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ARBITRATION.

WHERE ARBITRABLE AND NONARBITRABLE CLAIMS ARE INTERTWINED, COURT PROCEEDINGS SHOULD BE STAYED PENDING THE ARBITRATION DETERMINATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, under the terms of the employment contract, even if the matter involves both arbitrable and nonarbitrable claims, any court procedures should be stayed until the determination of the arbitrable issues:

Paragraph 4(b) of the consulting agreement, which addresses the defendant's right to terminate the plaintiff's retention for cause, ends with the following sentence: "Any dispute between the parties shall be resolved first by submitting same for mediation to AAA, and absent a resolution, then by a 3 member panel Arbitration through AAA." …

The defendant moved pursuant to CPLR 7503(a) to compel arbitration and to stay this action pending completion of the arbitration, invoking the above-quoted arbitration clause. The plaintiff opposed the motion on the grounds, inter alia, that the clause applied only to disputes relating to termination, and not to actions alleging breach of contract. Without conceding that the scope of the arbitration clause was limited to the resolution of disputes involving termination, the defendant argued that the reason the plaintiff was not paid was because it was terminated for cause. The Supreme Court denied the motion, and the defendant appeals. …

"[W]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters"… . Even assuming, without deciding, that the only arbitrable dispute is whether the plaintiff was properly terminated for cause, judicial proceedings should be stayed until that issue is resolved, since that determination may also dispose of the plaintiff's breach of contract cause of action … . Lake Harbor Advisors, LLC v Settlement Servs. Arbitration & Mediation, Inc., 2019 NY Slip Op 06073, Second Dept 8-7-19

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ARTICLE 78.

A JUDGE HAS THE DISCRETION TO EXPUNGE A YOUTHFUL OFFENDER'S DNA RECORDS, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court determined: (1) the Executive Law pertains to the local DNA databank maintained by the Office of the Chief Medical Examiner (OCME); (2) an Article 78 mandamus action seeking the expungement of the petitioner-youthful-offender's (YO's) DNA records from the databank was properly brought; and (3) a judge has the discretion to expunge a YO's DNA records. The petitioner voluntarily provided a DNA sample before he was adjudicated a youthful offender. Supreme Court had held it did not have the discretion to expunge the records:

… [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. * * *

A YO disposition by its very nature is a judgment of conviction that is vacated and then replaced by a YO determination. This conclusion is supported by the mechanics of the YO statute, its salutary goals, and legislative intent. * * *

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 06374, First Dept 8-27-19

ARTICLE 78.

CRIME VICTIMS DO NOT HAVE STANDING TO CHALLENGE A PRISONER'S RELEASE ON PAROLE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, over a concurrence and a dissent, determined that the wife of a police officer murdered in 1971 did not, as a crime victim, have standing to bring an Article 78 proceeding challenging the release on parole of Herman Bell, who was convicted of the murder. Crime victims do not have standing to challenge parole determinations:

As noted by one court that has previously addressed the issue before us: "While a relative of a crime victim may be more emotionally affected by the crime than a member of the general public, that increased emotional effect is not sufficient to confer standing. While statutes have been enacted to permit crime victims the right to be heard at certain proceedings (see [CPL] 380.50), their status as crime victims has not been held to confer standing to them at any proceeding. Executive Law § 259[-]i sets forth the procedures to be followed by the [B]oard of [P]arole. Executive Law § 259[-]i (2) (c) (A) provides that when considering whether or not to grant discretionary parole release, the [B]oard must consider 'any statement made to the [B]oard by the crime victim or the crime victim's representative where the crime victim is deceased[.]' The statute does not authorize any further participation in the process by a crime victim or the representative of a victim. It does not serve to confer standing to a victim who desires to challenge the determination. While the [c]ourt does not question whether the families of the victims of crime continue to suffer real emotional effects, there has not been a showing of any legal right that is affected by the determination which they seek to challenge" … . Matter of Piagentini v New York State Bd. of Parole, 2019 NY Slip Op 06229, Third Dept 8-22-19

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ATTORNEYS, CONFLICT OF INTEREST, PARTIES.

DEFENDANTS' ATTORNEYS SHOULD NOT HAVE BEEN DISQUALIFIED BECAUSE THEY HAD REPRESENTED PLAINTIFFS' TRUSTEE, A NONPARTY, IN AN UNRELATED MATTER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a concurrence, determined that defendants' attorneys, Rupp Baase, should not have been disqualified because the firm had represented a nonparty trustee of plaintiffs on an unrelated matter. The concurrence argued the matter was not justiciable because the court was asked to decide whether there was a conflict of interest between Rupp Baase and a nonparty. The lawsuit stemmed from a fire at plaintiffs' Elks Lodge allegedly caused by a boiler installed by defendants:

… [P]laintiffs "had to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [Rupp Baase] received specific, confidential information substantially related to the present litigation" … . Even assuming, arguendo, that a prior attorney-client relationship existed between Rupp Baase and the Trustee, we conclude that plaintiffs failed to establish that the interests of defendants in this action are materially adverse to the interests of the Trustee individually, who is not a named party and is merely a trustee of the Lodge. Plaintiffs likewise failed to establish that any alleged prior representation involved issues that were "identical to or essentially the same" as those in the instant lawsuit (id.). Although the Trustee asserts that he told Rupp Baase during their alleged representation of him that a fire had occurred on plaintiffs' property due to defendants' boiler installation, a claim that Rupp Baase disputes, we conclude that, even if the Trustee provided that information, it was not "specific [and] confidential" and thus does not warrant disqualification … . Because plaintiffs failed to establish that the Trustee's interests are materially adverse to defendants' in this lawsuit and that this lawsuit is substantially related to the alleged prior representation, the court abused its discretion in granting that part of plaintiffs' motion seeking disqualification of Rupp Baase … . Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc., 2019 NY Slip Op 06246, Fourth Dept 8-22-19

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COMPLAINTS, AMENDMENT.

PLAINTIFF ALLEGED A NEW THEORY OF LIABILITY FOR THE FIRST TIME IN ANSWER TO DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION; SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S SUMMARY JUDGMENT MOTION AND SHOULD NOT HAVE ALLOWED PLAINTIFF TO AMEND THE COMPLAINT AND BILL OF PARTICULARS TO REFLECT THE NEW THEORY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant doctor's motion for summary judgment in this medical malpractice action should have been granted. Instead of answering the defendant's expert opinion that the doctor's actions were not the cause of the amniotic fluid embolism (AFE) which plaintiff alleged caused the death of plaintiff's decedent, the plaintiff for the first time alleged the cause of death was septic shock, not AFE. Supreme Court erroneously denied defendant's motion for summary judgment and allowed plaintiff to amend the complaint to allege the new theory:

… [T]he defendant met his prima facie burden as to proximate cause by submitting the affidavit of an expert in maternal fetal medicine, who opined that any delay in the decedent undergoing an abortion procedure from the second trimester to the third trimester did not cause her to develop AFE. In opposition, the plaintiff did not raise a triable issue of fact as to the defendant's prima facie showing, but rather alleged, for the first time, a new theory of causation, claiming that the decedent died of septic shock, not AFE. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars" … . …

"[O]nce discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" … . Here, the plaintiff failed to show special and extraordinary circumstances in seeking leave to amend the complaint and the bill of particulars in response to the defendant's motion for summary judgment, three years after the commencement of the action and almost six months after the filing of the note of issue. The plaintiff offered no reasonable excuse for relying solely on the medical examiner's report and for failing to explore his new theory of causation earlier in the proceedings … . Moreover, permitting the amendment at this late stage of the proceedings would prejudice the defendant. Anonymous v Gleason, 2019 NY Slip Op 06207, Second Dept 8-21-19

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COMPLAINTS.

COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT, ELEMENTS EXPLAINED (FOURTH DEPT)

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort:

"Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful" … . "The requisite elements of a cause of action for prima facie tort are (1) intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" … .

Here, the prima facie tort cause of action cannot stand because, although the complaint alleged that defendant "acted maliciously" and "with disinterested malice," it did not allege that defendant's "sole motivation was disinterested malevolence' " … . In addition, the complaint failed to allege special damages as required … . Finally, the complaint is not "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013 …). "[A] cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations" … . Here, the complaint is devoid of relevant facts, including the time period at issue, the number of forms that defendant requested plaintiff to resubmit, and the number of claims involved. Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co., 2019 NY Slip Op 06349, Fourth Dept 8-22-19

COMPLAINTS.

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF CONTRACT, NEGLIGENT HIRING AND SUPERVISION OR PRIMA FACIE TORT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff, the assignee of no-fault benefits, did not state valid causes of action against the insurer for breach of contract, negligent hiring and supervision, and prima facie tort. The claims were paid by the defendant and plaintiff alleged flaws and delays in the processing of the claims:

The amended complaint, however, failed to identify the specific insurance contracts that plaintiff had performed services under or the contract provisions that defendant allegedly breached. Inasmuch as bare legal conclusions without factual support are insufficient to withstand a motion to dismiss, we conclude that the amended complaint fails to state a cause of action for breach of contract. …

Although "[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act"… , the amended complaint failed to allege that the acts of defendant's employees were committed independent of defendant's instruction or outside the scope of employment … . …

"There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" … . Here, the amended complaint alleged that defendant acted in "bad faith" and intentionally caused harm to plaintiff by requesting verifications and examinations under oath. Those conclusory allegations, however, failed to state that defendant had " a malicious [motive] unmixed with any other and exclusively directed to [the] injury and damage of [plaintiff]' " … . Furthermore, it is "[a] critical element of [a prima facie tort] cause of action . . . that plaintiff suffered specific and measurable loss" … . Medical Care of W. N.Y. v Allstate Ins. Co., 2019 NY Slip Op 06243, Fourth Dept 8-22-19

ESTOPPEL.

DEFINITION OF 'PARENT' IS THE SAME FOR PARENTAL ACCESS AND CUSTODY; JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL DOCTRINES PRECLUDED SUPREME COURT'S FINDING THAT FATHER DID NOT HAVE STANDING IN THE CUSTODY MATTER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the doctrines of judicial estoppel and collateral estoppel precluded Family Court from finding father did not have standing to seek custody of a child. Father had previously been deemed a "parent" in the context of parental access. The definition of "parent" is the same in the context of custody:

In the prior appeal, this Court expressly stated that the father had standing to proceed as Isabella's parent under Domestic Relations Law § 70 based on the doctrine of judicial estoppel … . As the term "parent" has the same

definition under Domestic Relations Law § 70 whether the party is seeking custody or parental access … , it is immaterial that our prior determination did not specifically mention custody when it concluded that the father had standing to seek parental access with Isabella. Since the mother is judicially estopped from arguing that the father is not Isabella's parent under Domestic Relations Law § 70, the father was free to seek custody under Domestic Relations Law § 70 as Isabella's "parent with coequal rights" to the mother … . Matter of Paese v Paese, 2019 NY Slip Op 06090, Second Dept 8-7-19

FAILURE TO PROSECUTE.

COURT DID NOT HAVE AUTHORITY TO DISMISS THE ACTION PURSUANT TO CPLR 3216 BECAUSE NO 90-DAY NOTICE HAD BEEN SERVED; DISMISSAL FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS WAS NOT WARRANTED, BUT PRECLUSION OF FURTHER DISCOVERY WAS APPROPRIATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the court did not have authority to dismiss the medical malpractice action pursuant to CPLR 3216 for failure to prosecute in the absence of a 90-notice. The court further noted that, although dismissal for failure to comply with discovery demands was not warranted, the preclusion of further discovery was appropriate:

With regard to CPLR 3216, "the courts have no authority to dismiss an action for failure to prosecute, whether on the ground of general delay, or for failure to serve and file a note of issue, unless there has first been served a [90 day notice]" … . Here, it is undisputed that neither the Supreme Court nor the defendant served the requisite 90-day notice upon the plaintiff. …

… . [D]smissal of the complaint pursuant to CPLR 3126(3) was unwarranted as a sanction for the plaintiff's failure to limit his disclosure demands. The remedy of dismissal is "only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" … . The sanction of dismissal is available for the willful and contumacious failure to disclose … , which did not occur here. The plaintiff submitted to a deposition by the defendants. However, the lengthy pendency of this action, the dispute over the plaintiff's overbroad demands for disclosure, and his refusal to tailor those demands in accordance with prior orders of the court, compels the conclusion that further disclosure has been forfeited. Rezk v New York Presbyt. Hospital/N.Y. Weill Cornell Ctr., 2019 NY Slip Op 06426, Second Dept 8-28-19

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FORUM NON CONVENIENS.

ACTION BROUGHT BY EUROPEAN PLAINTIFFS CONCERNING THE OWNERSHIP OF A PAINTING ILLEGALLY CONFISCATED BY THE NAZIS AND SOLD IN NEW YORK BY CHRISTIE'S PROPERLY DISMISSED ON FORUM NON CONVENIENS GROUNDS (FIRST DEPT).

The First Department determined a lawsuit to determine ownership of a Degas painting illegally confiscated by Nazis and years later sold at a Christie's auction in New York was properly dismissed on forum non conveniens. The plaintiffs' rights arose in Germany and France and Swiss and French estate law apply:

The motion court properly dismissed this action on forum non conveniens grounds without first determining whether it had personal jurisdiction over all the defendants. Sinochem Intl. Co. Ltd. v Malaysia Intl. Shipping Corp.(549 US 422 [2007]) is persuasive authority on this point. In that case, a unanimous United States Supreme Court held that a trial court "has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisidiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case" (id. at 425). To be sure, as the Sinochem Court noted, if a court can readily determine that it lacks personal jurisdiction over a defendant, the proper course is to dismiss on that ground. However, where personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground (id. at 436). …

Plaintiffs' rights as heirs to the painting arose in Germany and France, although the painting was allegedly wrongfully sold in New York. The burden on the New York court in applying Swiss and French estate law to determine the underlying issue of the lawful heirs to [the owner's] estate is significant. As the motion court noted, the parties "not only dispute the applicable foreign law, but discuss the substance of the law . . . in a manner that is, at best, opaque." "The applicability of foreign law is an important consideration in determining a forum non conveniens motion . . . and weighs in favor of dismissal" … . …

The potential hardships to the defendants of litigating in New York are clear. * * *

Switzerland appears to be an available alternative forum. France and Germany also may be possible alternatives. Kainer v UBS AG, 2019 NY Slip Op 06053, First Dept 8-7-19

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FORUM NON CONVENIENS.

DISPUTE INVOLVING MALAYSIAN BANKS, INCLUDING GOLDMAN SACHS SINGAPORE, PROPERLY DISMISSED ON FORUM NON CONVENIENS GROUNDS (FIRST DEPT).

The First Department determined a dispute involving Goldman Sachs Singapore (GSS) was properly dismiss on forum non conveniens grounds:

The action was properly dismissed on forum non conveniens grounds, given the unduly burdensome inquiry involved in determining personal jurisdiction in these circumstances and the balance of the forum non conveniens considerations … . The decision whether the court had jurisdiction over GSS because GSS was a mere department of New-York-based Goldman Sachs Group, Inc. (GSG) would involve an "arduous inquiry"… into whether GSG controlled GSS's finances, interfered with the selection and assignment of executive personnel, and failed to observe corporate formalities, and whether defendant Tim Leissner had sufficient contacts with New York.

Plaintiff's causes of action for fraud and breach of fiduciary duty lack a substantial nexus with New York … . Furthermore, plaintiff is a Cayman Islands partnership, not a New York resident … . Finally, Malaysia has a greater interest than New York in whether one Malaysian bank (nonparty Hong Leong Bank) corruptly took over another Malaysian bank (EON) … . Primus Pac. Partners 1, LP v Goldman Sachs Group, Inc., 2019 NY Slip Op 06052, First Dept 8-6-19

GOOD FAITH EFFORTS TO RESOLVE ISSUES.

ALTHOUGH THE BETTER PRACTICE IS TO SUBMIT A SEPARATE AFFIRMATION, DEFENSE COUNSEL'S PRIMARY AFFIRMATION IN SUPPORT OF THE MOTION TO COMPEL PLAINTIFF TO SUBMIT TO A VOCATIONAL EXAM DESCRIBED THE GOOD FAITH EFFORTS TO RESOLVE THE ISSUE, THE MOTION TO COMPEL WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined Supreme Court was not required to deny defendants' motion to compel plaintiff to submit to a vocational exam because defense counsel did not submit a separate affirmation demonstrating a good faith effort to resolve the dispute. The requirements of 22 NYCRR 202,7 (c) were met in

the primary affirmation submitted is support of the motion. The Second Department also determined the plaintiff was properly ordered to submit to a vocational rehabilitation examination in this Labor Law personal injury action:

… [T]he Supreme Court was not required to deny that branch of the defendants' motion on the ground that the defendant failed to submit an affirmation attesting to a good faith pre-motion attempt to resolve the dispute with the plaintiff. While it may be the better practice for the movant to detail such good faith efforts in an affirmation separate from the affirmation addressing the merits of the motion, under the circumstances of this case, the requirements of 22 NYCRR 202.7(c) were satisfied by the primary affirmation of counsel submitted in support of the motion wherein counsel detailed her efforts to obtain the plaintiff's compliance with the extant court order, including the failure of the plaintiff to appear for a duly noticed examination and the failure of the plaintiff's counsel to respond to correspondence, submitted with the defendants' motion papers, seeking the plaintiff's voluntary cooperation. Thus, the defendants amply demonstrated that the plaintiff was refusing to voluntarily cooperate with a court-ordered examination … . …

… [T]he plaintiff was noticed and directed to appear for a medical examination to be conducted by a vocational rehabilitation specialist on February 26, 2018. The plaintiff failed to respond to the notice or appear for the examination. Given the nature of this action and the parties' past discovery disputes, the Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was pursuant to CPLR 3124 to compel the plaintiff to submit to a vocational rehabilitation examination … . Encalada v Riverside Retail, LLC, 2019 NY Slip Op 06066, Second Dept 8-7-19

GOOD FAITH EFFORTS TO RESOLVE ISSUES.

DEFENDANTS' CROSS-MOTION FOR SANCTIONS RELATING TO DISCLOSURE WAS NOT ACCOMPANIED BY DEFENSE COUNSEL'S AFFIRMATION DEMONSTRATING A GOOD FAITH EFFORT TO RESOLVE THE ISSUES ADDRESSED IN THE MOTION, THE CROSS-MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendants' cross-motion for sanctions pursuant to CPLR 3126 relating to disclosure should not have been granted. The cross-motion was not accompanied by defense counsel's affirmation demonstrating a good faith effort to resolve the issues addressed by the motion:

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Pursuant to 22 NYCRR 202.7(a) and (c), a motion relating to disclosure must be accompanied by an affirmation from moving counsel attesting to a good faith effort to resolve the issues raised in the motion, including the time, place and nature of the consultation as well as the issues discussed. Here, the affirmation of good faith submitted by the defendants' counsel in support of the cross motion for sanctions pursuant to CPLR 3126 failed to provide any detail of the claimed efforts to resolve the issues. While the defendants' counsel asserted that he had conversations with the plaintiff's counsel, he did not identify the dates of such conversations or the name of the attorney with whom he conversed. Therefore, the cross motion should have been denied … . Bronstein v Charm City Hous., LLC, 2019 NY Slip Op 06058, Second Dept 8-7-19

GUARDIAN AD LITEM.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT PLAINTIFF HAD NOT YET MOVED TO BE APPOINTED GUARDIAN AD LITEM FOR HER COMATOSE HUSBAND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the motion to dismiss the medical malpractice action should not have been granted on the ground plaintiff had not moved pursuant to CPLR 1202 to be appointed guardian ad litem for her comatose husband (Zheng) prior to commencing the action:

… [T]he mere fact that this action was commenced before the plaintiff moved pursuant to CPLR 1202 to be appointed guardian ad litem of her husband does not provide grounds for dismissal of the complaint pursuant to CPLR 3211(a)(3). An incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person … , and CPLR 1202(a) expressly contemplates that a motion for the appointment of a guardian ad litem may be made "at any stage in the action." Thus, there is no strict legal requirement that the plaintiff should have been appointed guardian before the commencement of this action. While it would have been better for the action to have been commenced in Zheng's name, rather than by the plaintiff "as Proposed Guardian Ad Litem of [Zheng]," the defect is not fatal, particularly given the relatively short delay between the commencement of the action and the filing of the plaintiff's guardianship motion (see CPLR 2001). Linghua Li v Xiao, 2019 NY Slip Op 06388, Second Dept 8-28-19

INJUNCTIONS.

SUPREME COURT SHOULD NOT HAVE DENIED PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION WITHOUT A HEARING AND THE TEMPORARY RESTRAINING ORDER SHOULD NOT HAVE BEEN VACATED WITHOUT A HEARING, DEFENDANTS WERE SEEKING TO TERMINATE PLAINTIFF'S DIALYSIS TREATMENT BASED UPON SHARPLY CONFLICTING EVIDENCE OF PLAINTIFF'S BEHAVIOR (FIRST DEPT).

The First Department, reversing Supreme Court, determined the the temporary restraining order (TRO) preventing defendant dialysis provider from stopping plaintiff's treatment should not have been vacated and plaintiff's request for a preliminary injunction should have been denied without a hearing. The dialysis provider, Avantus, wanted to discontinue treatment because of plaintiff's behavior. However the evidence of plaintiff's behavior was sharply conflicting:

… [T]he motion court had found that Avantus had not produced evidence showing that it had complied with any of the federal procedural requirements for terminating a patient's care. Defendants had not presented any new evidence that it had done so before the court issued the order presently on appeal. Indeed, the court did not address the merits of defendants' decision to terminate plaintiff's care at all. Accordingly, the motion court should not have denied plaintiff's request for a preliminary injunction without holding a hearing.

The motion court also improperly vacated the TRO without a hearing. Plaintiff's showing that he would be irreparably injured in the absence of a TRO never changed. The court was presented with no evidence inconsistent with its finding in issuing the TRO that "there is no dispute that dialysis is a life-saving measure which plaintiff sorely needs, and at this stage of the litigation, the defendants have not established that the reasons for plaintiff's discharge from the facility outweigh the risks that discharge would carry with regard to plaintiff's health."

In addition, although the court concluded that plaintiff had failed to comply with the conditions set forth in the TRO, the parties presented sharply divergent facts on that issue, which could not be resolved without a hearing. Wilder v Fresenius Med. Care Holdings, Inc., 2019 NY Slip Op 06054, First Dept 8-7-19

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JURISDICTION.

FAMILY COURT DID NOT HAVE A SUFFICIENT BASIS, I.E. STATEMENTS BY A CASEWORKER AND THE ATTORNEY FOR THE CHILD, TO DETERMINE NEW YORK HAD BEEN DIVESTED OF JURISDICTION IN THIS CUSTODY CASE; MOTHER WAS NOT ADEQUATELY INFORMED OF HER RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judges should not have dismissed mother's petition to modify custody solely on the basis of statements made by a caseworker and the attorney for the child indicating the child lived in New Jersey. The Second Department further found that Family Court did not adequately inform mother of the rights she was giving up by representing herself:

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, a court of this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds that it should relinquish that jurisdiction because "neither the child" nor "the child and one parent" have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a[1][a] …).

Here, it is undisputed that the initial custody determination was rendered in New York. Nothing on the record before the Family Court established that it had been divested of exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1). * * *

Moreover, the parent of any child seeking custody in any proceeding before the Family Court has the right to the assistance of counsel (see Family Ct Act § 262[a][v]). A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel … . In order to determine whether a party has validly waived the right to counsel, a court must conduct a "searching inquiry" to ensure that the waiver has been made knowingly, voluntarily, and intelligently … . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel … . Here, the Family Court did not conduct a sufficiently searching inquiry to ensure that the mother's waiver of her right to counsel was knowingly, voluntarily, and intelligently made … . Matter of Means v Miller, 2019 NY Slip Op 06088, Second Dept 8-7-19

JURISDICTION.

PLAINTIFF ENTITLED TO JURISDICTIONAL DISCOVERY WITH RESPECT TO DEFENDANT HOSPITAL IN THIS MEDICAL MALPRACTICE ACTION; HOSPITAL DID NOT CONSENT TO JURISDICTION BY REGISTERING AS A FOREIGN CORPORATION; DOCTORS DID NOT CONSENT TO JURISDICTION BY BECOMING LICENSED IN NEW YORK (FOURTH DEPT).

The Fourth Department determined the plaintiff was entitled to jurisdictional discovery with regard to a hospital defendant in this medical malpractice action. The court noted that the hospital did not consent to the general jurisdiction of New York courts by registering as a foreign corporation with the Department of State and the defendant doctors did not consent to New York personal jurisdiction based upon becoming licensed to practice medicine in New York:

… [P]laintiff made a "sufficient start" in establishing personal jurisdiction over the hospital pursuant to CPLR 301 and 302 (a) (1) to be entitled to disclosure pursuant to CPLR 3212 (f) … . The record "is not clear whether [the hospital's] affiliations with the State [of New York] are so continuous and systematic as to render [it] essentially at home in the . . . State' " as required for general jurisdiction … or whether its activities in New York are " purposeful and [whether] there is a substantial relationship between the transaction and the claim asserted' " as required for long-arm jurisdiction … . However, the record contains evidence that the hospital advertises to prospective New York patients and has at least some relationship with New York providers, New York insurers, and defendant Guthrie Medical Group, P.C., which owns New York offices. The record also contains evidence that the hospital derives substantial revenue from New York residents. Based on that initial showing, we conclude that plaintiff has made a "sufficient start" by establishing that facts "may exist to exercise personal jurisdiction" over the hospital, warranting jurisdictional discovery … . Best v Guthrie Med. Group, P.C., 2019 NY Slip Op 06320, Fourth Dept 8-22-19

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NOTICE, FORECLOSURE.

BANK DID NOT SUBMIT SUFFICIENT PROOF OF A LOST NOTE AND COMPLIANCE WITH NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the bank, inter alia, did not demonstrate compliance with the RPAPL 1304 notice provisions and failed to submit sufficient proof of a lost note in this foreclosure action:

… [A]lthough the plaintiff came forward with evidence establishing that the note was assigned to it and establishing the note's terms, the affidavit of lost note submitted in support of its motion failed to establish the facts that prevent the production of the original note (see UCC 3-804 …). Additionally, we note that Riley's out-of-state affidavit lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion … .

Further, the evidence submitted in support of the plaintiff's motion failed to establish, prima facie, that the plaintiff strictly complied with RPAPL 1304. Proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action … . The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of the statute … . Contrary to the plaintiff's contention, the affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide evidence of a standard office mailing procedure and provided no independent evidence of the actual mailing … .

Likewise, the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full … . U.S. Bank N.A. v Cope, 2019 NY Slip Op 06111, Second Dept 8-7-19

PARTIES, SUBSTITUTION OF; RELATION BACK DOCTRINE.

PROTRACTED DELAY IN PLAINTIFFS' SEEKING SUBSTITUTION OF PARTIES IN THIS MEDICAL MALPRACTICE ACTION AFTER INFANT PLAINTIFF'S DEATH DID NOT REQUIRE DISMISSAL OF THE COMPLAINT, DEFENDANTS WERE IN POSSESSION OF THE MEDICAL RECORDS AND OTHER RELEVANT INFORMATION AND THEREFORE WERE NOT PREJUDICED BY THE DELAY; IN ADDITION, THE MOTION TO AMEND THE COMPLAINT TO ADD WRONGFUL DEATH SHOULD HAVE BEEN GRANTED UNDER THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' protracted delay in substituting father for the deceased infant in this medical malpractice action did not require dismissal of the complaint because the defendants were in possession of all the relevant medical records and therefore were not prejudiced by the delay. The court also noted that motion to amend the complaint to assert wrongful death should have been granted under the relation-back doctrine:

CPLR 1021 requires a motion for substitution to be made within a reasonable time … , and the determination of whether the timing is reasonable 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 the defense has potential merit … . Here, the plaintiffs moved, inter alia, for leave to substitute Jean Petion, who is the father of the plaintiff Jeremiah Prince Petion (hereinafter the deceased infant) and administrator of the deceased infant's estate (hereinafter the administrator), in place of the deceased infant as a party plaintiff and to amend the caption accordingly. Although the plaintiffs admit that the delay in seeking the substitution of the administrator was protracted … , the plaintiffs showed that there was no prejudice to the defendants because the defendants were on notice of the claims against them as early as February 2, 2009, when the plaintiffs filed a notice of claim against the defendant New York City Health and Hospitals Corporation, and the defendants possessed all of the relevant medical records … . In opposition, the defendants asserted only conclusory allegations of prejudice based solely on the passage of time … . The plaintiffs also demonstrated that they have potentially meritorious causes of action through their expert's affidavit of merit, the pleadings, and the testimony of Marie Petion at the General Municipal Law § 50-h hearing … . Petion v New York City Health & Hosps. Corp., 2019 NY Slip Op 06107, Second Dept 8-7-19

PRIVATE RIGHT OF ACTION.

NO PRIVATE RIGHT OF ACTION FOR A DEVELOPMENTALLY DISABLED CHILD HOUSED FOR MORE THAN FIVE WEEKS IN A HOSPITAL EMERGENCY ROOM BECAUSE NO APPROPRIATE RESIDENTIAL FACILITY WAS AVAILABLE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, considering the appeal under an exception to the mootness doctrine, determined a 16-year-old developmentally disabled child (Olivia) did not have a private right of action against Champlain Valley Physicians Hospital (CVPH), the Office for People with Developmental Disabilities (OPWDD) or the Department of Health (DOH) for housing her in the CVPH emergency room when no appropriate residential facility was available. The opinion is too comprehensive and covers too many substantive issues to be fairly summarized here:

In 2018, Olivia CC. (hereinafter the child), a minor with complex developmental disabilities, was stranded in the emergency room of respondent Champlain Valley Physicians Hospital (hereinafter CVPH) for more than five weeks while she waited for a residential school placement. The child was not in need of medical or psychiatric care. However, neither her family nor the Office for People with Developmental Disabilities (hereinafter OPWDD) — the agency legislatively charged with protecting the welfare of persons with developmental disabilities — could provide her with safe interim housing. CVPH thus retained the child in the emergency room, where she could not attend school, participate in community activities or go outdoors, and CVPH was forced to use scarce medical resources to provide for her nonmedical needs. Unfortunately, the child is not the first minor with special needs to be marooned for weeks or months in an emergency room, as hospitals find themselves serving as the last resort for providing shelter to children in crisis … . The difficult legal issues presented here call into question the extent of the responsibilities of the legislative and administrative functions of government to some of our society's most vulnerable members, and the limitations on the power of courts to protect them. * * *

Our conclusion that the amended petition/complaint provides this Court with no grounds to intervene in respondents' operations should not be misunderstood as condonation of the child's prolonged and unnecessary hospitalization or of respondents' failure to provide her with appropriate assistance. Nevertheless, this record does not permit a determination of the propriety of constitutional or equitable relief, and relief grounded in the statutory provisions relied upon here must come from the Legislature or from respondents' policy choices. Thus, we will not disturb Supreme Court's judgment. Matter of Mental Hygiene Legal Serv. v Delaney, 2019 NY Slip Op 06119, Third Dept 8-8-19

RENEW, MOTION TO.

CRITERIA FOR A MOTION TO RENEW WERE NOT MET, DISSENTERS ARGUED THE COURT HAD THE DISCRETION TO CONSIDER THE MOTION AS A MOTION TO REARGUE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the motion to renew should not have been granted. The dissenters argued the motion could have been considered a motion to reargue in the exercise of discretion:

It is well settled that "[a] motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion . . . and, inter alia, that would change the prior determination" (… see CPLR 2221 [e] [2]). Further, "[a]lthough a court has discretion to grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a reasonable justification for the failure to present such facts on the prior motion' " (…see CPLR 2221 [e] [3]). In particular, "[l]eave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion" … . …

We reject our dissenting colleagues' conclusion that the court would have been "justified" in exercising discretion to treat the motion to renew as a motion to reargue, and that it effectively did so in granting Camelot's motion. We disagree. There is no justification in this case to "deem" Camelot's motion as one seeking reargument and we decline to do so because, in our view, Camelot actively foreclosed that avenue of relief. The Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off., 2019 NY Slip Op 06245, Fourth Dept 8-22-19

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SAVINGS PERIOD (CPLR 205 (a)).

LETTERS OF ADMINISTRATION WERE ISSUED ON THE LAST DAY OF THE SIX MONTHS ALLOWED BY CPLR 205 (a) TO REFILE A DISMISSED ACTION, THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED; ARGUMENT THAT SUPREME COURT USED THE WRONG DATE TO CALCULATE THE SIX-MONTH PERIOD PROPERLY RAISED AND CONSIDERED FOR THE FIRST TIME ON APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the medical malpractice/wrongful death action should not have been dismissed because the letters of administration were issued within six months of the prior dismissal. The argument that Supreme Court used the wrong date to calculate the six-month period for re-filing a lawsuit pursuant to CPLR 205 (a) could be raised for the first time on appeal:

On appeal, plaintiff argues for the first time that the prior action was finally terminated when the October 2016 order granting the hospital's motion was issued, so that the court used the wrong date to calculate when the six-month savings period under CPLR 205(a) began to run. We will consider this argument, since it raises a legal question appearing on the face of the record which could not have been avoided … .

While plaintiff, as voluntary administrator, lacked the legal capacity to enforce decedent's personal injury and wrongful death claims on behalf of the estate in this second action (Surrogate's Court Procedure Act § 1306[3] …), he could remedy this defect by obtaining letters of administration within the six-month savings period provided under CPLR 205(a) … . In applying CPLR 205(a), we bear in mind that it is designed to ameliorate the potentially "harsh consequence of applying a limitations period where the defending party has had timely notice of the action" … . Because the first action was finally terminated on October 18, 2016, and the letters of administration were issued on April 18, 2017, on the last day of the six-month savings period (CPLR 205[a]), plaintiff timely obtained legal capacity to pursue the claims in this action … . Rodriguez v River Val. Care Ctr., Inc., 2019 NY Slip Op 06370, First Dept 8-27-19

SAVINGS PERIOD (CPLR 205(a)); PARTIES.

ALTHOUGH THE MEDICAL MALPRACTICE ACTION WAS COMMENCED IN DECEDENT'S NAME AFTER DECEDENT HAD DIED, THE ACTION WAS NOT A NULLITY AND WAS PROPERLY REVIVED WITHIN SIX MONTHS PURSUANT TO CPLR 205 (a); SUPREME COURT SHOULD NOT HAVE DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court and ruling on some issues of first impression, determined plaintiffs' medical malpractice action should not have been dismissed. The decision is too detailed and comprehensive to be fairly summarized here. The medical malpractice action was started in 2013 in decedent's name three months after decedent's death. Supreme Court erroneously declared that action a nullity. The order dismissing the 2013 action did not include the reasons for the dismissal as is required by the statute. In a later order, Supreme Court attempted to supply the missing reason as "neglect to prosecute." The Second Department held that the 2013 action was not a nullity and it was properly revived within six months of the dismissal. The subsequent attempt to provide the reason for the dismissal as "neglect to prosecute," which would preclude reviving the action within six months, was ineffective. The Second Department's summary of its holding states:

The plaintiff, pursuant to CPLR 205(a), was entitled to commence this action upon the termination of the 2013 action. The order dated November 6, 2015, directing the dismissal of the 2013 action did not set forth on the record a specific pattern of conduct constituting a neglect to prosecute required by CPLR 205(a) to preclude the commencement of subsequent litigation against the defendants, the plaintiff's nonviable substitution motion does not constitute evidence of neglect to prosecute, and the erroneous naming of the decedent as a plaintiff in the 2013 action does not preclude the application of CPLR 205(a). In addition, CPLR 5019(a) is inapplicable, as the June 6, 2016, order cannot be utilized to substantively change the order dated November 6, 2015.

Accordingly, the judgment entered August 23, 2016, is reversed, on the law, the complaint is reinstated … . Sokoloff v Schor, 2019 NY Slip Op 06176, Second Dept 8-21-19

STATUTE OF LIMITATIONS, FORECLOSURE.

MORTGAGE WAS NOT ACCELERATED UNTIL THE FORECLOSURE ACTION WAS COMMENCED IN OCTOBER 2016; ACTION FOR THE INSTALLMENT PAYMENTS MISSED DURING THE SIX YEARS PRIOR TO OCTOBER 2016 IS TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage was not accelerated until the foreclosure action was commenced in October, 2016. Therefore the action was not time-barred, except for the mortgages payments due but not paid more than six years prior to October 2016 (missed payments prior to October 2010):

… [C]ontrary to the defendant's contention, he did not establish that the complaint should be dismissed on statute of limitations grounds through the notices sent to the defendant in February 2009 and May 2009, as those notices did not accelerate the mortgage. The notices indicated that acceleration was a possible future event, but did not constitute an exercise of the mortgage's acceleration clause … . Rather, the mortgage was only accelerated in October 2016, when the plaintiff served the foreclosure complaint on the defendant seeking immediate payment of the balance of the principal indebtedness. Thus, the Supreme Court should not have granted dismissal of the complaint in its entirety as time-barred. Specifically, the defendant failed to show that the causes of action in the complaint, insofar as they relate to unpaid mortgage installments which accrued within the six-year period immediately preceding the plaintiff's October 2016 commencement of this foreclosure action, to wit, the unpaid installments which accrued on or after October 6, 2010, were time-barred … .

However, where, as here, the mortgage was payable in installments, there are "separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due" … . Therefore, since the plaintiff alleged that the defendant made his last payment on mortgage in January 2009 and this action was not commenced until October 6, 2016, the defendant established that any unpaid installments of the mortgage which accrued before the six-year period prior to the plaintiff's commencement of this mortgage foreclosure action, to wit, unpaid installments from January 2009 through October 5, 2010, are time-barred … . Ditech Fin., LLC v Reiss, 2019 NY Slip Op 06208, Second Dept 8-21-19

SUBPOENAS, MOTION TO QUASH.

MOTION TO QUASH SUBPOENA ISSUED TO ATTORNEY WHO REPRESENTED THE ORIGINAL BORROWERS AGAINST PROPERTY SUBJECT TO FORECLOSURE PROCEEDINGS SHOULD NOT HAVE BEEN QUASHED, CIVIL CONTEMPT ACTION AGAINST THE ATTORNEY SHOULD NOT HAVE BEEN DISMISSED, CRITERIA FOR BOTH TYPES OF PROCEEDINGS EXPLAINED (SECOND DEPT).

The Second Department determined the subpoona issued by the current owners of property subject to a foreclosure action (the Frankels) to the attorney (Satran) who represented the parties who initially took out the loan (the Confinos) should not have been quashed, the action for civil contempt against the attorney should not have been dismissed, and attorney-client privilege could only be asserted at a subsequent deposition:

"A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious'" … . " Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action'" … .

Here, Satran failed to meet his initial burden of demonstrating either that the requested disclosure was "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious" … . * * *

Additionally, the Supreme Court should have granted the Frankels' motion to hold Satran in civil contempt for failure to comply with the subpoena by failing to appear for a deposition. "To prevail on a motion to hold another in civil contempt, the moving party must prove by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct'" … . " To satisfy the prejudice element, it is sufficient to allege and prove that the contemnor's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party'" … .

Here, it was undisputed that Satran failed to comply with the subpoena by failing to appear for a deposition and that he had knowledge of the terms of the subpoena. Moreover, the Frankels demonstrated that Satran's conduct prejudiced their right under CPLR 3101(a)(4) to obtain all information relevant and necessary to their defense of the present action and their cross claims against the Confinos … . Wells Fargo Bank, N.A. v Confino, 2019 NY Slip Op 06114, Second Dept 8-7-19

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SUMMARY JUDGMENT.

PLAINTIFF WAS WALKING IN THE CROSSWALK WHEN SHE WAS STRUCK BY DEFENDANT'S BUS MAKING A RIGHT TURN; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURE AND SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian traffic accident case should have been granted. Plaintiff was in the crosswalk when she was struck by defendant's bus making a right turn:

The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting her own affidavit and a certified copy of the police accident report, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendants' vehicle failed to yield the right-of-way and struck her … . In opposition, the defendants failed to raise a triable issue of fact as to as to whether there was a non-negligent explanation for striking the plaintiff.

Furthermore, the plaintiff's motion was not premature, as the defendants failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff … . Rodriguez-Garcia v Bobby's Bus Co., Inc., 2019 NY Slip Op 06221, Second Dept 8-21-19

VENUE.

DEFENDANT DOCTOR'S MOTION TO CHANGE THE VENUE OF THE MEDICAL MALPRACTICE ACTION FROM BRONX TO WESTCHESTER COUNTY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined defendant doctor's (Goldstein's) motion to change the venue of this medical malpractice action from Bronx to Westchester County should not have been granted. The majority held the burden was on Goldstein to demonstrate the need for a change of venue and that burden was not met:

Plaintiff commenced this medical malpractice action in Bronx County, alleging that defendants were negligent in rendering podiatric care and treatment to her between April and September 2016. Defendants moved and cross-moved to transfer venue to Westchester County. WestMed and Rye submitted an affidavit of their medical director averring that Dr. Goldstein was one of their employees in Westchester. Dr. Goldstein submitted an affidavit averring that he had offices in Bronx County and Westchester County. He indicated that Westchester County was where his principal place of business was located because that was where he spent the majority of his time. However, he also averred that he maintained privileges at St. Barnabas Hospital and supervised podiatric residents at two St. Barnabas Hospital clinics where approximately 150 patients per month were seen. He averred that in addition he saw approximately 20-25 patients per week at a Bronx Park Medical pavilion located at 2016 Bronxdale Avenue in the Bronx.

Plaintiff is suing not only Westmed Medical Group, P.C. and Rye Ambulatory Surgery Center, LLC, but Dr. Goldstein individually. Since Dr. Goldstein is a party to the lawsuit, venue is proper in the county where he may be said to reside. CPLR 503(a) provides that the place of trial "shall be in the county in which one of the parties resided when it was commenced," and, insofar as relevant here, "[a] party resident in more than one county shall be deemed a resident of each such county" … . Dr. Goldstein may also be viewed as an individually-owned business, and thus a resident of any county in which he has a principal office (CPLR 503[d]). Thus, an individually-owned business, much as a partnership, may be deemed a resident of the county where it has its principal office, as well as any county in which the individual owner being sued resides … . Siegel notes that the "principal office" county is an alternative; venue may still be based on the residence of natural-born parties … .

Applying these principles, Dr. Goldstein's affidavit, attesting to residency in Westchester County but devoid of supporting documentation of residency, was insufficient to prove that plaintiff's designation of Bronx County as venue was improper … . Lividini v Goldstein, 2019 NY Slip Op 06150, Fourth Dept 8-20-19

VENUE.

DEFENDANTS DID NOT SUBMIT THEIR CERTIFICATE OF INCORPORATION AND THE PRINTOUT FROM THE DEPARTMENT OF STATE WAS NOT IN ADMISSIBLE FORM; DEFENDANTS' MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to change venue was not supported by admissible evidence and should have been denied:

"To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper" … . To succeed on their motion here, the defendants were obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in Kings County … . Only if the defendants made such a showing were the plaintiffs required to establish, in opposition, via documentary evidence, that the venue they selected was proper … .

Here, the defendants failed to submit their certificate of incorporation. Contrary to the defendants' contention, the computer printout they submitted in support of their motion from the website of the New York State Department of State, Division of Corporations was inadmissible, since it was not certified or authenticated, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record … . Therefore, the defendants failed to meet their initial burden of demonstrating that their principal office was located in Nassau County and that the plaintiffs' choice of venue in Kings County was improper … . O.K. v Y.M. & Y.W.H.A. of Williamsburg, Inc., 2019 NY Slip Op 06156, Second Dept 8-21-19

VERDICT, MOTION TO SET ASIDE.

DEFENDANT TRANSIT AUTHORITY'S NEGLIGENCE FURNISHED THE CONDITION FOR PLAINTIFF'S DECEDENT'S DEATH BUT WAS NOT THE CAUSE OF HIS DEATH, DEFENDANT'S MOTION TO SET ASIDE THE SUBSTANTIAL VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the substantial plaintiff's verdict in this wrongful death case should have been set aside. It was alleged that the NYS Transit Authority was negligent in failing to

make sure all passengers were off the subway train when the train reached the end of the line, requiring that it be repositioned in the relay tunnel. Plaintiff's decedent, who was intoxicated, remained on the train. At some point he fell from the train in the relay tunnel and was killed:

… [V]iewing the evidence in the light most favorable to the plaintiffs, there is no valid line of reasoning and permissible inferences which could possibly lead rational people to conclude that the defendants' alleged negligence was a proximate cause of the decedent's injuries and death … . Even assuming that the defendants' employees were negligent in failing to remove the decedent from the train before it was taken into the subject relay tunnel, the defendants' negligence merely furnished the condition or occasion for the occurrence of the decedent's fall from the train … rather than being one of its proximate causes. While the record evidence supports the plaintiffs' theory that the decedent was in the area between the two northernmost subway cars when he fell to the tracks below, the circumstances that led the decedent to be in that area, and the cause of the fall itself, remain unknown and, therefore, speculative … . Williams v New York City Tr. Auth., 2019 NY Slip Op 06187, Second Dept 8-21-19

VERDICT, MOTION TO SET ASIDE.

PLAINTIFF'S VERDICT IN THIS PERSONAL INJURY ACTION BROUGHT BY A FIREFIGHTER PURSUANT TO GENERAL MUNICIPAL LAW 205-a AND LABOR LAW 27-a SHOULD NOT HAVE BEEN SET ASIDE, CRITERIA FOR SETTING ASIDE A VERDICT EXPLAINED IN DEPTH (SECOND DEPT).

The Second Department reversed Supreme Court's setting aside the verdict in this personal injury action brought by a firefighter pursuant to General Municipal Law 205-a and Labor Law 27-a. The firefighter alleged he tripped over a torn rug in the fire department office. The torn rug violated provisions of the NYC Administrative Code. The Second Department took great pains to explain the criteria for setting aside a verdict as a matter of law and as against the weight of the evidence pursuant to CPLR 4404:

Although there were no other individuals present when the plaintiff fell, his supervisor immediately responded to "the loud bang" that resulted from the accident. The plaintiff's supervisor prepared a report that morning, which stated that the plaintiff had tripped on a piece of loose rug. Another one of the plaintiff's supervisors testified that he responded to the location of the accident and observed "a ripped carpet there." Photographs of the tear in the carpet that caused the plaintiff to fall were admitted into evidence and identified by the plaintiff's witnesses. * * *

The plaintiff testified that at the time of the accident, he felt a "popping in [his] leg." A doctor who examined the plaintiff after the accident, Leonard Harrison, testified that the plaintiff tore his hamstring as the result of the subject accident.

The City did not present any evidence to show that the plaintiff's accident was caused by something other than the tear in the carpet, or that the accident did not occur at all. Although the jury was not required, as a matter of law, to credit the plaintiff's uncontradicted testimony … the City's efforts to impeach the plaintiff as to the cause of the accident were particularly weak. * * *

Despite the City's attacks, the plaintiff's testimony as to the cause of the accident was consistent throughout the course of the trial. Moreover, his testimony regarding the cause of the accident was consistent with the testimony he gave at his deposition, in which he repeatedly testified that "[his] foot got caught on a piece of torn rug, where [he] los[t] [his] balance and tripped." The plaintiff's trial testimony was also consistent with the reports he gave to his supervisor and to doctors shortly after the accident occurred.

On this record, any conclusion that the plaintiff's accident was the result of some other unidentified cause, or that the entire incident was fabricated, could only be based upon mere speculation … . Annunziata v City of New York, 2019 NY Slip Op 06055, Second Dept 8-7-19