NEW YORK APPELLATE DIGEST,LLC

Civil Procedure
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Summaries of Selected Decisions Addressing Civil Procedure Released by the New York State Appellate Courts in September 2019, Organized Alphabetically by Topic. Click on the Table of Contents Entries to Go to the Summaries, which Link to the Decisions on the New York Courts Website.

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90-DAY NOTICE.

NEITHER A CERTIFICATION ORDER NOR A STIPULATION EXTENDING THE DATE FOR FILING A NOTE OF ISSUE MET THE REQUIREMENTS OF A 90-DAY NOTICE; THE DISMISSAL OF THE ACTION WAS INVALID; THE MOTION TO RESTORE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action was not properly dismissed pursuant to CPLR 3216 and plaintiff's motion to restore the action to the calendar should have been granted:

… [T]he Supreme Court issued a certification order which … certified the matter for trial and directed the plaintiff to file a note of issue within 90 days. The order provided that "[i]f plaintiff does not file a note of issue within 90 days this action may be dismissed. (CPLR 3216)." Thereafter, the parties executed a stipulation dated June 15, 2017, extending the date by which the note of issue must be filed to September 7, 2017. The action was ministerially dismissed on June 21, 2017, without further notice to the parties. …

An action cannot be dismissed pursuant to CPLR 3216(a) "unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed'" … .

The certification order, which purported to serve as a 90-day notice pursuant to CPLR 3216, was defective as it did not state that the plaintiff's failure to comply with the demand would serve as a basis for the court, on its own motion, to dismiss the action for failure to prosecute … . Furthermore, contrary to the determination of the Supreme Court, the subsequent stipulation … , which purported to extend the plaintiff's deadline for filing a note of issue … , did not constitute a valid 90-day demand … .

Moreover, it is evident from the record that the action was ministerially dismissed without a motion or notice to the parties, and there was no order of the court dismissing the action … . Rosenfeld v Schneider Mitola LLP, 2019 NY Slip Op 06813, Second Dept 9-25-19

ARTICLE 78.

DEFENDANT'S AFFIRMATIVE DEFENSES SHOULD HAVE BEEN CONSIDERED IN ITS MOTION FOR SUMMARY JUDGMENT; PLAINTIFF'S ACTION AGAINST DEFENDANT BASED UPON HER DISMISSAL FROM A NURSING PROGRAM SHOULD HAVE BEEN BROUGHT IN AN ARTICLE 78 PROCEEDING AND WAS THEREFORE TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the court should have considered defendant's affirmative defenses, including the statute of limitations defense, in determining defendant's summary judgment motion. Plaintiff brought fraud, breach of contract and prima facie tort causes of action against defendant. Plaintiff was enrolled in defendant's licensed practical nurse (LPN) program and was dismissed by defendant based upon plaintiff's performance in a clinical setting. The Third Department held that the action should have been brought in an Article 78 proceeding and was time-barred:

Supreme Court should have considered defendant's affirmative defenses on the summary judgment motion. Although the notice of motion did not cite CPLR 3211 (a), it did seek dismissal of the complaint in its entirety, as well as "such other and further relief" as the court deemed just and proper, and defendant's memorandum of law, submitted with the motion, addressed dismissal based on the statute of limitations and failure to exhaust administrative remedies, thereby providing plaintiff with adequate notice of these bases for the motion. … A defendant may raise an affirmative defense listed in CPLR 3211 (a) in a pre-answer motion to dismiss or, for most of those grounds, "may instead choose to raise that defense in its answer, and either move on that ground later in a motion for summary judgment, or wait until trial to have it determined" … . * * *

Plaintiff's separate causes of action sounding in breach of contract, fraud and prima facie tort are all, at their core, challenges to defendant's actions in dismissing her from the LPN program in a manner that allegedly was not in good faith and was without a sound factual basis, rendering her dismissal arbitrary and capricious. Thus, she should have brought her challenge in a CPLR article 78 proceeding. Although courts generally possess the authority to convert a plenary action to a CPLR article 78 proceeding if jurisdiction of the parties has been obtained (see CPLR 103 [c]), conversion is not appropriate where the claims are barred by the four-month statute of limitations governing CPLR article 78 proceedings … . Meisner v Hamilton, Fulton, Montgomery Bd. of Coop. Educ. Servs., 2019 NY Slip Op 06558, Third Dept 9-12-19

CLASS ACTIONS.

COURT OF APPEALS 2009 RULING THAT LANDLORDS RECEIVING J-51 TAX BENEFITS CANNOT DEREGULATE NEW YORK CITY APARTMENTS APPLIES RETROACTIVELY IN THIS CLASS ACTION FOR RENT OVERCHARGES BROUGHT BY TENANTS; THE CLASS, HOWEVER, SHOULD NOT HAVE BEEN EXPANDED AFTER THE ACTION WAS COMMENCED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Richter too comprehensive to fairly summarize here, modifying Supreme Court, determined that the class action by tenants in defendant's large housing complex properly sought repayment of rent overcharges. The complaint alleged the landlord, under New York City rent control and stabilization law, and pursuant to a 2009 Court of Appeals case (Roberts v Tishman, 13 NY3d 270), could not deregulate apartments while receiving so-called "J-51" tax benefits. The landlord argued unsuccessfully that the Roberts decision did not apply retroactively. The First Department remanded the case for recalculation of the overcharges and further held that Supreme Court should not have expanded the class. With regard to the expansion of the class, the court wrote:

CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied." Those requirements are generally referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (City of New York v Maul, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class.

Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class. Dugan v London Terrace Gardens, L.P., 2019 NY Slip Op 06578, First Dept 9-17-19

DEAD MAN'S STATUTE.

HEARSAY STATEMENTS ATTRIBUTED TO PLAINTIFF'S DECEDENT IN THIS MEDICAL MALPRACTICE ACTION NOT ADMISSIBLE AS ADMISSIONS OR BUSINESS RECORDS; THE DEAD MAN'S STATUTE PROHIBITED TESTIMONY ABOUT THE HEARSAY STATEMENTS; DEFENSE VERDICT REVERSED, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the defense verdict in this medical malpractice case and ordering a new trial, determined that hearsay statements to the effect that plaintiff's decedent had signed an "against medical advice [AMA]" form when he allegedly refused treatment at defendant hospital were not admissible under the Dead Man's Statute or as statements against interest or admissions, or as business records:

"A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient" (… see CPLR 4518[a]). Here, although the entries were germane to the decedent's diagnosis and treatment, the defendants failed to offer foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c) … . …

If an entry in the medical records "is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to the diagnosis or treatment, as long as there is evidence connecting the party to the entry'" … . Here … the entry clearly states that the decedent's primary care physician, not the decedent himself, was the source of the information … . …

Pursuant to CPLR 4519, otherwise known as the Dead Man's Statute, "[u]pon the trial of an action . . . a party or a person interested in the event . . . shall not be examined as a witness in his [or her] own behalf or interest . . . against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person . . . concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, of the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication." Here, both [witnesses] were defendants at the time they gave deposition testimony, making them interested parties under the statute … [and] they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate. …

The defendants argue that the plaintiff waived the protections of the Dead Man's Statute by eliciting the communications at issue. However, "[t]he executor does not waive rights under the statute by taking the

opponent's deposition" … . … Contrary to the defendants' contention, the declaration of the decedent did not fall within the declaration against interest exception to the hearsay rule because the defendants failed to establish that the subject statement was against the decedent's interest when made … . Moreover, where the Dead Man's Statute renders a witness's testimony inadmissible, "the fact that the testimony would fall within an exception to the hearsay rule is simply irrelevant" … . Grechko v Maimonides Med. Ctr., 2019 NY Slip Op 06478, Second Dept 9-11-19

DISMISSAL, CONDITIONAL ORDER OF.

THE CONDITIONAL ORDER OF DISMISSAL WAS NOT AUTHORIZED BECAUSE ISSUE HAD NOT BEEN JOINED AT THE TIME THE ORDER WAS MADE; THE BANK'S MOTION TO VACATE THE CONDITIONAL ORDER IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; AN UNAUTHORIZED SUPPLEMENTAL RECORD ON APPEAL TO WHICH THE PARTIES STIPULATED WAS NOT CONSIDERED (SECOND DEPT).

The Second Department determined the conditional order upon which dismissal of the complaint was based was not authorized because issue had not been joined at the time the order was made. Therefore the bank's motion to vacate the conditional order in this foreclosure action should have been granted. However, because of the two year delay in moving to vacate the order, the bank is not entitled to interest, late charges, fees, costs and attorney's fees incurred after the date of the 2014 conditional order. An unauthorized supplemental record on appeal, which was stipulated to by the parties, contained material that was not in the record and was not considered by the Second Department:

A pleading cannot be dismissed pursuant to CPLR 3216(a) "unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed'" … . While a conditional order of dismissal may have "the same effect as a valid 90-day notice pursuant to CPLR 3216" … , the conditional order here was defective in that it did not state that the plaintiff's failure to comply with the notice will serve as a basis for a motion by the court to dismiss the complaint for failure to prosecute … . Additionally, it appears that the complaint was ministerially dismissed, without a motion, and without the entry of any formal order by the court dismissing the complaint … . U.S. Bank Natl. Assn. v Spence, 2019 NY Slip Op 06529, Second Dept 9-11-19

INQUEST.

THE DEFENDANT IN THIS SLIP AND FALL CASE, WHOSE ANSWER HAD BEEN STRUCK, SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE ON DAMAGES (FIRST DEPT).

The Second Department, reversing Supreme Court, determined that, although defendant's answer in this slip and fall case had been struck, the defendant should not have been precluded from presenting evidence on damages:

… Supreme Court … struck the answer and scheduled an inquest on the issue of damages. At the inquest, following direct testimony by the plaintiff, the court denied defense counsel's request to cross-examine the plaintiff, since the defendant's answer had been stricken. The court awarded the plaintiff damages in the principal sum of $267,221.77. …

"[A] defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" … . "Accordingly, where a judgment against a defaulting defendant is sought by motion to the court, the defendant is entitled, at an inquest to determine damages, to cross-examine witnesses, give testimony, and offer proof in mitigation of damages" … . Here, since the Supreme Court did not provide such an opportunity to the defendant, we remit the matter to the Supreme Court, Queens County, for a new inquest on the issue of damages … . Dejesus v H.E. Broadway, Inc., 2019 NY Slip Op 06743, First Dept 9-25-19

INTEREST, POST-JUDGMENT.

THE DEPOSIT OF FULL PAYMENT OF JUDGMENTS IN A COURT MONITORED ESCROW ACCOUNT DID NOT STOP THE ACCRUAL OF POST-JUDGMENT INTEREST (FIRST DEPT).

The First Department determined the deposit of full payment of judgments placed in a court monitored escrow account were subject to the accrual of post-judgment interest:

Defendants' deposit of full payment on the judgments entered against it to a court monitored escrow account (the Monitorship Account) was not unconditional, such that it did not stop the accrual of post-judgment interest

… . Although the Monitorship Order expressly directed the Monitor to collect the judgment amounts and expressly provides for the collection of "pre- and post-judgment interest," such funds could not be further transferred until further order of the court. Moreover, the Monitorship Order reflects that the parties were not waiving "any rights, defenses or claims not set forth in the agreed order" by stipulating to the appointment of such Monitor. Accordingly, defendants' payment to the Monitorship Account was conditioned on defendants preserving both their defenses to plaintiff's claims, and defendants' direct claims to those funds.

Contrary to defendants' arguments, the payment to the Monitorship Account was not a "deposit to the court," as it was not "pursuant to an order of the court, made upon motion" (CPLR 5021[a][3]). Rather under the circumstances, the Monitorship Account functioned simply as an escrow account while the defendants continued to oppose plaintiff's claims and pursue their own. Triadou SPV S.A. v CF 135 Flat LLC, 2019 NY Slip Op 06453, First Dept 9-10-19

JURISDICTION.

DEFENDANT ALLEGED HE WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT WITHIN 120 DAYS OF FILING AND PLAINTIFF DID NOT FILE AN AFFIDAVIT OF SERVICE WITH THE CLERK, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant's motion to dismiss the complaint for lack of personal jurisdiction was properly granted. Defendant alleged he was not served with the summons and complaint within 120 days of filing and plaintiff had not filed an affidavit of service with the clerk of the court:

While the failure to timely file an affidavit of service with the clerk of the court as required by CPLR 308(4) may, in the absence of prejudice, be corrected by court order pursuant to CPLR 2004 … , in this case, the plaintiff failed to seek such relief, and the Supreme Court declined to extend this time sua sponte … . Accordingly, we agree with the court's determination to grant that branch of his motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him on the ground of lack of personal jurisdiction … . Zheleznyak v Gordon & Gordon, P.C., 2019 NY Slip Op 06536, Second Dept 9-11-19

JURISDICTION.

FAILURE TO TIMELY MAIL THE SUMMONS AND COMPLAINT AFTER SERVICE AT DEFENDANT'S BUSINESS AS REQUIRED BY CPLR 308 (2) IS A JURISDICTIONAL DEFECT WHICH IS NOT CURED BY LATE MAILING (SECOND DEPT).

The Second Department determined plaintiff's failure to timely mail a copy of the summons and complaint after serving the documents at defendant's place of business was a jurisdictional defect which was not cured by late mailing:

A mailing sent within the wrong time frame, like a mailing sent by the wrong method , increases the likelihood that a party will not receive proper notice of a legal proceeding. The first 20-day window set forth in CPLR 308(2) serves an important function. If the delivery and mailing required … that statute are not made within a short time of one another, there is a greater likelihood that one or both sets of pleadings will be mislaid, or, at the very least, that confusion will arise as to how much time the defendant has to respond—both of which appear to have occurred here. Further, the requirement that an affidavit of service be filed within 20 days of the delivery or mailing, whichever is effected later, also serves an important function. Timely filing of the affidavit of service is designed to give notice as to the plaintiff's claim of service and permit the defendant to calculate the time to answer. Where the affidavit of service claims that delivery but not mailing occurred within the 20-day period, yet the plaintiff intends to later claim that a timely mailing did occur, additional confusion is created, a defendant may be prejudiced by reliance upon the publicly filed affidavit which only partially disclosed the plaintiff's claim of service, and such prejudice may preclude the prospect that the failure to file the affidavit could be cured … . Estate of Norman Perlman v Kelley, 2019 NY Slip Op 06475, Second Dept 9-11-19

JURISDICTION.

GOODYEAR DEMONSTRATED IT DID NOT HAVE SUFFICIENT AFFILIATIONS WITH NEW YORK TO CONFER JURISDICTION IN THIS TIRE-MALFUNCTION OUT-OF-STATE ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that Goodyear's motion to dismiss the products liability complaint for lack of jurisdiction should have been granted. Plaintiff, a New York resident, was injured

when a tire manufactured by Goodyear allegedly malfunctioned causing the car to overturn in Virginia. The Second Department held that plaintiff did not rebut Goodyear's argument that it did not have significant affiliations with New York and noted that a corporation's registration with the New York State Department of State does not confer jurisdiction on New York:

"While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiffs, in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court" … . "General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise such jurisdiction over persons, property, or status as might have been exercised heretofore'"… . A court may exercise general jurisdiction over foreign corporations "when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State" … .

Here, in opposition to Goodyear's motion, the plaintiff failed to make a prima facie showing that personal jurisdiction over Goodyear existed under CPLR 301. The plaintiff did not rebut the evidence submitted by Goodyear showing that Goodyear's affiliations with New York are not so continuous and systematic as to render it essentially at home here … . Furthermore, contrary to the Supreme Court's determination, "a corporate defendant's registration to do business in New York and designation of the Secretary of State to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York" … . Aybar v Goodyear Tire & Rubber Co., 2019 NY Slip Op 06584, Second Dept 9-18-19

JURISDICTION.

JUDGE SHOULD NOT, SUA SPONTE, HAVE RAISED ISSUES ABOUT THE ADEQUACY OF SERVICE BY MAIL WHICH WERE NOT RAISED OR ADDRESSED BY THE PARTIES; DEFENDANTS' MOTION TO DISMISS THE ORIGINAL COMPLAINT FOR LACK OF JURISDICTION SHOULD NOT HAVE BEEN GRANTED; AMENDED COMPLAINT, FOR WHICH LEAVE OF COURT WAS NOT SOUGHT, WAS A NULLITY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the judge should not have raised, sua sponte, issues not raised by the parties in granting defendants' (the Wirths') motion to dismiss the complaint for lack of personal jurisdiction. The process server filed an affidavit stating that the summons and

complaint had been timely mailed to defendants. The affidavit did not state that the envelope was marked "personal and confidential" or that the envelope indicated it was from an attorney. There was no proof the envelope was not properly marked and the defendants had not raised these issues. The defendants merely asserted they never received the mailing. The Second Department also determined the amended complaint, adding additional parties, was a nullity because the court did not grant leave to amend:

Given that the Wirths argued that they did not receive the summons and complaint in the mail, the Supreme Court should not have determined, sua sponte, that jurisdiction was not acquired over the Wirths because the process server did not attest that the mailed copies of the summons and complaint were contained in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof that the communication is from an attorney or concerns an action against the person to be served (see CPLR 308[2] …). Courts are "not in the business of blindsiding litigants," who expect the courts to decide issues on rationales advanced by the parties, not arguments that were never made … . By raising the CPLR 308(2) envelope requirement on its own, the court deprived the plaintiffs of the opportunity to show compliance with that requirement. …

CPLR 3025(a) provides that a "party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." A plaintiff's failure to seek leave pursuant to CPLR 1003 to add a new defendant is a jurisdictional defect, and an amended complaint that is not filed in accordance with CPLR 1003 and 3025 is a legal nullity … . Hulse v Wirth, 2019 NY Slip Op 06483, Second Dept 9-11-19

JURISDICTION.

OHIO TRUSTEE'S REQUEST FOR PAYMENT PURSUANT TO A ROYALTY AGREEMENT WITH THE NEW YORK PLAINTIFF DID NOT CONFER JURISDICTION UPON NEW YORK, DESPITE A NEW YORK CHOICE OF LAW PROVISION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Ohio trustee's request for payment under a 1986 royalty agreement with the New York plaintiff did not confer jurisdiction upon New York, even though the contract included a New York choice of law provision:

The trustee's requests from Ohio, by letter, telephone, and/or email, to plaintiff in New York to send him monies due under the royalty agreement that plaintiff had entered into in 1986 with nonparty Denise Somerville …—

which would merely continue plaintiff's previous practice of sending royalties to Somerville in Ohio — do not constitute the transaction of business under CPLR 302(a)(1) … .

… [N]egotiating a contract from outside New York "is insufficient to constitute the transaction of business in New York" … . …

The fact that the contract chooses New York law does not "constitute a voluntary submission to personal jurisdiction in New York" … . ABKCO Music, Inc. v McMahon, 2019 NY Slip Op 06721, First Dept 9-24-19

JURISDICTION.

THE PROCESS SERVER WAS AWARE DEFENDANT IN THIS FORECLOSURE ACTION WAS IN THE MILITARY; THE "AFFIX AND MAIL" METHOD OF SERVICE DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT).

The Second Department determined personal jurisdiction was not obtained over defendant in this foreclosure action. The process server, who used the "affix and mail" method of service, was aware defendant was in the military:

After the hearing, the Supreme Court determined that the plaintiff had not established personal jurisdiction over the defendant. Service pursuant to CPLR 308(4), known as "affix and mail" service, "may be used only where service under CPLR 308(1) or 308(2) cannot be made with due diligence'" … . "While the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to [CPLR 308(4)] will be received"… . A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the "due diligence" requirement before resort to affix and mail service … . " [D]ue diligence' may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" … . …

According to the affidavit of service and the process server's in-house work order sheet, however, the process server knew that the defendant was in active military service. Since the process server was aware that the defendant was engaged in active military service at the time the process server attempted service at the address, the process server's four attempts at service prior to resorting to affix-and-mail service were not made when the

defendant "could reasonably be expected to be found at such location" … . Mid-Island Mtge. Corp. v Drapal, 2019 NY Slip Op 06488, Second Dept 9-11-19

PLEADINGS.

THE "PARTICULARITY" PLEADING-REQUIREMENTS FOR A FRAUD CAUSE OF ACTION DO NOT APPLY TO CAUSES OF ACTION ALLEGING A FRAUDULENT CONVEYANCE PURSUANT TO THE DEBTOR-CREDITOR LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, because a fraudulent conveyance action does not require an intent to defraud, the specificity requirement in the CPLR for pleading a fraud cause of action do not apply. Here plaintiff alleged the defective design and construction of a condominium:

Pursuant to Debtor and Creditor Law § 273, a conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration (see Debtor and Creditor Law § 273 …). Pursuant to Debtor and Creditor Law § 274, a conveyance is fraudulent as to creditors without regard to actual intent when it is "made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his [or her] hands after the conveyance is an unreasonably small capital" … . Section 270 of the Debtor and Creditor Law defines "creditor" as any "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent."

Here, the complaint's fifth cause of action sufficiently states cognizable claims alleging fraudulent conveyances pursuant to Debtor and Creditor Law §§ 273 and 274. Since valid claims of violations of Debtor and Creditor Law §§ 273 and 274 do not require proof of actual intent to defraud, such claims are not required to be pleded with the particularity required by CPLR 3016(b) … . Further, the plaintiff sufficiently alleged that it is a creditor of the sponsor since it asserted a breach of contract cause of action against the sponsor, even though said cause of action was unmatured at the time of the alleged conveyances … . Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC, 2019 NY Slip Op 06587, Second Dept 9-18-19

PRIVILEGE.

A PRIVILEGE UNDER WISCONSIN INSURANCE LAW APPLIED IN THIS NEW YORK ACTION CONCERNING INSURANCE CLAIMS STEMMING FROM THE ISSUANCE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES (FIRST DEPT).

The First Department determined a privilege under Wisconsin Law protected certain emails and documents generated in a Wisconsin action by the Wisconsin Commissioner of Insurance concerning the payment of insurance claims stemming from the issuance of residential mortgage-backed securities, The decision doesn't explain the underlying facts:

The Commissioner appointed a Special Deputy Commissioner (SDC) to oversee all activities … from Ambac's [plaintiffs'] New York offices, and, at the SDC's direction, plaintiffs commenced this action in New York, asserting claims of fraudulent inducement and breach of contract in connection with the policies Ambac issued on the securitizations sponsored by defendant. When defendant demanded the production of certain emails and other documents maintained by the SDC, plaintiffs responded by claiming the statutory privilege held by the Wisconsin Office of the Commissioner of Insurance (OCI) under Wisconsin law (see Wis Stat § 601.465). Defendant argued that New York law should be applied because, in adjudicating privilege issues, New York courts must apply the law of the place where the evidence will be introduced at trial or where the discovery proceeding is located. Supreme Court, after engaging in an interest-balancing analysis, determined that the Wisconsin statutory privilege was applicable, and denied defendant's motion to compel. We affirm.

New York courts "routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues" … . However, there are circumstances in which an interest-balancing analysis is properly undertaken to decide whether another state's law should govern the evidentiary privilege … . This is a case that presents such circumstances … . Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2019 NY Slip Op 06574, First Dept 9-17-19

PRIVILEGE.

PLAINTIFF WAIVED THE PHYSICIAN-PATIENT PRIVILEGE BY PLACING THE CONDITION OF HER KNEES INTO CONTROVERSY IN THIS ACCIDENT CASE, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined plaintiff had placed the condition of her knees into controversy in this accident case and defendants were therefore entitled to discovery re: prior treatment of her knees. The facts were not discussed:

Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages … . Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is "material and necessary" to defendants' defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees. Brito v Gomez, 2019 NY Slip Op 06452, CtApp 9-10-19

STANDING.

PRODUCTION OF THE ORIGINAL NOTE AND ENDORSEMENTS WAS "MATERIAL AND NECESSARY" TO THE DETERMINATION WHETHER THE BANK HAS STANDING TO BRING THE FORECLOSURE ACTION, DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion pursuant to CPLR 3124 to compel the bank in this foreclosure action to produce the original note and endorsements should have been granted. Defendant had challenged the bank's standing to bring the foreclosure action and the production of the original note and endorsements was "material and necessary" to resolve the standing question:

It is undisputed that a copy of the underlying note was annexed to the complaint. However, it cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if

on an allonge, whether the allonge was "so firmly affixed as to become a part thereof," as required under UCC 3-202(2). Since the answers to these questions are "material and necessary" to the defense of lack of standing, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3124 to compel the plaintiff to produce the original note and endorsements … . Bayview Loan Servicing, LLC v Charleston, 2019 NY Slip Op 06463, Second Dept 9-11-19

STANDING.

THE 2008 FORECLOSURE ACTION WAS DISMISSED BECAUSE THE BANK DID NOT HAVE STANDING; THEREFORE THE DEBT WAS NOT ACCELERATED IN 2008 AND THE STATUTE OF LIMITATIONS FOR FORECLOSURE DID NOT START RUNNING; PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's action to cancel and discharge a mortgage on the ground the statute of limitations for a foreclosure action had expired was properly dismissed. Although the bank had attempted to foreclose in 2008, that action was dismissed for lack of standing. Therefore the debt was not accelerated by the 2008 foreclosure proceedings:

Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced … . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . However, "an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" … .

Here, the evidence submitted in support of the defendants' motion, including the order dated December 13, 2011, demonstrated that while CitiGroup purported to accelerate the mortgage debt in the complaint served in the action to foreclose the mortgage in January 2008, that acceleration was a nullity, inasmuch as CitiGroup lacked standing to commence that foreclosure action … . Therefore, the plaintiff's allegation in this action that the statute of limitations to enforce the mortgage had expired was not a fact at all, and it can be said that no significant

dispute exists regarding it … . Q & O Estates Corp. v US Bank Trust Nat'l Assoc., 2019 NY Slip Op 06524, Second Dept 9-11-19

STATUTE OF LIMITATIONS.

THE 2008 FORECLOSURE ACTION WAS DISMISSED BECAUSE THE BANK DID NOT HAVE STANDING; THEREFORE THE DEBT WAS NOT ACCELERATED IN 2008 AND THE STATUTE OF LIMITATIONS FOR FORECLOSURE DID NOT START RUNNING; PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's action to cancel and discharge a mortgage on the ground the statute of limitations for a foreclosure action had expired was properly dismissed. Although the bank had attempted to foreclose in 2008, that action was dismissed for lack of standing. Therefore the debt was not accelerated by the 2008 foreclosure proceedings:

Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced … . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . However, "an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" … .

Here, the evidence submitted in support of the defendants' motion, including the order dated December 13, 2011, demonstrated that while CitiGroup purported to accelerate the mortgage debt in the complaint served in the action to foreclose the mortgage in January 2008, that acceleration was a nullity, inasmuch as CitiGroup lacked standing to commence that foreclosure action … . Therefore, the plaintiff's allegation in this action that the statute of limitations to enforce the mortgage had expired was not a fact at all, and it can be said that no significant dispute exists regarding it … . Q & O Estates Corp. v US Bank Trust Nat'l Assoc., 2019 NY Slip Op 06524, Second Dept 9-11-19

STATUTE OF LIMITATIONS.

THE DEFENDANT HOSPITAL DID NOT DEMONSTRATE THAT A DOCTOR ORDERED THE RESTRAINT OF PLAINTIFF'S DECEDENT AND THEREFORE DID NOT DEMONSTRATE THAT MEDICAL MALPRACTICE, AS OPPOSED TO NEGLIGENCE, WAS THE APPROPRIATE THEORY; THE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED UPON THE EXPIRATION OF THE 2 1/2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint on statute of limitations grounds should not have been granted. Plaintiff's decedent's injuries were alleged to relate to defendant-hospital's improper restraint of plaintiff's decedent (apparently to keep him from getting up from his hospital bed). Defendant argued the 2 1/2 year statute of limitations for medical malpractice actions had passed. The Second Department held that defendant did not demonstrate that a doctor had ordered the restraints; therefore the defendant had not made out a prima facie case that the action sounded in medical malpractice as opposed to negligence:

" The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached'" … . " When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence'" … . " The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts'" … .

Here, the defendant failed to establish, prima facie, that the plaintiff's claims were time-barred under the 2½-year statute of limitations applicable to medical malpractice actions (see CPLR 214-a). Since the defendant did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the defendant failed to establish that the plaintiff's claims related to medical treatment, as opposed to the failure of hospital staff to exercise ordinary and reasonable care to prevent harm to the decedent … . Wesolowski v St. Francis Hosp., 2019 NY Slip Op 06646, Second Dept 9-18-19

SUA SPONTE.

JUDGE SHOULD NOT, SUA SPONTE, HAVE RAISED ISSUES ABOUT THE ADEQUACY OF SERVICE BY MAIL WHICH WERE NOT RAISED OR ADDRESSED BY THE PARTIES; DEFENDANTS' MOTION TO DISMISS THE ORIGINAL COMPLAINT FOR LACK OF JURISDICTION SHOULD NOT HAVE BEEN GRANTED; AMENDED COMPLAINT, FOR WHICH LEAVE OF COURT WAS NOT SOUGHT, WAS A NULLITY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the judge should not have raised, sua sponte, issues not raised by the parties in granting defendants' (the Wirths') motion to dismiss the complaint for lack of personal jurisdiction. The process server filed an affidavit stating that the summons and complaint had been timely mailed to defendants. The affidavit did not state that the envelope was marked "personal and confidential" or that the envelope indicated it was from an attorney. There was no proof the envelope was not properly marked and the defendants had not raised these issues. The defendants merely asserted they never received the mailing. The Second Department also determined the amended complaint, adding additional parties, was a nullity because the court did not grant leave to amend:

Given that the Wirths argued that they did not receive the summons and complaint in the mail, the Supreme Court should not have determined, sua sponte, that jurisdiction was not acquired over the Wirths because the process server did not attest that the mailed copies of the summons and complaint were contained in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof that the communication is from an attorney or concerns an action against the person to be served (see CPLR 308[2] …). Courts are "not in the business of blindsiding litigants," who expect the courts to decide issues on rationales advanced by the parties, not arguments that were never made … . By raising the CPLR 308(2) envelope requirement on its own, the court deprived the plaintiffs of the opportunity to show compliance with that requirement. …

CPLR 3025(a) provides that a "party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." A plaintiff's failure to seek leave pursuant to CPLR 1003 to add a new defendant is a jurisdictional defect, and an amended complaint that is not filed in accordance with CPLR 1003 and 3025 is a legal nullity … . Hulse v Wirth, 2019 NY Slip Op 06483, Second Dept 9-11-19

TRIALS.

JUDGES IN THE SECOND DEPARTMENT HAVE THE DISCRETION TO ORDER UNIFIED PERSONAL INJURY TRIALS WHERE THE ISSUES OF LIABILITY AND THE INJURIES ARE INTERTWINED AS THEY WERE IN THIS CONSTRUCTION ACCIDENT CASE; DEFENSE VERDICT SET ASIDE AND A NEW UNIFIED TRIAL ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, setting aside the defense verdict on liability and ordering a new trial, determined that the trial judge had the discretion to order (and should have ordered) a unified trial (both liability and damages) in this Labor Law 240 (1), 241 (6), 200 and common law negligence action. Plaintiff (Castro) alleged the elevated work platform he was on collapsed and he fell 6 or 7 feet to the ground. There were no witnesses to the incident. Plaintiff alleged brain, head, shoulder and spine injuries. The defense alleged plaintiff was injured moving planks and did not in fact fall. Evidence of any brain injury was excluded from the trial. Because the evidence of brain injury was consistent with a fall, and inconsistent with moving planks, the exclusion of that evidence affected the fairness of the trial. The opinion makes it clear that judges in the Second Department have the discretion to order unified trials in personal injury cases:

Here, by any standard, a unified trial was warranted. Labor Law § 240(1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" … . [Defendants] disputed the plaintiffs' claim that Castro fell from a scaffold and contended that the accident resulted not from an elevation-related risk, but from Castro's action in lifting wooden planks. Evidence relating to Castro's brain injuries, which would not have occurred from lifting wooden planks, was probative in determining how the incident occurred … . Thus, the nature of the injuries had an important bearing on the issue of liability.

The Supreme Court did not exercise its available discretion in denying the plaintiffs' motion for a unified trial. The court's determination was predicated upon its perception that a bifurcated trial was strictly required by the Second Department's "rules." However, neither the statewide rule nor the governing precedent absolutely requires that the trial of a personal injury action be bifurcated. Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases. …

Because the issues of liability and Castro's injuries were so intertwined, the court's insistence upon bifurcation and its ensuing limitations on the scope of the medical evidence that could be elicited by the plaintiffs deprived them of a fair trial. Castro v Malia Realty, LLC, 2019 NY Slip Op 06466, Second Dept 9-11-19

VERDICT, MOTION TO SET ASIDE.

MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS INADEQUATE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED UNLESS DEFENDANT STIPULATES TO INCREASED AWARDS FOR PAST AND FUTURE PAIN AND SUFFERING (SECOND DEPT).

The Second Department determined the motion to set aside the damages verdict as inadequate in this traffic accident case should have been granted. The Second Department ordered a new trial unless the defendant stipulates to an increased award of damages for past pain and suffering from $25,000 to $150,000 and for future pain and suffering from $0 to $100,000:

"While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference'" … , it may be set aside if the award deviates materially from what would be reasonable compensation (see CPLR 5501[c] …). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" … ,

Under the circumstances of this case, where the plaintiff was required to undergo an anterior cervical discectomy and fusion surgery as a result of the accident, the jury's award for past pain and suffering was inadequate to the extent indicated … .

Further, since it was undisputed that the cervical fusion, inter alia, permanently reduced the plaintiff's cervical range of motion, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence … , and was inadequate to the extent indicated … . Chung v Shaw, 2019 NY Slip Op 06468, Second Dept 9-11-19

VERDICT, MOTION TO SET ASIDE.

PROPERTY OWNER PROPERLY FOUND NEGLIGENT IN FAILING TO MOP UP TRACKED IN SNOW AND WATER IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendant property owner (a school) was properly found negligent in failing to mop up tracked in snow and water in this slip and fall case. Defendant's motion to set aside the verdict should not have been granted:

Although a defendant is not required to "provide a constant remedy to the problem of water being tracked into a building during inclement weather, and has no obligation to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation" … , a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action … . Here, evidence was presented at trial demonstrating that the defendant had actual notice of the wet condition in the area where the plaintiff fell approximately an hour before the accident, yet failed to remedy it. …

Accordingly, viewing the evidence in the light most favorable to the plaintiff, and affording her every favorable inference which may properly be drawn from the facts presented, there is a valid line of reasoning and permissible inferences could lead rational individuals to the jury's conclusion that the defendant was negligent in failing to maintain the premises in a reasonably safe condition and that its negligence was a substantial factor in causing the plaintiff's accident … . Allen v Federation of Jewish Philanthropies of N.Y., 2019 NY Slip Op 06462, Second Dept 9-11-19