in an underlying class action settlement. The Court held that because the Attorney General was pursuing claims identical to the ones that had been released that fact alone established privity … . The facts herein are virtually indistinguishable from Applied Card. Here, respondents, on behalf of claimants, seek to pursue their released dual wage claims. As such, privity has been established between claimants and respondents. Matter of Silvar v Commissioner of Labor of the State of N.Y., 2019 NY Slip Op 05841, First Dept 7-30-19

COMPLAINT, SPOLIATION.

SPOLIATION WARRANTED STRIKING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the destruction of plaintiff's truck, which was allegedly struck by defendant's truck, warranted striking the complaint:

… [O]n their motion pursuant to CPLR 3126 to strike the complaint, the defendants sustained their burden of establishing that the plaintiff was obligated to preserve the truck at the time it was purportedly "seized and disposed" of, that the truck had been seized and disposed of before the defendants had an opportunity to inspect it, and that the truck was relevant to the litigation … . Furthermore, the defendants demonstrated that their ability to prove their defense had been significantly, if not fatally, compromised by the loss of the truck. Under the circumstances presented, the sanction of striking the complaint was appropriate … . Delmur, Inc. v School Constr. Auth., 2019 NY Slip Op 05764, Second Dept 7-24-19\

COMPLAINT, SPOLIATION.

RECORD WAS INSUFFICIENT TO DETERMINE THE LEVEL OF PREJUDICE CAUSED BY PLAINTIFF'S FAILURE TO PRESERVE THE PHONE WHICH ALLEGEDLY CAPTURED IMAGES OF THE INCIDENT AT THE HEART OF THE LAWSUIT, DISMISSAL OF THE COMPLAINT REVERSED AND MATTER REMITTED FOR FURTHER DISCOVERY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined that the record was not sufficient to conclude whether dismissal of the complaint was a proper sanction for spoliation of evidence. Plaintiff alleged defendant negligently or intentionally struck defendant with an all-terrain vehicle (ATV). Defendant asked plaintiff to preserve a phone which allegedly contained images of the incident. Plaintiff did not preserve the phone but provided one image and one video which were alleged to have been on the phone. Supreme Court dismissed the complaint as a sanction for spoliation. The Third Department noted there was evidence that all the metadata on the phone had been preserved and remitted the matter for discovery and, if necessary, an appropriate sanction:

… [T]he factors to be considered in determining the appropriate sanctions for such failures are "the extent that the spoliation of evidence may prejudice a party and whether a dismissal will be necessary as a matter of elementary fairness" … . …

… [W]e remit to Supreme Court with direction for plaintiff to promptly obtain and provide to defendant all photos, videos and metadata pertinent to the incident that have been preserved in any source, or to provide defendant with full access to any such stored photos, videos and metadata. The retrieval and examination of this information — or the continued failure to do so — will permit Supreme Court to reexamine, upon a full record, whether pertinent electronic information has been lost as a result of plaintiff's failure to preserve the phone, to what extent defendant has been prejudiced by that loss and, thus, whether dismissal, an adverse inference charge or some other sanction may be appropriate … . LaBuda v LaBuda, 2019 NY Slip Op 05372, Third Dept 7-3-19

COMPLAINT, CONSOLIDATION.

PLAINTIFF'S NEW COUNSEL FILED A SECOND COMPLAINT ARISING OUT OF THE SAME FACTS AS THE FIRST COMPLAINT TO ALLEGE CERTAIN INTENTIONAL TORTS BEFORE THE STATUTE OF LIMITATIONS RAN OUT, DISMISSAL OF THE SECOND COMPLAINT WAS NOT REQUIRED, CONSOLIDATION OF THE TWO COMPLAINTS WAS ORDERED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that dismissal of a second complaint arising out of the same facts as the first complaint, filed two months earlier, was not required. Plaintiff had hired new counsel 13 days before the statute of limitations ran out. The first complaint mentioned both intentional and negligent conduct. The second complaint fleshed out specific intentional torts:

CPLR 3211 (a) (4) does not require a trial court to dismiss an action upon the ground that another similar action is pending, instead allowing it to "make such order as justice requires" … . … "[t]he purpose of the defense of the pendency of another action between the same parties for the same cause is to prevent a party from being harassed or burdened by having to defend a multiplicity of suits" . In our view, the reasons stated by plaintiff for commencing this action rather than moving for leave to amend the first complaint are not… so clearly inadequate that dismissal was required to serve that purpose … . ….

We note that Supreme Court agreed with plaintiff that there was insufficient time to pursue a motion for leave to amend pursuant to CPLR 2214 (b). As the court observed, it was possible that plaintiff could have obtained timely relief by bringing a request for leave to amend the first complaint via an order to show cause … . Nevertheless, even if counsel erred in failing to pursue that course, dismissal of this action is too harsh a consequence.

Where, as here, relief is required under CPLR 3211 (a) (4) to correct similar pending actions, "consolidation or joint trial is permissible and in many instances preferable to dismissal"… . In his opposition to defendant's motion to dismiss, plaintiff requested such relief as an alternative remedy. Thus, the requirement for notice to defendant before consolidation is ordered has been satisfied (see CPLR 602 [a] …). Accordingly, we direct Supreme Court to consolidate this action with the first action, and remit for that purpose. LaBuda v LaBuda, 2019 NY Slip Op 05366, Third Dept 7-3-19

[Note that it may have been possible for the plaintiff to file a copy of the proposed supplemental summons with a motion to amend the complaint which would have tolled the statute of limitations. (*see Karagiannis v North Shore Long Is. Jewish Health Sys., Inc.*, 80 AD3d 569, 569 [2d Dept 2011])]

CONTINUING WRONG DOCTRINE.

IN THIS EMPLOYEE-EMPLOYER DISPUTE ABOUT A HEALTH INSURANCE PREMIUM CONTRIBUTION, THE CONTINUING WRONG DOCTRINE DID NOT APPLY TO TOLL THE STATUTE OF LIMITATIONS, EACH PAYCHECK WITH THE PREMIUM DEDUCTION WAS NOT AN INDEPENDENT WRONG (SECOND DEPT).

The Second Department determined the continuing wrong doctrine did not toll the statute of limitations in this employee-employer dispute about a health insurance premium contribution. The petitioner unsuccessfully argued each paycheck with the premium deduction was an independent wrong which tolled the statute of limitations:

A challenge to an administrative determination must be commenced within four months of the time the determination is "final and binding upon the petitioner" (CPLR 217[1]). "A challenged determination is final and binding when it has its impact' upon the petitioner who is thereby aggrieved" … . An administrative determination regarding payment of salary or pay adjustments is final and binding, and a challenge thereto accrues, when the petitioner receives a check or salary payment reflecting the administrative determination … .

Contrary to the petitioner's contention, the continuing wrong doctrine does not apply here to toll the statute of limitations … . The doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" … . "The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" … . Here, the Town made the determination to classify the petitioner as an employee hired after December 31, 2014, subject to a 15% health insurance premium contribution requirement, as reflected in her first paycheck issued in April 2015, more than two years prior to the commencement of this proceeding. Each subsequent paycheck deduction "represent[ed] the consequences of [that allegedly] wrongful act[ ] in the form of continuing damages," and was not an independent wrong in itself … . Matter of Salomon v Town of Wallkill, 2019 NY Slip Op 05671, Second Dept 7-17-19

CONTINUOUS REPRESENTATION DOCTRINE, LEGAL MALPRACTICE.

CONTINUOUS REPRESENTATION DOCTRINE DID NOT APPLY TO TWO DISTINCT AND SEPARATE ACTIONS, LEGAL MALPRACTICE ACTION TIME-BARRED (FIRST DEPT).

The First Department determined the continuous representation doctrine did not apply and the legal malpractice action was time-barred. Plaintiff was represented by defendant law firm in a 2005 divorce. Plaintiff's ex-wife then sued plaintiff alleging he fraudulently concealed an asset in the divorce proceedings. Defendant law firm successfully defended the fraud action. 12 years after the divorce action ended, plaintiff sued the law firm for malpractice, asking to be relieved of the obligation to pay the law firm's legal fees in the fraud action:

The motion court correctly found that this action, which was commenced 12 years after the divorce action ended, is barred by the applicable three-year statute of limitations … . Contrary to plaintiff's contentions, the continuous representation doctrine is inapplicable, because defendants were retained under two separately executed retainer agreements in the divorce action and the fraud action … . The first retainer agreement expressly stated that it did not cover any services following the entry of a final judgment of divorce. Thus, there was no mutual understanding that further representation was necessary on the specific subject matter of the malpractice claim … . Moreover, the divorce action and the fraud action, although related, were two distinct and separate actions … . Etzion v Blank Rome, LLP2019 NY Slip Op 05468, First Dept 7-9-19

CONTINUOUS REPRESENTATION DOCTRINE, LEGAL MALPRACTICE.

QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS LEGAL MALPRACTICE ACTION; THE ATTORNEY HAD ATTEMPTED TO REMEDY THE FAILURE TO FILE OBJECTIONS IN AN ESTATE MATTER AFTER THE STATUTE HAD RUN; ABSENCE OF AN EXPERT'S REPORT FROM THE RECORD ON APPEAL PRECLUDED A RULING ON THE RELATED ISSUE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff had raised a question of fact whether the continuous representation doctrine tolled the statute of limitations in this legal malpractice action. The attorney had attempted to remedy the failure to file objections in an estate matter after the statute had run. The Fourth Department noted that plaintiff's expert's report was missing from the record on appeal and therefore plaintiff was unable to argue on appeal that he had raised a related question of fact (concerning damages) before Supreme Court. Defendant had argued the damages were speculative (requiring dismissal) and Supreme Court did not rule on the issue (because the case was dismissed as untimely). The matter was remitted for a ruling on the damages issue:

We are unable to review plaintiff's contention that he raised a triable issue of fact with respect to … damages by submitting an expert report inasmuch as plaintiff failed to include that document in the record on appeal. Thus plaintiff, as the party raising this issue on his appeal, "submitted this appeal on an incomplete record and must suffer the consequences" … . …

Defendant met his burden … by establishing that the statute of limitations for legal malpractice is three years (see CPLR 214 [6]), that the estate cause of action accrued on November 1, 2010, the last date on which to file objections to the accounting …, and that the estate cause of action was therefore untimely when this malpractice action was commenced on November 15, 2013. "The burden then shifted to plaintiff[] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" … .

We agree with plaintiff that the court erred in determining that plaintiff failed to do so. It is well settled that, in order for the continuous representation doctrine to apply, "there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" … . Here, plaintiff submitted evidence that defendant made several unsuccessful attempts to file the objections within the weeks after the deadline and that he made

preparations to appear at a scheduled conference on the objections on November 23, 2010. Those efforts could be viewed as "attempt[s] by the attorney to rectify an alleged act of malpractice" … , and thus plaintiff raised a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine. Leeder v Antonucci, 2019 NY Slip Op 05898, Fourth Dept 7-31-19

CONTINUOUS TREATMENT DOCTRINE, MEDICAL MALPRACTICE.

ALTHOUGH THE TWO THYROID SURGERIES WERE PERFORMED BY THE SAME DOCTOR, THE 2005 SURGERY AND THE 2010 SURGERY WERE DISCRETE EVENTS; THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE CONTINUOUS TREATMENT DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the medical malpractice action based upon a 2005 thyroid surgery by the same doctor who performed the 2010 thyroid surgery was time-barred. The two surgeries were discrete events and the statute of limitations was not tolled by the continuous treatment doctrine:

Defendants established that [the 2005] claims are time-barred inasmuch as more than 2½ years elapsed between the date of the alleged conduct and the commencement of the action … , and plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, the continuous treatment doctrine does not apply. It is undisputed that plaintiff did not treat with Dr. Chahfe in relation to the 2005 surgery after her final follow-up appointment in 2005, and that she did not return to Dr. Chahfe until 2010. The surgical procedures in 2005 and 2010 were " discrete and complete' events that cannot be linked by way of the continuous treatment doctrine" … , and there was no evidence of anticipated further treatment related to the 2005 procedure at the time plaintiff left Dr. Chahfe's care in 2005 … . Angelhow v Chahfe, 2019 NY Slip Op 05437, Fourth Dept 7-5-19

COURT OF CLAIMS, DAMAGES.

THE CLAIM WAS NOT JURISDICTIONALLY DEFECTIVE FOR FAILURE TO SPECIFICALLY ALLEGE LOST WAGES AS PART OF THE DAMAGES IN THIS PERSONAL INJURY ACTION, THE DISSENT DISAGREED AND WOULD HAVE VACATED THE AWARD FOR LOST WAGES (FOURTH DEPT).

The Fourth Department affirmed the award of money damages to claimant for personal injury. The claim did not specifically request lost wages as damages. The majority held the claim was not jurisdictionally deficient and the specific items of damage need not have been spelled out. The dissenter disagreed and argued the award for lost wages should be vacated:

Contrary to defendant's contention, the court did not lack subject matter jurisdiction with respect to damages for past and future lost wages inasmuch as the facts alleged by claimant "were sufficient to apprise [defendant] of the general nature of the claim and to enable it to investigate the matter" … .

The plain language of the statute requires a claimant to specify "the items of damage or injuries claimed to have been sustained" and, "except in[, inter alia,] action[s] to recover damages for personal injury . . . , the total sum claimed" (Court of Claims Act § 11 [b]). Contrary to the view of our dissenting colleague, a natural reading of the statute requires a claimant to specify the items of damage to property or injuries to a person for which the claimant seeks compensation. Here, claimant sufficiently specified the nature of the claim, the time when and the place where the claim arose, and the injuries claimed to have been sustained, i.e., "injuries to his shoulder, bicep, and elbow" … . Inasmuch as this is an action for damages for personal injury, claimant was not required to specify, in total or itemized by category, his claimed items of damage … . Damages sought by claimant for medical expenses or lost wages are matters for the bill of particulars. Donahue v State of New York, 2019 NY Slip Op 05948, Fourth Dept 7-31-19

COURT OF CLAIMS.

THE CLAIM DID NOT ADEQUATELY DESCRIBE THE LOCATION OF CLAIMANT'S SLIP AND FALL AND EVIDENCE SUBMITTED BY THE CLAIMANT IN RESPONSE TO THE MOTION TO DISMISS NEED NOT BE CONSIDERED, CLAIM PROPERLY DISMISSED (THIRD DEPT).

The Third Department determined claimant in this slip and fall case did not meet the pleading requirements of Court of Claims Act 11 and her claim was therefore properly dismissed. Although claimant submitted an aerial map in opposition to the motion to dismiss, only the information in the claim need be considered:

Court of Claims Act § 11 (b) provides that "[t]he claim shall state the . . . place where such claim arose." Although "absolute exactness" is not required, "a claimant must provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" … . "[D]efendant is not required to ferret out or assemble information that [Court of Claims Act §] 11 (b) obligates the claimant to allege," and "[f]ailure to abide by [the statute's] pleading requirements constitutes a jurisdictional defect mandating dismissal of the claim, even though this may be a harsh result" … . …

Claimant alleged that she fell "on the exterior stairs/landing located proximate to Moffit Hall and Clinton Dining Hall." The record establishes, however, that there are three staircases proximate to Moffit Hall and Clinton Dining Hall. Claimant's contention that the location stated in her claim necessarily referred to the sole staircase/landing between the two buildings is without merit because the claim did not allege that the situs of the accident occurred between the two buildings … . In opposition to the motion to dismiss, claimant submitted an aerial map of where she allegedly fell. However, the aerial map does not cure the pleading defect in her claim because the aerial map was not included in her claim, and defendant is not required to go beyond the claim to ascertain the situs of the injury … . Katan v State of New York, 2019 NY Slip Op 05746, Third Dept 7-18-19

DEFAULT, MOTION TO VACATE.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE, MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that law office failure was an adequate excuse and appellants' motion to vacate a default judgment should have been granted in this foreclosure action:

… [T]he appellants moved, among other things, pursuant to CPLR 2005 and 5015(a) to vacate their default … . …

"A motion to vacate a default is addressed to the sound discretion of the motion court" … . "In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" … .

Under the circumstances presented here, the appellants set forth a reasonable excuse for their failure to appear at the centralized motion part of the Supreme Court on the return date of the plaintiff's motion based on evidence of law office failure. In an affirmation, the appellants' attorney explained that upon receiving the plaintiff's motion, he directed his office's legal assistant to note the return date of the motion on the office calendar, but that the return date had not been noted on the calendar. In addition, the appellants demonstrated a potentially meritorious defense based upon the statute of limitations. Bank of N.Y. Mellon v Faragalla, 2019 NY Slip Op 05641, Second Dept 7-17-19

DEFAULT, MOTION TO VACATE.

MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED, NO EXCUSE OFFERED (SECOND DEPT).

The Second Department determined plaintiff's motion to vacate a default judgment in this foreclosure action should not have been granted:

With regard to default judgments, CPLR 3215(c) provides, in pertinent part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion." The "one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint . . . may be excused if sufficient cause is shown why the complaint should not be dismissed'" … . "This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious" … .

Here, the plaintiff did not offer any excuse for its failure to take proceedings for the entry of a default judgment … for more than one year after the action was released from the foreclosure settlement conference part … . "Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and shall' dismiss the claim pursuant to CPLR 3215(c)" … . HSBC Bank USA, N.A. v Uddin, 2019 NY Slip Op 05649, Second Dept 7-17-19

FORECLOSURE, ABANDONMENT.

FORECLOSURE ACTION ABANDONED, BANK FAILED TO INITIATE DEFAULT JUDGMENT PROCEEDINGS WITHIN ONE YEAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank had abandoned the foreclosure action by failure to move for a default judgment within one year. The bank's participation in mandatory settlement conferences did not constitute the initiation of an action for a default judgment:

CPLR 3215(c) provides, in part, that if the plaintiff fails to take proceedings for the entry of judgment within one year after the defendant's default, "the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion" … . "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts shall' dismiss claims … for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" … . However, the failure to timely seek a default judgment may be excused if "sufficient cause is shown why the complaint should not be dismissed" … . To establish sufficient cause as required by CPLR 3215(c), a plaintiff must proffer a reasonable excuse for the delay in timely moving for a default judgment and demonstrate that it has a potentially meritorious cause of action … .

… [A]fter this action was released from the mandatory foreclosure settlement conference part in July 2016, the plaintiff was authorized to proceed with the prosecution of this action. However, despite the fact that the appellants failed to answer or otherwise appear in the action after being served with process, the plaintiff took no steps to initiate proceedings for the entry of a default judgment against the appellants. The plaintiff's participation in the mandatory foreclosure settlement part conferences did not constitute the initiation of proceedings for the entry of a default judgment. Moreover, more than one year passed from the time that the plaintiff was authorized to resume prosecution of this action prior to the appellants moving in October 2017 to dismiss the complaint as abandoned …. In light of the plaintiff's failure to meet its burden to show sufficient cause why the complaint should not be dismissed as abandoned, it is not necessary to address the issue of whether the plaintiff demonstrated that it had a potentially meritorious cause of action … . HSBC Bank USA, N.A. v Slone, 2019 NY Slip Op 05963, Second Dept 7-31-19

FORECLOSURE, CONFERENCE,

FORECLOSURETHE BANK'S MOTION TO VACATE A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED BECAUSE OF THE BANK'S UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED CONFERENCE IN VIOLATION OF 22 NYCRR 202.27(c) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's unexcused failure to appear at a scheduled conference required denial of the bank's motion to vacate a default judgment:

Although CPLR 3215(c) was not an appropriate ground upon which to dismiss the complaint because the plaintiff initiated proceedings for the entry of a judgment by moving for an order of reference within one year

of the defendant's default …, dismissal of the complaint was appropriate pursuant to 22 NYCRR 202.27(c) since the plaintiff failed to appear for the scheduled October 2012 conference.

A plaintiff seeking to vacate a default in appearing at a conference is required to demonstrate both a reasonable excuse for its default and a potentially meritorious cause of action (see CPLR 5015[a][1] …). Although "[t]he determination of whether an excuse is reasonable is committed to the sound discretion of the motion court" … , the defaulting party must submit evidence in admissible form establishing both a reasonable excuse and a potentially meritorious cause of action or defense … .

Here, the plaintiff alleged only that the failure of its two prior attorneys to timely file the attorney affirmation in accordance with the January 2011 order caused the delay in prosecuting this action, and failed to proffer any evidentiary support therefor or any excuse for its failure to appear at the October 2012 conference. Moreover, the record reflects that the plaintiff did not take any action for almost four years to cure its default after the action was marked off the calendar. Since the plaintiff failed to demonstrate a reasonable excuse for its default … , we need not reach the issue of whether it had asserted a potentially meritorious cause of action … . Wells Fargo Bank, N.A. v McClintock, 2019 NY Slip Op 06015, Second Dept 7-31-19

FORECLOSURE, NOTICE.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT SUBMIT ADMISSIBLE PROOF OF STANDING PURSUANT TO A MERGER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and did not demonstrate it had standing, based upon a merger, to foreclose:

… [T]he plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304 … . The plaintiff did not submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that the plaintiff properly served the defendants pursuant to RPAPL 1304. Instead, the plaintiff relied upon the affidavit of its employee Lesa Duddey, a vice president of document control. In her affidavit, Duddey averred that her "review of records" maintained by the plaintiff "reveal[ed]" that the plaintiff sent 90-day notices by registered or certified mail and first class mail to each of the defendants, and she described a correspondence log that

purportedly evidenced such mailings. "While mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay" … , here, the plaintiff failed to submit a copy of the correspondence log in support of its motion. Consequently, the statements in Duddey's affidavit regarding the correspondence log are inadmissible hearsay and lack probative value … . The plaintiff did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . The presence of 20-digit numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304 … .

… [W]e note that the plaintiff also failed to submit sufficient evidence in admissible form of ABN's merger with the plaintiff to establish, prima facie, that the plaintiff was the holder of the note at the time of the commencement of the action … . CitiMortgage, Inc. v Osorio, 2019 NY Slip Op 05383, Second Dept 7-3-19

FORECLOSURE, NOTICE/MAILING.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE/MAILING REQUIREMENTS AND THEREFORE DID NOT DEMONSTRATE PERSONAL JURISDICTION OVER DEFENDANTS, THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because plaintiff did not demonstrate compliance with the notice requirements:

… [T]he Supreme Court should not have confirmed the Referee's report. The plaintiff failed to submit any evidence at the hearing of compliance with the mailing requirement of CPLR 308(2) and, thus, failed to demonstrate that personal jurisdiction had been obtained over the defendants … . Federal Natl. Mtge. Assn. v Puretz, 2019 NY Slip Op 05958, Second Dept 7-31-19

FRAUD, CIVIL CONSPIRACY.

ALTHOUGH THERE IS NO CAUSE OF ACTION FOR CIVIL CONSPIRACY IN NEW YORK, THE ELEMENTS OF CONSPIRACY, INCLUDING OVERT ACTS, WERE PROPERLY PLED AS PART OF THE FRAUD CAUSE OF ACTION (FIRST DEPT).

The First Department, modifying Supreme Court, determined that, although there is no cause of action for civil conspiracy in New York, the conspiracy alleged here was validly pled as part of the fraud cause of action. The unjust enrichment cause of action should have been dismissed because there was no close relationship between the plaintiff and defendant. The complaint did not support the punitive damages claim because it did not allege defendants' actions were aimed at the public or showed moral turpitude. The permanent injunction cause of action was validly pled because the injury cannot be fully compensated by money damages. The action stemmed from a failed partnership to develop a cure for rare genetic blood disorders:

The complaint states a cause of action for fraud by alleging that Sloan-Kettering knowingly misrepresented or omitted a material fact for the purpose of inducing plaintiff to rely upon it, that plaintiff justifiably relied on the misrepresentation or omission, and that plaintiff sustained injury … . …

… "[C]ivil conspiracy is not recognized as an independent tort in this State" … . Rather, the "allegations in the complaint herein charging conspiracy are deemed part of the remaining causes of action to which they are relevant" … . Here, the conspiracy charge remains as part of the fraud cause of action. …

… "[L]iability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud" … . Allegations of conspiracy "serve to enable a plaintiff to connect a defendant with the acts of his co-conspirators where without it he could not be implicated" … .

… [P]laintiff sufficiently alleges overt acts …. …

… [T]he liability of a defendant as a conspirator for co-conspirators' wrongful acts "does not necessarily depend upon his active participation in the particular overt acts" … . Moreover, once a conspiracy is established, all defendants are liable for each other's acts in furtherance of the conspiracy … . Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research, 2019 NY Slip Op 05754, First Dept 7-23-19

FRAUD, CONTRACT LAW.

FRAUD CAUSE OF ACTION, AS ALLEGED, IS NOT DUPLICATIVE OF THE ACTION FOR BREACH OF A LOAN GUARANTEE AND SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's fraud cause of action was not duplicative on the action for breach of a loan guarantee and should not have been dismissed:

Plaintiff alleges that, as CEO of nonparty Karmaloop, Inc., defendant Gregory Selkoe solicited from plaintiff a bridge loan in the amount of $2,040,000. Plaintiff agreed, on condition that Selkoe personally guarantee the loan. Selkoe provided the personal guarantee, and also represented to plaintiff that he had previously given only one other personal guarantee, and that Karmaloop had never defaulted on any loan payment. Both of these representations were false, in that, unbeknownst to plaintiff, Selkoe had previously guaranteed a loan issued to another Karmaloop executive, and Karmaloop had defaulted on that loan.

The foregoing states a claim for fraudulent inducement, which is not duplicative of plaintiff's claim for breach of the guarantee. Plaintiff does not allege that Selkoe misrepresented the intent to perform on the guarantee and underlying promissory note, which would render the fraud claim duplicative, but rather alleges that Selkoe misrepresented his and Karmaloop's ability to perform … .

At this early juncture, we find that plaintiff should be "permitted to plead in the alternative (see CPLR 3014)," and its claim "for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action" … . Man Advisors, Inc. v Selkoe, 2019 NY Slip Op 05483, First Dept 7-9-19

FRAUD, CONTRACT LAW.

IN THE INDUCEMENT CAUSE OF ACTION WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the fraud cause of action should not have been granted. Supreme Court held the fraud action was duplicative of the breach of contract action:

"The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury" … . "Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud and the injured party's remedy is to sue for breach of contract" … . Where, however, it is alleged that the defendant made misrepresentations of present facts that were collateral to the contract and served as an inducement to enter into the contract, a cause of action alleging fraudulent inducement is not duplicative of a breach of contract cause of action … .

… [T]he cause of action alleging fraudulent inducement was not duplicative of the breach of contract cause of action. The first cause of action alleges that the defendants knowingly made false representations in … financial statements, which were collateral to the APA [asset purchase agreement], that these false statements were made in order to induce the plaintiff to enter into the APA, that the plaintiff would not have entered into the APA but for these false statements, and that the plaintiff was injured by this fraudulent conduct …. As the first cause of action alleges misrepresentations of present fact that were collateral to the APA and further alleges that these misrepresentations induced the plaintiff to enter into the APA, the court should have denied that branch of the defendants' motion which was to dismiss the first cause of action. Did-it.com, LLC v Halo Group, Inc., 2019 NY Slip Op 05644, Second Dept 7-17-19

JUDGES, ORDERS.

FAMILY COURT WAS WITHOUT AUTHORITY TO ISSUE A RESETTLED ORDER WHICH SUBSTANTIALLY CHANGED THE ORIGINAL ORDER AND WHICH WAS ISSUED WITHOUT THE BENEFIT OF TESTIMONY CONCERNING MOTHER'S SERIOUS MENTAL HEALTH AND SUBSTANCE ABUSE PROBLEMS (THIRD DEPT).

The Third Department, reversing Family Court, determined the court was without authority to issue a resettled order which substantially changed the original order. The original order, which was issued in the absence of testimony, provided that mother's mental health and substance abuse problems be monitored by the Monroe County Probation Department. The Department declined because it does not handle custody matters. Family Court then issued the resettled order requiring mental health and substance abuse treatment for mother and allowing grandmother access to mother's medical records:

"Resettlement of an order is a procedure designed solely to correct errors or omissions as to form or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court" (… see CPLR 2221).

… Family Court's resettled order does "effect a substantive change" and was beyond the court's authority to issue. The underlying petition included serious substance abuse and mental health allegations, but at no point was any actual testimony taken. These concerns were discussed during the stipulation colloquy before Family Court (Ames, J.), but the court ultimately determined to place the mother on probation subject to standard terms and conditions that did not impose independent evaluation requirements. In addition, the court was not authorized to defer to the probation department the decision as to whether the mother should undergo a substance abuse and/or mental health evaluation … . The plain fact of the matter is that the colloquy resulting in the oral stipulation was not definitive on the evaluation issue. "To be enforceable, an open court stipulation must contain all of the material terms and evince a clear mutual accord between the parties" … . Although we are mindful of the court's authority to require a party to undergo an evaluation, the resettled order was issued as a consent order, not as an express directive under Family Ct Act § 251. Given the absence of any record testimony, the resettled order cannot stand. Matter of Joan HH. v Maria II., 2019 NY Slip Op 05737, Third Dept 7-18-19

JUDGES, SUA SPONTE, FORECLOSURE.

DEFENDANT IN THIS FORECLOSURE ACTION DID NOT ASSERT THE BANK LACKED STANDING IN HIS ANSWER AND DID NOT OPPOSE THE BANK'S MOTION FOR SUMMARY JUDGMENT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, RAISED THE STANDING ISSUE AND DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, denied plaintiff bank's motion for summary judgment in this foreclosure action on the ground the bank did not establish standing. The bank need not affirmatively demonstrate standing absent the defendant's assertion that the bank lacked standing. Here the defendant did not address the bank's standing in his answer and did not oppose the motion for summary judgment:

… [A]s a general matter, a plaintiff need not establish its standing (i.e., that it held and/or owned the note at the time the action was commenced) as an essential element of the cause of action. Rather, it is only where the plaintiff's standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced" … .

In the present case, the defendant did not raise the issue of standing by asserting lack of standing as an affirmative defense in his answer or moving to dismiss the complaint on that ground in a pre-answer motion to dismiss … . Inasmuch as the defendant "failed to . . . raise the issue, it was inappropriate for the Supreme Court to, sua sponte, do so on the defendant['s] behalf" … . The issue of standing was not properly before the Supreme Court … . Deutsche Bank Natl. Trust Co. v Matzen, 2019 NY Slip Op 05386, Second Dept 7-3-19

JUDGES, SUA SPONTE, MUNICIPAL LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED BY A PARTY, HERE THE ABILITY FOR UNLIMITED AMENDMENT OF A NOTICE OF CLAIM WHICH HAD NOT YET BEEN FILED; SUA SPONTE ORDERS ARE NOT APPEALABLE; LEAVE TO APPEAL GRANTED AS AN EXERCISE OF DISCRETION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that Supreme Court should not, sua sponte, have granted relief which was not requested by a party. Petitioner allegedly was injured trying to board a subway train. Before filing a notice of claim petitioner commenced a CPLR 3102 (c) proceeding to obtain discovery before starting the action. The court granted the petition and, sua sponte, gave the petitioner permission to amend the notice of claim, which had not yet been filed, within 30 days of filing the note of issue. The Second Department noted that a sua sponte order is not appealable and exercised its discretion to grant leave to appeal (CPLR 5701[a][2]; [c]):

Turning to the merits, "[p]ursuant to CPLR 2214(a), an order to show cause must state the relief demanded and the grounds therefor'" . "However, the court may grant relief that is warranted by the… facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'" … .

Here, the Supreme Court strayed from this principle when, in addition to granting, in effect, that branch of the petition which was for an order preserving material related to the accident, it also sua sponte granted a nearly unlimited prospective right to the petitioner to amend a notice of claim that had not yet been served. This sua sponte relief was dramatically different from the pre-action discovery that was the subject of the petition … . Furthermore, the papers before the court did not support the award of such additional relief, since the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would be in compliance with General Municipal Law § 50-e. We also agree with the appellants that they were prejudiced insofar as the court set a permissive timeline for amending the notice of claim that potentially could be, inter alia, beyond the statute of limitations and after the completion of discovery. Matter of Velez v City of New York, 2019 NY Slip Op 05781, Second Dept 7-24-19

JURISDICTION.

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED, DEFENDANT'S ONLY CONNECTION TO THE CORPORATION WHICH HAD CONTACTS WITH NEW YORK WAS HIS SALARY; THEREFORE THE CORPORATION'S NEW YORK CONTACTS COULD NOT BE IMPUTED TO DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's (Sprinkle's) motion to dismiss the complaint for lack of personal jurisdiction should have been granted, noting that Sprinkle's only connection with the corporation alleged to have breached the contract was his salary. The corporation's contacts with New York could not, therefore, be imputed to Sprinkle:

The complaint fails to state a cause of action as against Sprinkle for tortious interference with contract, because there is no allegation that Sprinkle personally benefitted from the corporations' alleged breach of contract; the only benefit he is alleged to have received is his salary from the corporations … .

Plaintiff failed to make a sufficient start on a showing of jurisdiction over Sprinkle to entitle it to jurisdictional discovery … . Because the conduct complained of involved the diversion of funds from outside New York to recipients outside New York, the "critical events," and thus the situs of injury, were not in New York … . Moreover, plaintiff does not allege that Sprinkle received substantial revenue from interstate or international commerce (see CPLR 302[a][3][ii]). Because Sprinkle did not personally benefit from the breach of contract, the corporations' contacts with New York cannot be imputed to him … .

Nor can Sprinkle be said to have "reasonably expected" his actions to have consequences in New York … as he neither did anything to avail himself of New York nor took any steps to project himself into New York. Given that Sprinkle had no contact with New York and did not purposefully avail himself of New York, the constitutional guarantee of due process bars New York courts from exercising personal jurisdiction over him. Greenbacker Residential Solar LLC v OneRoof Energy, Inc., 2019 NY Slip Op 05487, First Dept 7-9-19

LAW OF THE CASE.

DEED MADE UNDER FALSE PRETENSES IS VOID AB INITIO RENDERING THE RELATED MORTGAGE INVALID; THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE RECONSIDERING A MATTER WHERE THERE IS NEW EVIDENCE (FIRST DEPT).

The First Department, reversing Supreme Court, in this foreclosure action, determined a deed made under false pretenses was void ab initio and therefore the related mortgage was invalid. The court noted that the law of the case doctrine does not prohibit it from reconsidering a matter where there is subsequent evidence affecting the prior determination:

It is undisputed that nonparty Rapsil Corporation conveyed the same property to two different recipients, first, defendant Rafael Pantoja (who obtained a mortgage from CitiMortgage), and, second, a bona fide entity that transferred it to the Salazar defendants. Although the deed that conveyed the property from Rapsil to Pantoja was unacknowledged, which ordinarily would render it only voidable, because Pantoja controlled Rapsil, the deed was made under false pretenses and was therefore void ab initio … . Accordingly, the CitiMortgage mortgage was invalid as well (Weiss v Phillips, 157 AD3d 1, 10 [1st Dept 2017]).

This determination is not inconsistent with our prior related decisions … . In any event, the law of the case doctrine does not limit our power to reconsider issues "where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination" … . CitiMortgage, Inc. v Pantoja, 2019 NY Slip Op 05481, First Dept 7-9-19

MUNICIPAL LAW, IMMUNITY.

STATEMENTS POSTED ON AN ELECTION-RELATED FACEBOOK PAGE ABOUT THE OPPOSING CANDIDATE ARE NOT SHIELDED BY IMMUNITY AND ARE ACTIONABLE IN THIS DEFAMATION CASE; TO APPEAL THE DENIAL OF A MOTION TO STRIKE PORTIONS OF A COMPLAINT A MOTION FOR LEAVE TO APPEAL MUST BE MADE (THIRD DEPT).

The Third Department determined statements posted on an election-related Facebook page by defendant, a Sheriff running for County Executive, concerning plaintiff, a Deputy County Executive also running for County

Executive, were actionable in this defamation case. The court noted that the defendant's appeal of the denial of his motion to strike certain paragraphs of the complaint (CPLR 3024) was not before the court because a motion for leave to appeal had not been made (CPLR 5701 [b] [3]):

… [W]e reject defendant's contention that he is shielded from liability due to absolute immunity. This immunity protects government officials, such as defendant, "with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" … . As such, plaintiff cannot maintain a defamation claim against defendant based upon statements "emanating from official reports and communications" … . Although defendant was commenting about an investigation being conducted by his office, as well as responding to attacks on the credibility of his office, the documentary evidence in the record establishes that the challenged statements were not posted on the official site of the Chemung County Sheriff. Rather, they were posted on defendant's campaign Facebook page and another Internet website. Under these circumstances, defendant cannot rely on absolute immunity … .

… The statement that plaintiff was "pilfering free gas from taxpayers" is "susceptible to a defamatory meaning, inasmuch as [it] convey[s], at a minimum, serious impropriety and, at worst, criminal behavior" … . Such statement also "has a precise meaning that is capable of being proven true or false" … . …

The complaint alleged that defendant published the false statements and that they "were made in bad faith, with reckless disregard for the truth" and "tend[ed] to subject plaintiff to public contempt, ridicule, aversion, and disgrace." In view of these allegations, as well as the specific statements at issue, we are satisfied that plaintiff sufficiently pleaded malice … . Krusen v Moss, 2019 NY Slip Op 05733, Third Dept 7-18-19

MUNICIPAL LAW, RECORDING MORTGAGE, ATTORNEY AFFIDAVITS.

PLAINTIFF BANK WAS ENTITLED TO AN ORDER REQUIRING THE COUNTY COURT TO RECORD A MORTGAGE, THE ORIGINAL OF WHICH HAD ALLEGEDLY BEEN LOST; AN ATTORNEY AFFIDAVIT IS AN APPROPRIATE VEHICLE FOR THE SUBMISSION OF DOCUMENTS IN ADMISSIBLE FORM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was entitled to an order requiring the county clerk to accept a copy of a mortgage for recording (the original allegedly had been lost and

was never recorded). The Second Department further determined that an attorney affidavit was an appropriate vehicle for the submission of the documents to be recorded, which were in admissible form:

The plaintiff established its prima facie entitlement to judgment as a matter of law on the first cause of action, which sought an order directing the Suffolk County Clerk to accept a copy of the mortgage for recording. The County Clerk has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee (see Real Property Law §§ 290[3]; 291; County Law § 525[1]). "Accordingly, the Clerk does not have the authority to refuse to record a conveyance which satisfies the narrowly-drawn prerequisites set forth in the recording statute" … . Here, the copy of the mortgage submitted on the motion, which is notarized, was subject to recording … . Contrary to the Supreme Court's determination, the complaint adequately stated a cause of action for this relief … , and the plaintiff's failure to submit an affidavit of someone with personal knowledge of the facts was not fatal to the motion. The affidavit or affirmation of an attorney, even if he or she has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, e.g., documents and transcripts … . JPMorgan Chase Bank, N.A. v Wright, 2019 NY Slip Op 05966, Second Dept 7-31-19

MUNICIPAL LAW.

THE NOTICES OF CLAIM NOTIFIED THE MUNICIPAL DEFENDANTS ONLY OF THE DAMAGES RELATING TO PLAINTIFF'S DECEDENT, PLAINTIFF'S MOTHER'S MOTION TO AMEND THE COMPLAINT TO ADD HER DERIVATIVE CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the complaint against the municipal defendants could not be amended to assert a derivative cause of action by plaintiff's decedent's mother:

In September 2015, the decedent commenced this action against the City, the Port Authority, and another defendant, alleging common-law negligence and violations of the Labor Law. The decedent died on August 7, 2016. Subsequently, the decedent's mother, Marilyn Conn (hereinafter Marilyn), as administrator of the decedent's estate and individually, moved for leave to substitute herself as the plaintiff in place of the decedent. She also moved for leave to amend the complaint to add a cause of action to recover damages for wrongful death on behalf of the decedent's estate and, in effect, a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity. …

… [T]he notices of claim filed against the City and the Port Authority were limited to allegations that, as a result of the accident, the decedent was caused to sustain damages related to his "personal injuries, loss of earnings, pain and suffering and medical expenses." Marilyn was not identified as a claimant in the caption of the notices of claim, she was not mentioned in the text of the notices of claim, and there were no allegations that she, individually, sustained any damages for which compensation was sought from the City or the Port Authority … .

Accordingly, the Supreme Court should have denied that branch of Marilyn's motion which was, in effect, for leave to amend the complaint to assert a derivative cause of action to recover damages for loss of services on her own behalf, in her individual capacity, against the City and the Port Authority. Since the City and the Port Authority were not given timely notice of Marilyn's derivative claim, the court should not have allowed it to be asserted against them. Conn v Tutor Perini Corp., 2019 NY Slip Op 05643, Second Dept 7-17-19

NEGLECT, FAMILY LAW, SUMMARY JUDGMENT.

SUMMARY JUDGMENT, BASED IN PART ON THE COLLATERAL ESTOPPEL EFFECT OF RESPONDENT'S CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, PROPERLY GRANTED (THIRD DEPT).

The Third Department determined petitioner's motion for summary judgment in this neglect proceeding was properly granted. The motion was based in party on respondent's endangering-the-welfare-of-a-child conviction:

… "[A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" … . Defendant does not dispute that he had a full and fair opportunity to litigate his criminal conduct before the trial court … . … In order to find a defendant guilty of endangering the welfare of a child, it must be proven that "[h]e or she knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (Penal Law § 260.10 [1]). In turn, "[t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care" … . …

… [T]the factual allegations underlying respondent's conviction were adequate to support the finding of neglect. Matter of Lilliana K. (Ronald K.), 2019 NY Slip Op 05358, Third Dept 7-3-19

PRIVILEGE, MEDICAL MALPRACTICE.

STATEMENTS MADE IN CONNECTION WITH A HOSPITAL'S QUALITY ASSURANCE INVESTIGATION ARE PRIVILEGED PURSUANT TO THE EDUCATION LAW AND PUBLIC HEALTH LAW; THE STATEMENTS ARE NOT DISCOVERABLE IN THE MEDICAL MALPRACTICE ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a concurrence, and refusing to follow the Second Department, determined certain statements made in connection with a hospital's (SUNY Upstate's) quality assurance investigation were privileged pursuant to the Education Law and Public Health Law and therefore were not subject to discovery in this medical malpractice action:

"The New York State Education Law shields from disclosure the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program' " (… see Public Health Law § 2805-m [2]). Although there is an exception to that privilege, "the exception is narrow" … and is limited to "statements made by any person in attendance at such a [quality assurance] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]; see Public Health Law § 2805-m [2] …).

Here, the "statements" at issue were provided shortly after the incident and were obtained as part of SUNY Upstate's quality assurance investigation. The statements, however, were not made at a quality assurance committee meeting; nor were they made in response to any inquiries initiated by the committee … . None of the defendants appeared at any committee meeting. Thus, we agree with SUNY Upstate and defendants that plaintiff's proposed construction of the statutory exception would not give any practical effect to the phrase "in attendance," but rather would render that phrase meaningless … . Further, the Court of Appeals specifically instructed that the exception is "narrow and limited to statements given at an otherwise privileged peer review meeting" … . Following plaintiff's proposed construction "would extend the [statutory] exception to a point where it would swallow the general rule that materials used by a hospital in quality review and malpractice prevention programs are strictly confidential" … . Nowelle B. v Hamilton Med., Inc., 2019 NY Slip Op 05464, Fourth Dept 7-5-19

PRIVILEGE.

EMAILS INADVERTENTLY PROVIDED TO PLAINTIFF WERE NOT PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, SUPREME COURT SHOULD NOT HAVE ISSUED A PROTECTIVE ORDER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that emails which had inadvertently been provided to the plaintiff were not protected by attorney-client privilege. Therefore Supreme Court should not have granted a protective order pursuant to CPLR 3101 (b):

… [T]he defendants failed to meet their burden of establishing a right to protection of the subject emails … . The communications relate to the business of the defendants, rather than legal issues … , and nothing stated by in-house counsel in the emails sets him apart as a legal advisor in the discussion. The affidavits of the defendants' CEO and in-house counsel, submitted in support of the cross motion, merely state in a conclusory manner that the communications were confidential and privileged. The defendants point to no particular communication in which in-house counsel gave legal advice, or in which the defendants' other employees sought legal advice from in-house counsel. Saran v Chelsea GCA Realty Partnership, L.P., 2019 NY Slip Op 05710, Second Dept 7-17-19

RELIGION, JURISDICTION.

PLAINTIFF CHURCH'S OBJECTION TO THE SYNOD'S TAKING CONTROL OF A SCHOOL OPERATED BY PLAINTIFF CHURCH IS A RELIGIOUS CONTROVERSY WHICH IS NOT JUSTICIABLE IN STATE COURTS (SECOND DEPT).

The Second Department determined three causes of action in a lawsuit brought by a church (Eltingville) against the Synod and its Bishop (stemming from the Synod's decision to place a school owned and operated by Eltingville under its control) were not justiciable in state courts because of the constitutional separation of church and state:

… [T]he complaint challenged the Synod's determination to impose synodical administration upon Eltingville. Such a determination could only be made upon finding that "the membership of a congregation has become so scattered or so diminished in numbers as to make it impractical for such a congregation to fulfill the purposes

for which it was organized or that it is necessary for this synod to protect the congregation's property from waste and deterioration" (Synod's Constitution § 13.24; see Religious Corporations Law § 17-c[2][a][iii]). A Synod's determination to impose synodical administration on a local church is a nonjusticiable religious determination … . Eltingville Lutheran Church v Rimbo, 2019 NY Slip Op 05957, Second Dept 7-31-19

RES JUDICATA, COLLATERAL ESTOPPEL, ARBITRATION.

THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA APPLY TO THE ARBITRATOR'S DETERMINATION THAT PETITIONER DID NOT ABUSE A MENTAL HEALTH SERVICES RECIPIENT, THE CONTRARY SUBSEQUENT DETERMINATION BY AN ADMINISTRATIVE LAW JUDGE ANNULLED (THIRD DEPT).

The Third Department, reversing the administrative law judge (ALJ), determined that the doctrines of collateral estoppel and res judicata applied to the original arbitrator's finding that petitioner, a security assistant employed by the Office of Mental Health (OMH), did not abuse a mental health service recipient. The arbitrator found that the service recipient was the aggressor. The proceedings before the ALJ, which found that petitioner had abused the service recipient, were annulled:

The fundamental point here is that the arbitrator reviewed the underlying event and determined that the service recipient fell to the floor and was the sole aggressor. As such, we conclude that respondent was precluded under principles of res judicata and collateral estoppel from relitigating the question of whether petitioner physically abused the service recipient by pushing her to the floor. It follows that his petition to annul respondent's determination should be granted and the determination annulled. The matter must be remitted to respondent for amendment of the findings to state that the report is unsubstantiated and for compliance with the requirements of Social Services Law § 494. Matter of Anonymous v New York State Justice Ctr. for the Protection of People With Special Needs, 2019 NY Slip Op 05364, Third Dept 7-3-19

SANCTIONS, WAIVER.

PLAINTIFF LOAN SERVICING COMPANY WAIVED THE TIME OF THE ESSENCE PROVISION BY ITS RELENTLESS EFFORTS TO PREVENT THE FORECLOSURE SALE TO THE HIGHEST BIDDER (TO EXACT A HIGHER PRICE); THE SANCTIONS IMPOSED ON PLAINTIFF WERE NOT SUPPORTED BY A WRITTEN DECISION AS REQUIRED BY THE CONTROLLING REGULATION; SANCTIONS ASPECT REMITTED (FOURTH DEPT).

The Fourth Department determined plaintiff loan company waived the time of the essence provision in this foreclosure sale to the highest bidder, Fox, by its relentless attempts to prevent the sale from going forward (to exact a higher purchase price). The Fourth Department noted that the sanctions imposed upon plaintiff were not supported by a written decision as required by 22 NYCRR 130-1.1 and remanded for compliance with the regulation:

We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that "[a] party may waive timely performance even where the parties have agreed that time is of the essence" … , and that such a waiver may be accomplished by the conduct of a party … . Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause.

We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1 [c] [1], [2] …). Nevertheless, we conclude that the court erred in failing to comply with 22 NYCRR 130-1.2 because "it failed to set forth in a written decision the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate' " … . We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2 … . Bayview Loan Servicing, LLC v Strauss, 2019 NY Slip Op 05866, Fourth Dept 7-31-1

SERVICE, EXTENSION OF TIME.

PLAINTIFF BANK IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED AN EXTENSION OF TIME TO EFFECT SERVICE FOR GOOD CAUSE SHOWN AND IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action should have been granted more time to serve the defendant by publication:

Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service upon "good cause shown or in the interest of justice" … . "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" … .

If a plaintiff fails to establish good cause for an extension, courts must consider whether an extension is warranted in the interest of justice … . A showing of reasonably diligent efforts at service is not required, but courts may consider diligence along with other factors, including "the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant" … . **Wilmington Sav. Fund Socy., FSB v James, 2019 NY Slip Op 05807, Second Dept 7-24-19**

SERVICE, ORDERS.

AN ORDER REQUIRING COMPLIANCE WITH DISCOVERY DEMANDS WHICH WAS NOT SERVED ON THE DEFENDANT BY THE PLAINTIFF IS NOT ENFORCEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an order that was not served on the defendant by the plaintiff, here an order striking the answer if discovery demands were not complied with by a specified date, was not enforceable:

… [T]he plaintiff, as the successful moving party given that the Supreme Court conditionally granted that branch of the prior motion which was to strike the defendant's answer, was required to serve the May 2016 order on the defendant for that order to be enforceable against the defendant with respect to its answer being stricken in the event that it failed to provide discovery responses by June 17, 2016 … . The plaintiff's contention that since the May 2016 order did not specify that the plaintiff had to serve a copy of that order with notice of entry upon the defendant, the plaintiff did not have to do so before that order was enforceable against the defendant, is without merit (see CPLR 2220). Since the defendant did not have notice of the May 2016 order, its failure to provide discovery responses by June 17, 2016, was not willful. Wolf Props. Assoc., L.P. v Castle Restoration, LLC, 2019 NY Slip Op 05808, Second Dept 7-24-19

SUBPOENAS.

NONPARTY SUBPOENA SHOULD NOT HAVE BEEN QUASHED IN THIS OUT-OF-STATE ASBESTOS-RELATED INSURANCE ACTION, THE NONPARTY HAD BEEN EMPLOYED BY THE INSURER AND MAY POSSESS RELEVANT KNOWLEDGE ABOUT HOW THE INSURANCE POLICIES WERE INTERPRETED AND ENFORCED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the petition to quash a nonparty subpoena in this out-of-state asbestos-related insurance action should not have been granted:

"CPLR 3101 (a) (4) allows a party to obtain discovery from a nonparty, and provides that [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " … . The phrase "material and necessary" in CPLR 3101 "must be interpreted liberally to require

disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' " …

"An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" … , and the burden is on the party seeking to quash a subpoena to make such a showing … . …

"[A] witness's sworn denial of any relevant knowledge …" … is insufficient, standing alone, to establish that the discovery sought is utterly irrelevant to the action or that the subpoena, if honored, will obviously and inevitably fail to turn up relevant evidence … . … [The nonparty's] deposition testimony is … potentially relevant because she has personal knowledge of how [the insurer] interpreted and enforced similar "consent" provisions of other excess policies while she was employed by [the insurer]. Matter of Barber v Borgwarner, Inc., 2019 NY Slip Op 05850, Fourth Dept 7-31-19

SUMMARY JUDGMENT.

A COURT MAY CONVERT A MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT WITHOUT NOTICE WHERE A PURE QUESTION OF LAW IS INVOLVED; THE STRICTER STANDARDS FOR NON-COMPETITION AGREEMENTS IN THE EMPLOYMENT CONTEXT DO NOT APPLY IN THE CONTEXT OF THE SALE OF A BUSINESS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, noted that Supreme Court properly dispensed with notice when it converted a motion to dismiss to a motion for summary judgment on a contractual-interpretation issue, and further noted the difference between non-competition agreements in the employment context and in the sale-of-a-business context. Here defendant sold his business, including goodwill, to plaintiff and then was employed by plaintiff:

… [A]lthough the court is normally required to give notice to the parties before converting a motion to dismiss to one for summary judgment … , the court properly dispensed with the statutory notice here inasmuch as the issue presented "rested entirely upon the construction and interpretation of an unambiguous contractual provision . . . [that] exclusively involve[d] issues of law which were fully appreciated and argued by the parties' " … . …

Because plaintiff sold his business to defendant, including the goodwill of that business, the enforceability of the restrictive covenants must be evaluated pursuant to the standard applicable to the sale of a business rather

than the "stricter standard of reasonableness" applicable to employment contracts … . It is well settled that a covenant restricting the right of a seller of a business to compete with the buyer is enforceable if its duration and scope are "reasonably necessary to protect the buyer's legitimate interest in the purchased asset" … . Frank v Metalico Rochester, Inc., 2019 NY Slip Op 05863, Fourth Dept 7-31-19

TRAFFIC ACCIDENTS, INCREDIBLE AS A MATTER OF LAW.

PLAINTIFF'S TESTIMONY ABOUT HOW THE TRAFFIC ACCIDENT HAPPENED FOUND INCREDIBLE AS A MATTER OF LAW AT THE SUMMARY JUDGMENT STAGE, DISSENT ARGUED THE TESTIMONY RAISED CLASSIC QUESTIONS OF FACT FOR THE JURY TO DETERMINE (FIRST DEPT).

The First Department, over an extensive dissent, determined the defendants' motion for summary judgment in this traffic accident case was properly granted. The majority argued plaintiff's testimony was incredible and therefore was properly disregarded. The dissent argued plaintiff's testimony raised classic questions of fact about how the accident happened. The collision occurred when plaintiff was attempting to change lanes. The majority interpreted plaintiff's testimony to mean that she was straddling two lanes and was not moving when the truck struck her SUV, which, based on photographic evidence, the majority found incredible as a matter of law:

The photographic evidence shows that plaintiff's SUV struck the rear of defendants' tractor-trailer as plaintiff was attempting to merge into defendants' truck's lane of traffic. Thus, plaintiff violated her "duty not to enter a lane of moving traffic until it was safe to do so" (… see Vehicle and Traffic Law § 1128[a] …), "and [her] failure to heed this duty constitutes negligence per se". * * ^

… [I]n summary judgment analysis, we must discount the plaintiff's testimony where the plaintiff has "relied solely on [her] own testimony, uncorroborated by any other witnesses or evidence," and her testimony belied "common sense" … . As these circumstances are presented in this case, plaintiff's testimony was properly "disregarded as being without evidentiary value" … . Thus, plaintiff's testimony raised no triable issues of fact. Castro v Hatim, 2019 NY Slip Op 05639, First Dept 7-16-19

VERDICT, MOTION TO SET ASIDE.

EYEWITNESS TESTIMONY THAT DEFENDANT IN THIS TRAFFIC ACCIDENT CASE APPEARED TO BE INTOXICATED SHOULD NOT HAVE BEEN EXCLUDED, THE EVIDENCE WAS RELEVANT TO DEFENDANT'S RELIABILITY AS A WITNESS AND COULD PROPERLY HAVE BEEN PRESENTED IN REBUTTAL TO DEFENDANT'S TESTIMONY, PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this traffic accident case should have been granted. There was sharply conflicting testimony about how the accident happened and whether defendant fled the scene. A witness, Stephen, who allegedly chased defendant down after the accident was not allowed to testify that defendant appeared to be intoxicated:

We agree with plaintiffs that the court erred in excluding Stephen's testimony that defendant exhibited indicia of intoxication during their interaction immediately after the accident and that, in his opinion, she was intoxicated. Although defendant's failure to remain at the scene meant that Stephen was the only witness who had an opportunity to observe defendant and interact with her after the accident, the court prohibited Stephen from testifying about his observations of defendant on the ground that he was not an "expert" in signs of intoxication. Contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication … , and also regarding his or her opinion that another individual was intoxicated … . …

… [P]laintiffs should have been permitted to present Stephen's testimony with respect to whether defendant appeared to be intoxicated, which would allow the jury to consider whether and to what degree alcohol impaired defendant's senses and her ability to accurately perceive and recall the events about which she testified at trial. …

… Stephen's proposed testimony regarding his observations of defendant, i.e., that she fumbled with her license, slurred her speech, and smelled of alcohol, was not cumulative of other evidence already before the jury … . …

Defendant testified that she did not fumble with her license, her speech was not slurred, she did not recall her eyes being "glassy," and there was no alcohol on her breath. Thus, the excluded testimony from Stephen would have provided " evidence in denial of some affirmative fact which [defendant] has endeavored to prove' " …

and therefore fell within the scope of permissible rebuttal evidence. Brooks v Blanchard, 2019 NY Slip Op 05847, Fourth Dept 7-31-19